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General Chapters:

1	To Shop or not to Shop?: Jurisdictional Differences Following Implementation of the Damages Directive – Euan Burrows & Emile Abdul-Wahab, Ashurst LLP	1
2	Recovering European Cartel Damages in England – A Plaintiff’s Guide – Kenny Henderson & Kate Pollock, Stewarts	14
3	A Jurisdictional Toolkit for Claimants: Establishing Jurisdiction in England and Wales for Competition Follow-On Damages Claims Post-Vattenfall and Post-iiyama – Scott Campbell & Luke Grimes, Hausfeld & Co. LLP	21
4	The Right to Contribution Among Cartelists: A Progress Report – Frédéric Louis, Wilmer Cutler Pickering Hale and Dorr LLP	27

Country Question and Answer Chapters:

5	Australia	Arnold Bloch Leibler: Zaven Mardirossian & Matthew Lees	31
6	Austria	Preslmayr Rechtsanwälte OG: Mag. Dieter Hauck	37
7	Belgium	DALDEWOLF: Thierry Bontinck & Pierre Goffinet	46
8	Brazil	Pinheiro Neto Advogados: Leonardo Rocha e Silva & Alessandro Pezzolo Giacaglia	53
9	Canada	Blake, Cassels & Graydon LLP: Robert E. Kwinter & Evangelia Litsa Kriaris	59
10	China	Zhong Lun Law Firm: Peng Wu & Yi Xue (Josh)	67
11	Cyprus	Tassos Papadopoulos & Associates LLC: Marios Eliades & Alexandra Kokkinou	77
12	Czech Republic	Vejmelka & Wunsch, s.r.o.: Tomáš Fiala	84
13	Denmark	ACCURA Advokatpartnerselskab: Jesper Fabricius & Laurits Schmidt Christensen	89
14	England & Wales	Ashurst LLP: James Levy & Max Strasberg	97
15	European Union	Skadden, Arps, Slate, Meagher & Flom LLP: Stéphane Dionnet & Antoni Terra	122
16	Finland	Dittmar & Indrenius: Ilkka Leppihalme & Toni Kalliokoski	134
17	France	Osborne Clarke SELAS: Alexandre Glatz & Charles Meteaut	141
18	Germany	Haver & Mailänder: Prof. Dr. Ulrich Schnelle & Dr. Volker Soyez	148
19	Greece	Stavropoulos & Partners: Evanthia V. Tsiri & Efthymia N. Armata	155
20	Ireland	Arthur Cox: Richard Ryan & Patrick Horan	161
21	Italy	Ashurst LLP: Denis Fosselard & Gabriele Accardo	171
22	Japan	Nagashima Ohno & Tsunematsu: Koki Yanagisawa	178
23	Korea	Barun Law LLC: Gwang Hyeon Baek & Seung Jae Jeon	186
24	Malta	GANADO Advocates: Sylvann Aquilina Zahra & Antoine G. Cremona	192
25	Mexico	Ledesma Uribe y Rodriguez Rivero S.C.: Claudia de los Ríos Olascoaga & Bernardo Carlos Ledesma Uribe	203
26	Netherlands	Maverick Advocaten N.V.: Bas Braeken & Martijn van de Hel	209
27	New Zealand	MinterEllisonRuddWatts: Oliver Meech & April Payne	215
28	Poland	Wardyński & Partners: Sabina Famirska	222
29	Portugal	Linklaters LLP: Carlos Pinto Correia & Ricardo Guimarães	228
30	Romania	Wolf Theiss Rechtsanwälte GmbH & Co KG: Adrian Șter & Raluca Maxim	235
31	Slovakia	Čechová & Partners: Tomáš Maretta & Marek Holka	241
32	Spain	Ashurst LLP: Rafael Baena & Raquel Mendieta	247
33	USA	Shearman & Sterling, LLP: Todd Stenerson & Ryan Shores	258

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To Shop or not to Shop?: Jurisdictional Differences Following Implementation of the Damages Directive

Euan Burrows



Emile Abdul-Wahab



Ashurst LLP

1 Introduction

- 1.1 When the EU Directive on antitrust damages actions (the “**Directive**”) was adopted on 26 November 2014, its stated aim was to ensure “*a more level playing field for undertakings operating in the internal market and to improve conditions for consumers to exercise the rights they derive from the internal market [...] and to reduce the differences between the Member States as to the national rules governing actions for damages [for competition law infringements]*”.² It was widely acknowledged at the time that this was a laudable but very ambitious aim, given the mixture of common and civil law systems in place across EU Member States, and the differing levels of private enforcement to date.
- 1.2 Whilst all Member States have implemented the Directive into national law as of 6 June 2018,³ it is still too early to tell whether the Directive will ultimately achieve its stated aim. However, a comparative review of the implementing legislation adopted in different Member States indicates that, even to the extent that the Directive establishes similar basic rules on matters such as disclosure and limitation periods, the widely differing approaches taken to the question of temporal application (i.e. when the new rules will take apply) mean that it is likely to be a number of years before we see any significant degree of harmonisation. In the meantime, the complexity of determining exactly which substantive and procedural rules will apply to a competition law claim in any given Member State remains high.
- 1.3 Moreover, given that the Directive only sets out *minimum* requirements, and does not cover certain key issues such as the possibility of collective actions, the availability of interim injunctions in standalone private actions, or crucial practical matters such as costs and funding, significant differences are likely to remain between private enforcement regimes across the EU even once the implementation of the Directive takes full effect. As a result, the choice of jurisdiction (where available) seems likely to continue to be a key strategic question for both defendants and claimants (and their legal advisors).
- 1.4 This chapter considers in particular the approach to implementation taken in the UK, the Netherlands, Germany, France and Spain, highlighting the key differences between the new regimes and the likely impact on antitrust damages actions going forward. It also briefly considers how the UK’s decision to leave the EU (referred to as “**Brexit**”) may affect the UK regime and its desirability as a jurisdiction for private enforcement of competition law, viewed in conjunction with the impact of the Directive on the EU’s remaining Member States.

2 Temporal Application of New Regimes

- 2.1 Article 22 of the Directive provides that Member States shall ensure that national measures adopted to comply with the *substantive* provisions of the Directive shall not be applied retroactively. In contrast, national measures adopted to comply with any other provisions of the Directive (i.e. those relating to *procedure*) may have limited retroactive effect, but shall not apply to actions for damages of which a national court was seized prior to 26 December 2014.
- 2.2 However, the Directive does not provide further specification on when national implementing legislation should enter into force, or, rather unhelpfully, which of its provisions should be treated as substantive and which as procedural for these purposes. Whilst the distinction will often be obvious, this is not always the case, in particular in relation to the key issue of limitation periods. As previously discussed in the *ICLG to: Competition Litigation 2017*,⁴ the EU courts have previously held that new laws may apply to “future effects” or “future consequences” of situations which arose under previous law.⁵ Prior to the implementation of the Directive in the UK, this led to questions being raised as to the admissibility of a claim lodged after the implementation of the Directive which related to an infringement that took place prior to that date and which, potentially, would have been time-barred under the previous law.⁶
- 2.3 As a result, it has been left open to Member States to take differing approaches to the question of temporal application of national implementing legislation and the distinction between procedural and substantive provisions, and this is indeed what has happened in practice. For example:
 - (a) in the UK, none of the provisions adopted to comply with the Directive apply to proceedings brought prior to 9 March 2017 (when the UK implementing regulations entered into force⁷). In addition, substantive provisions (expressly specified in the UK implementing regulations, and including all amendments to limitation periods) only apply where the infringement and harm to which the claim relates also occurred on or after 9 March 2017;
 - (b) in the Netherlands, measures relating to non-substantive provisions (deemed to include requesting assistance of the Dutch national competition authority (“**NCA**”) in the quantification of loss, the binding nature of an irrevocable decisions of the Dutch NCA, disclosure and a stay of proceedings for out-of-court dispute resolution) do not apply to actions for damages of which a Dutch court was seized prior to 26 December 2014. Measures relating to substantive provisions are stated to apply with effect from 10 February 2017 (when the national implementing legislation entered into force⁸) with no retroactive effect,

- but it is at present unclear whether this will be interpreted to mean that it is sufficient that proceedings have been commenced on or after this date, or whether – as in the UK – it will also be necessary that the relevant infringement of EU competition law occurred on or after that date as well. However, in a follow-on damages case pending before the entry into force of the national implementing legislation, the Dutch Supreme Court acknowledged that (notwithstanding that the case did not fall within the temporal scope of the Directive) it was deemed desirable to interpret the law ‘pre-implementation’ such that the outcomes are compatible with the Directive and the national implementing legislation⁹;
- (c) in France, procedural provisions relating to amendments to the disclosure regime required by the Directive apply to all damages actions brought on or after 26 December 2014. All other implementing provisions will only apply to claims which relate to a competition law infringement that occurred on or after 11 March 2017 (when the national implementing legislation entered into force¹⁰), with the notable exception of provisions relating to limitation periods, which apply immediately to any claims which were not already time-barred on 11 March 2017 (including where proceedings have already been commenced);
- (d) in Germany, provisions adopted to comply with the substantive aspects of the Directive have limited retroactive effect in so far as they come into force on 27 December 2017 and apply to all claims which arose on or after 27 December 2016 (the date of the deadline for implementation of the Directive), rather than the later date of entry into force of other aspects of the relevant legislation (9 June 2017).¹¹ In addition, the new provisions on disclosure and the provisions empowering a court to estimate the scope and amount of passing-on of an overcharge (but not the rebuttable presumption that an overcharge has been passed on to an indirect purchaser) will apply to all claims where proceedings are commenced on or after 27 December 2016 (irrespective of whether the infringement to which the claim relates occurred prior to that date). In relation to limitation periods, the German legislator has adopted an approach which combines aspects of the approach adopted in France and the Netherlands: the new five-year limitation period will apply to all claims which are not already time-barred as at 9 June 2017 (irrespective of when the infringement to which the claim relates occurred), but the amendments to the rules relating to the starting point and the suspension of the limitation period will be of more limited application: in principle they will apply to all claims which are not yet time-barred as at 9 June 2017, but if the claim arose prior to 27 December 2016 then the old rules as regards the starting point and suspension of the limitation period will apply until 8 June 2017, for the purpose of determining whether the claim is time-barred as at 9 June 2017.¹² Given the complexity of these rules on the temporal applicability of the new provisions (adding to the complexity of the old provisions,¹³ which may also still be applicable), there is an on-going and controversial debate amongst German lawyers regarding their interpretation and application. It remains to be seen how German courts will apply these rules in practice; and
- (e) in Spain, all of the provisions implementing the Directive are stated to apply only in proceedings initiated after 27 May 2017 (when the relevant legislation entered into force).¹⁴ In relation to amendments to the procedural rules, it does not matter whether the relevant infringement caused harm prior to that date, provided the proceedings are initiated after that date. It is unclear whether it is intended that the same approach will apply to substantive amendments.
- 2.4 The net result of these differing approaches is that the “level playing field” envisaged in the recitals to the Directive seems unlikely to materialise any time soon. Claimants and defendants (and their advisors) will – in the short to medium term at least – instead face increased levels of complexity when initially assessing the rules which will apply to any potential claim and considering whether there may be strategic benefits to bringing/defending a claim in a particular jurisdiction, depending on exactly when proceedings are being brought and, in particular, when the relevant infringement/harm occurred.
- 2.5 These difficulties will be further exacerbated in some jurisdictions by other transitional provisions relating to earlier private enforcement reforms, whose interaction with the legislation implementing the Directive must also be taken into account. For example, as discussed further in Chapter 14, for competition claims brought before the Competition Appeal Tribunal (“CAT”) in the UK there are now, at the time of writing, five different potential sets of rules relating to the application of limitation periods, depending on exactly when proceedings are initiated and when the cause of action originally arose.

3 Disclosure

- 3.1 Antitrust litigation is often characterised by information asymmetry, and the extent to which a claimant can require disclosure of relevant documents from a defendant is crucial to successfully establishing liability (in a standalone action), causation and quantum (in both follow-on and standalone actions). In a small number of cases, contemporaneous documents in the possession of the defendant(s) may record direct commentary on key elements of a cartel’s “effects” (for example, its duration and scope, and possibly even the extent of any resulting overcharge); and even where such direct commentary does not exist (which is more common), data and other records in the possession of the defendant(s) are likely to be critical to any attempt to deduce the scale and scope of the alleged illegal price inflation resulting from the cartel.
- 3.2 The scope of national laws on disclosure has therefore traditionally been a key factor in the popularity of certain jurisdictions with claimants seeking to bring damages actions for infringements of competition law. The broad disclosure regime of the UK in particular has often been viewed as “claimant-friendly”.
- 3.3 As discussed in more detail in the *ICLG to: Competition Litigation 2017*,¹⁵ the Directive seeks to impose minimum disclosure requirements for competition damages claims brought in national courts of all EU Member States, effectively introducing an EU-wide disclosure mechanism. Pursuant to Articles 5–7 of the Directive, national courts are empowered to order defendants, claimants and third parties to disclose relevant evidence in their possession or control, and also to order disclosure of information contained in the file of an NCA or evidence obtained via the “access to the file” process. Such disclosure is subject to a number of safeguards and restrictions aimed at protecting defendants from very wide and vague disclosure requests, and ensuring that leniency programmes are not undermined. In particular, corporate leniency statements and settlement submissions¹⁶ are granted absolute protection from disclosure, disclosure of “investigation materials” from an NCA’s file is restricted until the investigation has been closed, and national courts must have regard to the scope, cost and proportionality of disclosure of all other documents.
- 3.4 These new minimum requirements markedly broaden the disclosure regimes in many EU Member States where disclosure requirements were previously quite narrow,

including Germany, France and Spain. In particular, the move to disclosure of relevant “categories” of evidence (in recognition of the fact that it will not always be possible for a claimant to know in advance precisely which relevant documents the defendant has in its control) mark a significant change in jurisdictions where disclosure was previously limited to specific documents identified in the claimant’s request. Even for those jurisdictions which already had extensive pre-trial disclosure, most notably the UK, the disclosure provisions of the Directive will have at least some impact; for example, in relation to the absolute protection granted to leniency statements, and the restrictions on disclosure of so-called “grey-list” documents from the file of an NCA whilst the relevant investigation is still on-going.¹⁷

- 3.5 It appears that all Member States have implemented the provisions of the Directive relating to disclosure as “procedural” provisions for the purposes of determining when the new rules should apply (as one would logically expect). However, as noted above, this has still not resulted in a harmonised approach to the question of temporal application: Article 22(2) provides that national measures adopted to implement the procedural provisions of the Directive should not apply in actions for damages of which a national court was seized prior to 26 December 2014, but it does not mandate that they *must* apply in proceedings initiated after that date.
- 3.6 As discussed above, this has resulted in differing approaches being adopted, such that existing claims pending before national courts at the time of entry into force of the national implementing legislation may be affected by the new disclosure regime in some jurisdictions (such as France, Germany and the Netherlands) but not in others (such as the UK and Spain).
- 3.7 That said, looking to the future, it seems likely that the new minimum disclosure regime required by the Directive will at least apply in all EU Member States in proceedings lodged on or after the date of entry into force of the relevant national implementing legislation (irrespective of whether the infringement/harm to which the claim relates occurred prior to that date). As a result, the period of time before harmonisation is achieved in respect of the Directive’s disclosure requirements will be limited (in contrast to aspects involving substantive provisions, where effective implementation of the Directive is likely to take much longer in practice due to the approach taken by some Member States – such as the UK – in requiring both the proceedings to be brought and the relevant infringement/harm to have occurred after the entry into force of the implementing legislation).
- 3.8 However, even once that degree of harmonisation is achieved, there will still remain scope for differences between national disclosure regimes, given that the Directive merely sets out minimum requirements. Furthermore, it is likely to take some time for national courts with little or no previous experience of the processes envisaged in the Directive (in particular regarding protection of confidential information) to develop a predictable approach under the new regime. For example, in Spain, it is anticipated that there may be a natural initial reluctance to order disclosure of sensitive information. In contrast, this is less likely to be an issue for the German courts (which already have, for instance, experience of *in camera* proceedings in the context of IP litigation) or the English courts (which have already shown themselves to be willing to engage in the necessary balancing act between protection of sensitive information and ensuring claimants have access to key evidence required to substantiate their claims, in particular through the use of confidentiality rings, although such arrangements are not without difficulties, as illustrated by the *Air Cargo* litigation¹⁸). It also remains to be seen whether significant differences will emerge between national courts in terms of their approach to deciding key

questions such as whether particular documents/information fall within the definition of protected “leniency statements” or “settlement submissions”. Even in Member States where such documents are perfectly identifiable, there is scope for debate on the treatment of parts of documents containing literal quotations from, or making reference to, a leniency statement or a settlement submission.¹⁹ It may well be that references to the European Court of Justice for preliminary rulings on these sorts of issues may be required in due course.

4 Effect of National Decisions

- 4.1 Infringement findings by the European Commission are already binding on national courts in competition damages actions pursuant to Article 16(1) Regulation 1/2003. Article 9 of the Directive provides further that an infringement of competition law found in a final decision of an NCA in one EU Member State shall be legally binding on national courts in damages actions brought in its own jurisdiction, and shall constitute “*at least prima facie evidence*” of an infringement when relied upon before the court of another EU Member State. This was a compromise position adopted in light of the reluctance of many Member States to accept that infringement findings by NCAs – in particular less experienced authorities – should be legally binding on national courts outside their own jurisdiction.
- 4.2 Whilst infringement findings of NCAs were already binding on national courts in some EU Member States (at least in the same Member State) prior to implementation of the Directive, such as the UK, this will be a significant change for others, where infringement findings by NCAs were not previously legally binding on national courts (for example, in France and Spain, although NCA decisions were in practice generally nonetheless relied upon by the national courts in those jurisdictions). This should establish a follow-on action regime in all EU Member States, and seems likely to result in proceedings being commenced more often in the jurisdiction in which they are first investigated, as well as leading to an overall increase in the number of follow-on antitrust damages actions being brought in the EU.
- 4.3 However, differences in approach will remain between EU Member States. The majority of EU Member States have followed the minimum requirements of this aspect of the Directive in their national implementing legislation, in terms of providing that decisions of NCAs of other EU Member States will be treated as “*prima facie evidence*” of an infringement or – as in the Netherlands – by leaving the appreciation of such evidence to the discretion of the courts. However, in Germany the national law goes further than this, providing that a final decision by an NCA of *any* EU Member State shall be treated as binding proof of an infringement before German courts. This maintains the position under German law prior to implementation of the Directive, but the German legislator has taken the opportunity to clarify the scope of the binding effect of such decisions in the explanatory notes to the German legislation implementing the Directive. It is made clear that the scope of the binding effect extends to findings of fact included in the infringement decision, findings relating to the geographic and product market definition, and findings relating to the temporal scope of the infringement. This seeks to clarify some points on which German courts had previously reached diverging conclusions,²⁰ and recent practice suggests that the German courts are likely to adopt a liberal interpretation of the facts established in decisions by other competition authorities.²¹ In France, it appears that the combined effect of the national legislation implementing the Directive and the existing *Loi Hamon* regarding collective damages actions for infringement of competition law²² may be such that an infringement decision of another Member State’s NCA will be treated as non-binding *prima facie*

evidence of an infringement in the context of a damages action brought by an individual consumer or business, but may be deemed binding proof of an infringement if the damages claim is brought by consumers on a collective basis. It remains to be seen how the French courts will approach this issue in practice.

- 4.4 Furthermore, there is clearly scope for differing approaches between the courts of Member States even where the national implementing legislation is phrased in an identical/similar manner. For example, it is unclear to what extent a national court will consider that it needs to go into the detailed facts of a case itself when assessing what weight should be properly attached to an infringement decision of an NCA of another Member State. In the UK, it is anticipated that the courts may well insist on doing so, by analogy with the approach taken in cases such as *Ferrexpo v Gilson Investments*²³ (a shareholder dispute), where the High Court held that, whilst decisions of other courts could be relied upon by the claimants as admissible evidence, the court could not assess what weight should be properly attached to a decision of another court without going into the facts for itself. It also noted that the difficulties in assessing the weight to be attached to the other decision were magnified if, as in the *Ferrexpo* case, the party relying on the judgment of another court puts it forward without any information about how the argument before the other court proceeded.
- 4.5 It is also unclear whether any distinctions will be drawn by national courts in terms of the weight given to infringement decisions of less experienced NCAs compared to those of their more well-established counterparts. Scope for differences in approach is clearly also an issue in relation to the assessment of any other evidence adduced by the parties which runs counter to the relevant infringement decision – for example, in relation to the duration of the cartel, or its geographic scope.
- 4.6 Questions are also likely to be raised with regard to the issue of when an infringement decision will be deemed “final” for these purposes: whilst the Directive provides that a final infringement decision is one that “cannot be, or that can no longer be, appealed by ordinary means”, it does not address some key related issues. For example, the question of whether a decision which is subject to an appeal in respect of the penalty imposed (but not the substantive infringement finding) should be treated as “final” for this purpose. This is an issue which the English courts have previously grappled with in the context of limitation periods, concluding in *BCL Old Co v BASL*²⁴ that the existence of a penalty appeal should not prevent a substantive infringement finding being deemed final for the purposes of deciding when a limitation period before the CAT should start to run. It would seem logical for the English courts to adopt a similar approach in this context, but it remains to be seen whether they will do so, and whether national courts across the EU will adopt a consistent approach.
- 4.7 Disputes may also arise as to whether an NCA’s infringement decision is “final” where it is the subject of a substantive appeal by some addressees of the decision but not others. Again, there is precedent from the English courts on this question in the context of limitation periods, where the Supreme Court has held that an infringement decision becomes final as against a particular addressee once it can no longer be appealed by that addressee (even if appeals by other addressees are ongoing at that point in time).²⁵ As noted in Chapter 14, such an approach gives rise to a risk that undertakings that apply for leniency, and therefore choose not to appeal substantive infringement decisions, become strategic targets for follow-on litigation. However, to the knowledge of the authors, the same approach is anticipated in at least Germany, Spain and the Netherlands. It remains to be seen whether national courts in other Member States might take different approaches.

- 4.8 References to the ECJ for preliminary rulings may be required to obtain clarity on points such as these (and others) in order to ensure a consistent approach across all EU Member States. For the parties involved in the first claims to raise these issues, this would be likely to result in significant delays to proceedings. Post-Brexit, when – on the basis of statements made by the UK Government as to its proposed negotiating position – the UK would no longer be subject to the jurisdiction of the ECJ, it has been suggested that such difficulties may in fact increase the attractiveness of the English courts as a forum for dealing with competition damages claims, on the basis that they could circumvent five years of uncertainty and preliminary references regarding the interpretation and application of the Directive.²⁶

5 Limitation Periods

- 5.1 Article 10 of the Directive introduces a minimum five-year limitation period within which an antitrust damages action must be brought. This period must not start to run until:
- (a) the infringement has ceased; and
 - (b) the victim knows or can reasonably be expected to have knowledge of:
 - (i) the behaviour constituting the infringement;
 - (ii) the qualification of such behaviour as an infringement;
 - (iii) the fact that the infringer caused harm to him; and
 - (iv) the identity of the infringer who caused such harm.
- 5.2 In addition, this limitation period must be suspended during an investigation by the European Commission or an NCA, and must re-start no earlier than one year after any infringement decision has become final or proceedings are otherwise terminated. Pursuant to Article 18(1) of the Directive, the limitation period must also be suspended during any consensual dispute resolution negotiations.
- 5.3 Prior to implementation of the Directive, limitation periods were one of the most divergent features of EU private enforcement, with widely different rules being applied in different Member States as to both the time within which a claim could be brought and the point in time from which the relevant time period began to run. For example, at one extreme, in Spain claims for damages arising from competition law infringements had to be brought within one year from the date the injured party obtained knowledge of the harm caused by the infringement. In contrast, in the Netherlands the absolute limitation period could ultimately last for up to 20 years after the cause of action first arose, and a similar maximum limitation period also applies in France. This significant divergence in limitation periods has often been a key consideration when choosing where to file a claim (when a choice of jurisdiction has been available), and the application of limitation rules has also often been the subject of interlocutory challenges by defendants before national courts, often resulting in significant delays in practice.
- 5.4 Implementation of the Directive has sought to simplify the position, and will result in at least a degree of harmonisation across Member States (largely in favour of claimants, who will generally benefit from much longer limitation periods than are currently the case in most, if not all, Member States). However, there will still be scope for differences between Member States on this key issue, as the five-year period specified by the Directive is only a minimum requirement. For example, in the UK, the implementing regulations maintain the existing six-year limitation period for competition damages claims (amended to reflect the Directive’s requirements as to the point at which the limitation period starts to run, and the circumstances in which it is extended). In the Netherlands, alongside a five-year subjective limitation period, a 20-year “long-stop” limitation period will also continue to apply (but now calculated from the date following the date on which the

relevant infringement ceased). This is in line with recital 36 of the Directive, which provides that “[...] *Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation*”. Differences in approach are also likely to emerge in terms of how national courts determine when claimants are deemed to know (or reasonably ought to have known) of the competition infringement for the purpose of determining when the limitation period starts. German courts have recently ruled, for instance, that a claimant could not have been deemed to have sufficient knowledge of an infringement until it was aware of the decision to issue a fine. Knowledge of a dawn raid has also been held to be insufficient for the purposes of starting the limitation period.²⁷

5.5 Furthermore, as discussed above in relation to the temporal application of the new national regimes, Member States have taken significantly different approaches to the question of whether national provisions implementing the limitation period requirements of the Directive should be treated as “procedural” or “substantive”, and when the amended rules will properly take effect in practice. By way of re-cap, in the jurisdictions which are the focus of this chapter:

- (a) in the UK, on their face, the amended limitation rules do not apply unless proceedings were commenced on or after 9 March 2017, and the relevant infringement and harm also occurred on or after that date;
- (b) in the Netherlands, the courts may stay proceedings which are brought before them concerning an action for compensation arising from an infringement of competition law, for up to two years, where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action, provided that the court was not seized of such action prior to 26 December 2014. The existing five-year subjective limitation period and 20-year absolute limitation period were maintained by the implementing regulation but on the understanding that they only start to run on the day following the day that the infringement has ceased. The additional or new provisions relating to when those periods start to run will only apply to actions for damages commenced on or after 10 February 2017, with uncertainty currently surrounding the question of whether the relevant infringement/harm or the claim to which the action relate, also needs to have occurred or arisen on or after that date;
- (c) in France, all of the amendments required by the Directive in relation to limitation periods apply immediately to any claims which were not already time-barred on 11 March 2017 (including where proceedings have already been commenced);
- (d) in Germany, the new five-year limitation period applies to all claims which are not already time-barred as at 9 June 2017, but the amendments to the rules relating to the starting point and suspension of the limitation period only apply to claims arising after that date; and
- (e) in Spain, the amended limitation rules only apply to proceedings initiated on or after 27 May 2017 which relate to infringements which occurred on or after that date.²⁸

5.6 The effect of this complex web of differing approaches is perhaps best illustrated by considering a hypothetical example. Imagine a scenario where a price-fixing cartel is operative from 1 March 2007 – 1 January 2012. A European Commission investigation results in an infringement finding dated 5 May 2014. That decision is confirmed following an appeal to the General Court, which hands down its judgment on 5 December 2016. No further appeal to the European Court of Justice is lodged within the relevant two-month time limit, such that the infringement decision becomes final

on 5 February 2017. A potential claimant who suffered loss as a result of the cartel is interested in bringing a damages claim, and it appears that there is likely to be a wide choice of jurisdiction as the cartel involved a number of defendants, each domiciled in different EU Member States. The claimant is therefore considering bringing a claim in one of the five jurisdictions referred to above.

- 5.7 If the claim were to be lodged in the UK, Spain or the Netherlands, none of the substantive amendments to the national private enforcement regimes in those jurisdictions reflecting the Directive requirements would apply: instead, the claimant would need to look to the “old” limitation periods in each of those jurisdictions (which would mean a one-year limitation period in Spain that could potentially be argued to mean that the claim was already time-barred,²⁹ differing applicable rules in the UK depending on whether the claim was brought before the High Court or the CAT, and nevertheless a five-year limitation period in the Netherlands but with a different regime regarding the starting date).³⁰ If the claim were lodged in Germany or the Netherlands, some aspects of the amendments relating to the Directive would apply, but not others. In particular, whilst the five-year limitation period required by the Directive would apply, the amendments to the rules relating to the starting point and suspension of the limitation period would not apply in Germany. The rules relating to a stay of proceedings in case of consensual dispute resolution concerning the cartel damages claim would only apply in the Netherlands if the court was seized on or after 10 February 2017. Finally, if the claim were lodged in France, all of the amendments to limitation periods reflecting the Directive requirements would apply, although other amendments to substantive provisions would not.

6 Joint and Several Liability

- 6.1 Article 11 of the Directive introduced the concept of joint and several liability in antitrust damages actions across all EU Member States, by providing that, as a general rule, a person who has suffered harm as a result of a competition law infringement should be able to claim compensation for the entire harm suffered from any of the co-infringers. Whilst this principle already existed under the national laws of some EU Member States, including all five of the jurisdictions focused on in this chapter (i.e. the UK, the Netherlands, France, Germany, and Spain), this aspect of the Directive represents a significant change for some other jurisdictions.³¹ It is anticipated that the adoption of the principle of joint and several liability across all EU Member States will make it easier for a claimant to bring a claim for the entire harm caused against the defendant with the “deepest pockets” across the EU.
- 6.2 Moreover, even for those jurisdictions which already recognised the principle of joint and several liability, amendments to national laws have been required to reflect additional provisions of the Directive which grant a degree of protection from the standard joint and several liability rule to small and medium enterprises (“SMEs”)³² and immunity recipients:
- (a) Article 11(2) provides that an SME should only be liable to its own direct and indirect purchasers, provided that: its relevant market share was less than five per cent at all times during the infringement;³³ the application of the normal rules would irretrievably jeopardise its economic viability and cause its assets to lose all their value; and the SME in question is not a co-ercer or a recidivist; and
 - (b) Article 11(4) provides that immunity recipients should only be liable to compensate their own direct and indirect purchasers, unless the other co-infringers are unable to compensate the remaining claimants.
- 6.3 In this regard, there is an interesting difference worth highlighting between the wording of Article 11(2) of the

- Directive (in the English language version) and the wording of the corresponding paragraph of the UK implementing legislation. Article 11(2) of the Directive sets as one of the conditions for the SME exemption that the entity's "market share in the relevant market was below 5% at any time during the infringement" (emphasis added). In contrast, paragraph 12(1)(b) of Schedule 8A inserted into the Competition Act 1998 by the UK implementing regulations phrases that condition as "*throughout the period of the infringement, the undertaking's share of the relevant market (or, if there was more than one, each relevant market) was less than 5%*" (emphasis added). However, a closer inspection of other language versions of the Directive (including the definitive French language version) suggests that there is a translation error in the English version, and that the requirement is indeed correctly expressed in the UK implementing regulations. The French version of the Directive refers to the market share being "*inférieure à 5% à quelque moment que ce soit de la durée de l'infraction*", and the Dutch version refers to the market share "*te allen tijde tijdens de inbreuk*", both of which equate to "at all times/throughout the period of the infringement". The Dutch implementation legislation also refers to '*voortdurend*', which means *continuously* below five per cent during the infringement. It therefore appears that the UK implementing legislation does accurately reflect the intention of the Directive on this point.
- 6.4 Prior to implementation of the Directive, a number of questions had been raised about how these exemptions to joint and several liability would work in practice, given the lack of further detail provided in the Directive or the recitals thereto. National implementing legislation has not clarified the position any further, and it appears likely that national courts will be asked to determine difficult questions of interpretation in the future (with the potential for differing conclusions, or delays pending a reference to the ECJ for a preliminary ruling).
- 6.5 For example, it is not clear how or when it will be determined whether co-infringers are unable to compensate victims, such that immunity recipients should be liable to compensate other purchasers of the affected products, beyond their own direct and indirect purchasers. Likewise, it is unclear how it will be determined whether the conditions for the SME exemption are met in a particular case, especially the requirement that the application of the normal rules would "*irretrievably jeopardise [the] economic value*" of the SME and cause its assets to "*lose all their value*". Member States with a tendency to follow a literal interpretation of legislation, for example, may exclude circumstances that others would consider irreparable economic harm.
- 6.6 The concept of joint and several liability inevitably also raises the question of contribution claims, in circumstances where a defendant has paid more compensation than its "fair share". This is expressly dealt with in Article 11(5) of the Directive, which provides that the amount payable by way of contribution by a co-infringer must be determined in light of the "relative responsibility" of each infringer for the harm caused by the infringement of competition law. Immunity recipients are once again granted a degree of protection in this regard: Article 11(5) further provides that the amount of contribution payable by an immunity recipient shall not exceed the amount of harm it caused to its own direct and indirect purchasers or providers. This is, however, subject to Article 11(6), which provides that in circumstances where the infringement has caused harm to parties other than the direct or indirect purchasers or providers of the infringers (i.e. so-called "umbrella claims"), the amount of any contribution payable by an immunity recipient shall be determined in light of its "relative responsibility" for that additional harm. Considerable protection from contribution claims is also provided (pursuant to Article 19(2) of the Directive) for defendants who opt to settle a damages claim, as discussed further below in section 8.
- 6.7 It is notable that the key question of how to determine the "relative responsibility" of each infringer is not addressed in any detail by the Directive: recital 37 simply provides that this is a matter for national courts, having regard to "relevant criteria" such as turnover, market share, or the role of the infringer in the cartel. National implementing legislation of the EU Member States focussed on in this chapter (and others, as far as the authors are aware) has not further addressed this important issue either, despite the fact that the assessment envisaged by the Directive is likely to be a complex matter, particularly for courts in those jurisdictions which have not previously had to consider such issues in this context.
- 6.8 In jurisdictions where the courts are already experienced in assessing questions of contribution based on the degree of responsibility for the harm, national courts are likely to continue to apply their existing approach post-implementation of the Directive. Indeed, the UK implementing regulations expressly provide for the continued application of section 2 of the UK Civil Liability (Contribution) Act 1978 to contribution proceedings relating to competition damages claims, subject to the immunity recipient exemption required by Article 11(5) of the Directive.³⁴ That section provides that the amount of contribution recoverable from a co-defendant shall be "*such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question*". The UK Government appears to have taken the view that this is equivalent to the concept of "relative responsibility" contained in the Directive, even though the "just and equitable" requirement arguably adds a degree of additional flexibility for national courts faced with determining questions of contribution. The explanatory memorandum to the Dutch implementation legislation makes similar reference to existing Dutch law, which also includes a requirement that such apportionment is deemed "fair". By way of contrast, French implementing legislation has adopted the arguably narrower language of the "gravity of the wrongful conduct and causal role in the damage". In Germany, it is anticipated that the national courts will continue to follow well-established case law which provides for an assessment of all the circumstances of an individual case, taking into account the individual contribution of each infringer for the damage caused and the extent of their respective participation in the cartel.³⁵ It therefore remains to be seen how other jurisdictions will approach this assessment, to what extent differences in approach may emerge between Member States and the extent to which other factors, such as differences in limitation periods in which to bring contribution claims, will affect the choice of jurisdiction for bringing or defending competition damages claims.³⁶
- 6.9 The interplay between the provisions on joint and several liability and those setting out minimum limitation periods also raises some further interesting questions which are not addressed in the national implementing legislation of the EU Member States focussed on in this chapter (or others, as far as the authors are aware). Article 11(4) of the Directive states that EU Member States must ensure that for cases where there is an immunity recipient who may benefit from protection from joint and several liability, the limitation period shall be "*reasonable and sufficient to allow injured parties to bring such actions*", i.e. to seek compensation from the co-infringers or the immunity recipient in the event that co-infringers prove unable to compensate the victims. No cross-reference is made to this provision in Article 10 of the Directive, which deals with limitation periods generally, but it appears to be envisaged that the limitation period applicable in such circumstances could be significantly longer than would normally be the case.³⁷ However, this possibility is not expressly dealt with in national implementing legislation. It remains to be seen whether national courts may take into account the risk of a potential claim against an immunity recipient becoming otherwise time-barred when determining

how long a claimant should have to wait before determining that the relevant co-infringers are unable to compensate him (and therefore permit him to proceed with a claim against the immunity recipient).

7 Remedies

General principle of full compensation

- 7.1 At the outset, Article 1 of the Directive makes clear that it is intended to facilitate the exercise of the right to “*full compensation*” for losses suffered by parties along the supply chain in respect of harm caused by competition law infringements. This includes compensation for actual loss and loss of profit, together with payment of interest, so as to “*place a person who has suffered harm in the position in which that person would have been had the infringement not been committed*”.³⁸
- 7.2 Overcompensation – which is stated to include “*punitive, multiple or other types of damages*” – is expressly excluded by Article 3(3). This is a clear policy statement intended to distinguish the EU approach from systems that employ “punitive” or multiple damages, such as are available under the US Clayton Antitrust Act, which provides for treble damages in antitrust private action damages cases. However, it would also appear to rule out the application of awards for restitutionary damages or other measures seeking to return unjust enrichment. Such awards are not, strictly speaking, loss-based measures, but are employed as equitable remedies to ensure that unlawful profits are disgorged and repaid, often in circumstances where it may be difficult for the claimant to establish quantum and/or causation of loss on the ordinary measure. It remains to be seen whether national courts will consider claims for such forms of damages in appropriate cases post-implementation of the Directive. This possibility does at least appear to be left open in the UK implementing regulations: paragraph 36 of Schedule 8A of the Competition Act 1998 (as inserted by the implementing regulations) expressly provides that a court or the CAT may not award exemplary damages in competition proceedings,³⁹ but does not make any further reference to prohibition of restitutionary damages or other measures.

Passing-on “defence”

- 7.3 In line with the emphasis on compensatory damages, Article 12 of the Directive requires Member States to ensure that the compensation awarded in a competition damages claim does not exceed the actual loss suffered at any particular level of the supply chain. In other words, the passing-on defence should be available. The Directive provides partial assistance in relation to the crucial question of how this division of actual loss between different levels of the supply chain is to be proven and assessed. Articles 13 and 14 introduce varying presumptions in respect of the burden of proof to be applied to direct and indirect claims, but the resulting position has the potential to lead to considerable complexity. Perhaps recognising this, Article 16 states that in assessing whether the burden of proof is satisfied, national courts shall be able to take account of various matters including competing actions arising at different levels of the supply chain in connection with the same infringement, judgments resulting from such actions, and any other relevant information in the public domain resulting from the public enforcement of competition law.
- 7.4 However, national courts might be excused from thinking that such insights offer only moderate assistance at best. It is obvious that such issues will need to be taken into account: the difficulty will be in how to assess and quantify the

competing claims between them. Article 16 of the Directive provides that the European Commission shall issue non-binding guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser. These guidelines were originally due to be completed by the end of May 2016, but the Commission has only recently published a draft of the guidelines for a period of consultation scheduled to end on 4 October 2018. The guidelines are intended to complement a 315-page report on a study into passing on of overcharges by RBB Economics and Cuatrecasas, Gonçales Pereira (commissioned by the European Commission) published in October 2016, which was intended to help with the drafting of guidelines for national courts. The guidelines may be of assistance to national courts that do not have previous experience in dealing with the passing-on defence in damages claims. However, the non-binding nature of the guidelines also mean that Member States shall remain free to adopt alternative approaches. It is also suggested that the guidelines will have only modest impact in jurisdictions, including the UK and Germany that, respectfully, have more experience than the European Commission in assessing complex claims for compensatory damages, whether or not in the context of antitrust. Therefore, it is probably that the level of experience of national courts in dealing with passing-on issues will be a factor when considering the choice of jurisdiction.

- 7.5 The passing-on defence has, in principle, been available in the case law of the Member States focussed on in this chapter prior to the introduction of the Directive. However, Member States have taken different approaches to the question of whether it is necessary to introduce express provisions of national law to confirm the availability of the passing-on defence in competition damages actions. For example, in the UK, the Government has taken a “light touch” approach to implementation (such that changes have only been made to UK law where necessary to implement aspects of the Directive not already covered by existing UK law), and concluded that only minimal changes were required following the CAT judgment in *Sainsburys-v-Mastercard* (upheld on appeal).⁴⁰ In that case, discussed further in Chapter 14, the CAT confirmed the rights of indirect purchasers to claim damages for infringements of competition law, and the principle of the passing on “defence”.⁴¹ The changes introduced by the UK implementing regulations are therefore limited to provisions dealing with the issue of where the burden of proof lies when proving that an overcharge has been passed on (which was not expressly dealt with by the CAT).⁴² In contrast, whilst the passing-on defence was also already recognised by the German courts prior to implementation of the Directive, the German legislature has chosen to codify the relevant case law into statute.

Quantification of harm

- 7.6 The Directive introduced some basic principles relating to quantification of harm which are intended to avoid a situation where national laws of procedure make it difficult in practice to begin any form of antitrust claim. Pursuant to Article 17, Member States are required to ensure that the standard of proof under national law does not render it excessively difficult to exercise the right to damages and that judges are given the opportunity to estimate losses (i.e. a claim is not to fail simply because harm cannot be quantified on an exact basis). In addition, cartel infringements are to be presumed to cause harm (thus ensuring that a ground of action does not fail in some jurisdictions simply because the losses cannot be measured at the outset), although the Directive refrains from prescribing any presumption as to the amount of harm caused. Whilst most practitioners welcomed the decision not to include a rebuttable presumption of a certain level of overcharge (as initially proposed when the Directive was

being negotiated), it is anticipated that as a result national courts may well take differing approaches and reach different conclusions on questions of quantification.

- 7.7 Differing approaches by national courts may also emerge in relation to their use of the power to request assistance from NCAs on the issue of quantification of loss (pursuant to Article 17(3) of the Directive). This is a new power for the courts of many EU Member States, and raises important and interesting possibilities. It may be, for example, that in the course of the administrative procedure the regulator receives a wide variety of confidential information on effects of conduct upon prices and volume of sales in the affected market. This information may have been received from third parties and never fully disclosed to the cartel defendants or, most likely, the damages claimants. The possibility of creating important asymmetries of information in this regard is obvious, as is the scope for unfairness should a court seek to take account of materials not disclosed to the parties before it. Whilst the European Commission may be prepared to take decisions on the basis of information that it alone has been given opportunities to review, such practices are generally rejected by the courts on the basis that damages should be awarded on the basis of evidence that all parties have had the opportunity to comment upon and contest.
- 7.8 It is also notable that in cases involving “object” infringements of competition law, NCAs tend not to include any analysis of the likely harm caused in their cartel decisions, as the impact on the market does not need to be evaluated in order to reach a finding of infringement. Having not undertaken such (often very complicated) analysis as part of their own investigation, NCAs may not be best placed to advise and indeed may be reluctant to devote resources to undertaking such an exercise on behalf of the courts, particularly in light of the adversarial context. It will therefore be interesting to see to what extent national courts make use of this new power, and how NCAs respond. For example, the Spanish courts have already requested assistance from the Spanish NCA (an established practice in Spain that precedes implementation of the Directive). This is, to some degree, unsurprising as the approximation of harm is a factor that the Spanish CNMC takes into account when calculating applicable fines. The Spanish NCA has also announced its intention to publish a guide on the quantification of losses in damages claims.⁴³ In the UK, where the CAT and the courts already had the power to seek assistance from third parties in determining damages prior to implementation of the Directive,⁴⁴ the CMA is not generally asked for its advice, and it is anticipated that there will be no change in approach in light of the Directive. However, the approach of national courts and NCAs of other Member States remains to be seen.

8 Effect of Consensual Settlement

- 8.1 The Directive has introduced three key measures aimed at increasing the incentives for parties to reach consensual resolution of antitrust damages actions in all EU Member States:
- (a) the limitation period for bringing an action for damages must be suspended for the duration of any consensual settlement process;
 - (b) NCAs have been given discretion to consider whether a settlement reached prior to a fining decision should be a mitigating factor in setting the level of any such fine; and
 - (c) settling parties are permitted to agree that, in so far as the settling injured party is concerned, it will not come back to the settling defendant for any further sums in connection with its own losses, reinforcing the finality of settlement.
- 8.2 However, whilst these provisions will result in a degree of harmonisation across Member States, a number of important questions remain open for Member States to determine at

the national level. For example, how will it be determined whether a “consensual dispute resolution process” for the purposes of the obligatory suspension of the limitation period has arisen and/or continues to exert a suspensory effect? How many NCAs will make use of the option to treat a settlement agreement as a mitigating factor in setting fine levels, and what level of discount will be applied?⁴⁵ How will national courts approach contribution claims where a consensual settlement has been reached with some defendants but not others? This latter question is addressed in part by Article 19 of the Directive (which limits liability of a settling defendant for contribution claims from non-settling co-infringers),⁴⁶ but such claims are still likely to raise complex questions in practice, and it remains to be seen how these will be handled by national courts.

- 8.3 As a result, the availability of clear settlement procedures – in particular in relation to collective settlement (expressly excluded from the scope of the Directive⁴⁷) – is likely to remain a key point of difference between jurisdictions, and an important consideration for both claimants and defendants. A detailed assessment of the settlement procedures available in Member States is beyond the scope of this chapter, but it is interesting to note in this regard that two of the jurisdictions which are currently amongst the most popular for bringing antitrust damages actions – the Netherlands and the UK – have both introduced “opt-out” collective settlement regimes that enable businesses to settle competition claims from multiple claimants quickly and easily on a voluntary basis. Neither regime has yet been used in relation to a competition law claim,⁴⁸ but it is anticipated that the possibility of such collective settlement will be a factor in the continued popularity of both jurisdictions.

9 Continued Differences in Approach to Key Issues not Covered by the Directive

- 9.1 Finally, it is important to remember that there are a number of key practical issues which are likely to be critical to the relative popularity of different jurisdictions for antitrust damages actions which are not covered at all by the Directive, and in relation to which important differences will continue to exist between different EU Member States.
- 9.2 One of these is the availability of a collective action regime, allowing claimants to join together to bring an antitrust damages action, on either an “opt-in” or “opt-out” basis. Where available, this is often an attractive option for consumer claims in particular, where the individual loss suffered as a result of a competition law infringement may not be sufficient to justify the costs involved in bringing an action, but the aggregate loss suffered by a particular class of claimants is significant. The availability of collective redress was considered at EU level at the same time as the Directive, but this proved too controversial to include in the Directive itself. Instead, a non-binding Recommendation was adopted, which set out some common principles for collective redress mechanisms in EU Member States.⁴⁹ This left it open to Member States to pursue implementation of collective redress mechanisms as they saw fit, albeit against the background of some general non-binding guidance.
- 9.3 The UK currently has probably the most well-developed collective actions regime amongst EU Member States, following reforms in 2015 which expanded the regime to include the possibility of bringing a claim on an “opt-out” basis (i.e. where members of a defined class are automatically included if they fall within the relevant definition, unless they actively choose to “opt-out” of the action), in addition to the option of an “opt-in” claim (i.e. on behalf of named consumers who have taken active steps to opt in to the action).⁵⁰ Whilst successful certification of the first opt-out

collective claim under this new regime is still awaited,⁵¹ it is anticipated that the broad collective actions regime in the UK will contribute to its continued popularity as a jurisdiction for bringing antitrust damages claims (subject to potential issues raised by Brexit, discussed below).

- 9.4 However, collective actions regimes have also been introduced or proposed in a number of other Member States. For example, as mentioned above (in section 4), in France the *Loi Hamon* introduced the possibility of collective actions seeking damages for material harm caused to consumers as a result of a competition law infringement (with effect from 1 October 2014). In the Netherlands, there is a collective actions regime which allows representative organisations to seek declaratory or injunctive relief, and reform proposals are currently under consideration which would extend this regime to allow claims for monetary damages on an opt-out basis. At the time of writing a draft bill is pending before the House of Representatives. According to the draft bill, a representative would be able to bring a collective claim on behalf of a defined class, who would be automatically included in the claim unless they opted out, provided that the claim had a “sufficiently close connection” with the Netherlands.⁵² Further developments are also underway in Germany, where in May 2018 the legislature adopted a collective redress mechanism for consumer claims which shall enter into force in November 2018. The new mechanism, which is broad in the respect that it covers many areas of law, including potentially competition law, is limited to model declaratory actions for collective redress in consumer matters (and in this regard is nearer in scope to France’s *Loi Hamon*). The right to bring actions under this new mechanism is also limited to so-called ‘registered qualified institutions’ being, in essence, consumer associations that satisfy certain criteria. However, further limitations to the scope of the model declaratory action are likely to impact its usefulness to private competition law claims. In particular, the mechanism is designed to resolve recurring issues of fact or law (for example, a breach of legal duty), but cannot itself be used to establish causation or quantum and, accordingly, cannot result in an award of compensation.
- 9.5 Another key practical issue relates to costs and funding. There has been a steady rise in third party litigation funding in many EU Member States, and such funding is often crucial in enabling antitrust damages claims to be brought. For example, in the UK, the Road Haulage Association has reportedly secured full funding from Therium Capital Management for its GBP 3.9 billion follow-on damages claim in the English courts against trucks manufacturers, in connection with the European Commission’s *Trucks* decision in 2016. Therium is also known to be actively funding competition litigation in Spain, including a large number of claims being brought against Cepsa, BP and Repsol following on from a 2009 infringement of the Spanish NCA relating to price-fixing of fuel and claims arising from the European Commission’s *Trucks* decision. A number of other third party funders are also known to be active in Germany and the Netherlands. In contrast, third party funding of claims is much more limited in France, and formally prohibited in certain other Member States including Ireland. It is anticipated that the availability of funding, and the terms thereof, is likely to become an increasingly important consideration for claimants when deciding where to lodge a claim, alongside the more “traditional” considerations such as disclosure and limitation periods.

10 The Potential Impact of Brexit

- 10.1 At the time of writing (July 2018), there has been considerable debate about the potential impact of Brexit (both on competition law enforcement and more widely). Whilst it remains difficult to predict with any degree of certainty what the post-Brexit UK-EU relationship will look like, the enactment of the European Union (Withdrawal) Act 2018 (the “**Brexit Act**”) ensures that, for the period immediately following Brexit on 29 March 2019, ‘EU-derived domestic legislation’ and ‘direct EU legislation’ that was operative immediately before Brexit will continue to form part of UK domestic law. As discussed in Chapter 14, this means that Articles 101 and 102 TFEU and Regulation 1/2003 will continue to apply under UK law save to the extent they are amended or repealed.
- 10.2 There remain, however, key issues to the enforcement of private competition law that are subject to the position that must ultimately be agreed between the UK and the EU under the terms of a withdrawal agreement (the “**Withdrawal Agreement**”). That agreement cannot, as a matter of law, be agreed until 30 March 2019 (however, it is widely believed that a draft Withdrawal Agreement must be in place by the European Council’s October Summit for any final Withdrawal Agreement to be ready for the day after Brexit). The terms of that Withdrawal Agreement are likely to impact the future of the UK’s current status as a preferred jurisdiction for antitrust damages actions post-Brexit, particularly with respect to:
- whether European Commission infringement decisions continue to be treated as binding proof of infringement by English courts and the CAT;
 - the nature of the agreement reached on matters relating to jurisdiction; and
 - the future approach to enforceability of English court judgments in Europe.
- 10.3 As noted above, the incorporation of ‘direct EU legislation’ into UK law and, in particular, Regulation 1/2003 will mean that European Commission decisions remain binding on UK courts. Decisions by NCAs of Member States will also continue to provide *prima facie* evidence of an infringement under the same regulation. However, the extent to which English courts will continue to accept such decisions as proof of liability in the future is unclear (and is in any event subject to the possibility of amendment by the UK Government).
- 10.4 Further uncertainties also arise on the applicability of the recast Brussels Regulation. Whilst in principle that regulation will apply in the UK, the UK will retain no reciprocal rights from other Member States, unless provided for by the terms of the Withdrawal Agreement. On 19 June 2018, the UK Government and EU confirmed in a joint statement that an consensus has been reached (at the negotiators’ level) on the articles of the draft Withdrawal Agreement relating to civil judicial cooperation. In effect, if the Withdrawal Agreement is agreed, as currently drafted, the recast Brussels Regulation will continue to apply until the end of the transitional period on 31 December 2020. The position after 31 December 2020 is, however, even more ambiguous. Statements from the UK Government have indicated an intention to either achieve an outcome similar to the recast Brussels Regulation or, alternatively, to accede to the 2007 Lugano Convention.
- 10.5 It is plainly the case that, if the outcome of the Brexit negotiations is such that European Commission infringement decisions can no longer be relied upon as the basis for follow-on damages actions before English courts or the CAT, and the rules on jurisdiction and enforceability of judgments are significantly amended in a way which impacts negatively on claimants, the UK’s position at the forefront of private enforcement of competition law in Europe could diminish in the medium to long term.

- 10.6 That said, it is important to remember that in the short term nothing will change: until the UK formally withdraws from the EU on 29 March 2019, the provisions of EU competition law and infringement decisions of the European Commission will remain binding in the UK, and the pre-Brexit approach to questions of jurisdiction and enforceability of judgments will continue. Moreover, that period is likely to be extended under the terms of any Withdrawal Agreement until 31 December 2020. Any new post-Brexit regime will not apply in practice for a number of years.
- 10.7 Moreover, even if the UK Government does pursue a so-called “hard Brexit” in the long term, including the possibility that (despite the UK Government’s stated intentions) no Withdrawal Agreement is entered into with the EU, the UK will still offer a well-established competition litigation infrastructure, which is likely to remain an attractive proposition for claimants (and indeed, in many respects, also for defendants). In particular, and in contrast to many other Member States with less well-developed private enforcement regimes, the UK will continue to offer experienced specialist judges, legal advisors and economists, as well as favourable procedural rules which the courts have considerable experience in applying, and a reputation for efficient and effective case management. As noted above, the well-established presence of a number of litigation funders is also likely to offer significant advantages. Whilst the long-term effect of the Directive may well have been to “kick-start” private enforcement of competition law in Member States which have not seen many antitrust damages actions before national courts to date, it seems clear that this will not occur overnight, and the traditionally popular jurisdictions – including the UK – are likely to continue to be perceived in a favourable light.
- 10.8 Furthermore, even if it proves difficult post-Brexit to claim damages before the English courts for harm suffered in EU Member States, the prospect of bringing an antitrust claim in the UK in respect of damage suffered in the UK as a result of a Europe-wide or global cartel may well still be an attractive option for claimants, on the basis that it would be likely to lead to extensive disclosure of documents relating to the cartel, which could then place claimants in a much better position to settle claims relating to damage suffered outside the UK.
- 10.9 Finally, as mentioned above, it has been suggested that the attractiveness of the English courts as a forum for dealing with competition damages claims could even be increased post-Brexit, on the basis that they would be in a position to circumvent years of uncertainty and preliminary references from national courts of remaining Member States regarding the interpretation and application of the Directive.

11 Conclusions

- 11.1 Whilst it is too early to reach definitive conclusions about the long-term impact of the Directive on private enforcement of competition law across the EU, a comparison of the national implementing legislation adopted by Member States suggests that it is unlikely that the Directive will fully achieve its stated aim of a “level playing field” for private enforcement. That said, it appears likely that the total number of antitrust damages actions being brought across the EU will continue to increase. The Directive has already had an impact on jurisdictions where private enforcement of competition law is not as well-developed, such as in Spain, where more than 160,000 consumers have now opted-in to a claim lodged against car manufacturers following a cartel decision by the Spanish NCA.⁵³
- 11.2 Where a choice of jurisdiction is available (as will often be the case in multi-jurisdictional cartels), “forum shopping” seems likely to continue, and it will be critical for potential claimants and defendants to seek expert advice in assessing

the strategic advantages of one possible jurisdiction over another. This will be particularly important in the short to medium term, when the differing approaches taken to the question of temporal application of amendments to national laws to reflect the Directive requirements will add an extra layer of complexity to the assessment, and many unanswered questions will remain as to how national courts will interpret key provisions of the relevant implementing legislation.

- 11.3 It is to be noted with emphasis that, in recent months, Germany has continued to consolidate its position as a key jurisdiction for claimants seeking to file competition damages claims. More than 100 cartel damages claims are reported to be pending in Germany at the time of writing, including multiple claims that individually exceed EUR 1 billion. A substantial sum of recovered damages can be attributed to a single claimant, Deutsche Bahn AG, which has successfully recovered in excess of EUR 400 million in connection with cartels in various Member States but, in particular, Germany. At the time of writing Deutsche Bahn has filed its most recent claim for damages in the UK against Mastercard. Mastercard has, in turn, recorded a charge of \$70 million in defending competition damages claims from pan-European claimants during the first quarter of 2018. This growth of enforcement activity is symptomatic of a wider European phenomenon. For example, it is understood that in relation to the European Commission’s *Trucks* decision alone, more than 170 cartel damages claims have now been filed across EU Member States.
- 11.4 It remains to be seen whether the combined effect of the implementation of the Directive and Brexit will affect the traditional popularity of the UK, Germany and the Netherlands as claimant-friendly jurisdictions. In the short term, little is expected to change, but in the longer term much will depend on the precise terms of the UK-EU relationship post-Brexit, and the approach taken by the German and Dutch courts to key questions of interpretation of their amended private enforcement regimes. But it is clear that the Damages Directive has not been a zero-sum game; growth in domestic enforcement activity has, to the knowledge of the authors, been a common experience between Member States. This outcome is likely to have an inherently significant impact on competition, beginning from the risks of participating in anti-competitive practices in the first place, to the strategic implications of leniency applications and settlement agreements and, finally, to the opportunities that consumers now have available for redress.

Endnotes

1. 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 EU Member States and of the European Union (OJ L349/1, 05.12.2014).
2. Recital 9 of the Directive.
3. An implementation status table is available on the European Commission’s website at: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.
4. See section 4.9 of Chapter 1 of the *ICLG to: Competition Litigation 2017*, “*The likely impact of the EU Damages Directive*”, by Euan Burrows and Alina Fazal.
5. Case C-122/96 *Saldanha and MTS* (EU:C:1997:458), see paragraphs 12–14.
6. The potential retroactive application of the Directive was the subject of an interesting debate at a seminar held at Brick Court Chambers in London on 26 March 2015, following a presentation by Daniel Jowell QC which highlighted concerns relating to the application of the new limitation period required by the Directive.

7. Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 385/2017).
8. Law amending Book 6 of the Civil Code and the Code of Civil Procedure in relation to the implementation of Directive 2014/104/EU (“*Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht*”).
9. Supreme Court 8 July 2016, ECLI-NL:HR:2016:1483.
10. Ordinance no. 2017-303 and Decree n. 2017-305.
11. 9th amendment to the German Act against Restraints of Competition. This legislation also introduces various other changes to German competition law, including notification thresholds for the merger control regime.
12. In contrast, if the claim arose on or after 27 December 2016, the new rules regarding the starting point and suspension of the limitation period will apply for the purpose of determining whether the claim is time-barred as at 9 June 2017.
13. For example, it was only recently confirmed on 12 June 2018 by the German Federal High Court that, under the German Act against Restraints of Competition, the staying effect of investigations by NCAs apply to investigations where claims have arisen before 1 July 2005 provided that the claims had not yet been time-barred on 1 July 2005. The controversy that preceded the German court’s decision concerned whether a provision on limitation periods introduced to the German Act against Restraints of Competition on 1 July 2005 had retroactive effect (see Judgment of the Federal High Court, KZR 56/16 - Grauzementkartell II). The ruling, which in this case concerned a cement cartel between 1993 and 2002, will have a significantly claimant-friendly impact on the enforcement of private damages claims in the German courts in relation to long-running cartels for years to come.
14. Royal Decree 9/2017 of 26 May 2017.
15. See section 2 of Chapter 1 of the *ICLG to: Competition Litigation 2017*, “*The likely impact of the EU Damages Directive*”, by Euan Burrows and Alina Fazal.
16. Provided they have not been withdrawn.
17. “Grey-list” documents are listed in Article 6(5) of the Directive. They include: (i) information prepared specifically for the proceedings of an NCA, other than leniency corporate statements and settlement submissions (which benefit from absolute protection from disclosure under Article 6(6)); (ii) information that the NCA has drawn up and sent to parties in the course of proceedings; and (iii) settlement submissions that have been withdrawn.
18. Discussed in more detail in section 2.17 of Chapter 1 of the *ICLG to: Competition Litigation 2017*, “*The likely impact of the EU Damages Directive*”, by Euan Burrows and Alina Fazal.
19. Recital 24 to the Directive provides that the protection granted to leniency statements and settlement submissions in Article 6(6) extends to literal quotations of a leniency statement or a settlement submission in other documents. However, it appears from recital 28 and the definitions in Article 1 of the Directive that this protection will not extend to, for example, pre-existing evidence referred to in an application for leniency, or other documents relating to the application other than the actual corporate statement itself. It appears inevitable that claimants and defendants will often disagree on where exactly the line should be drawn, and that there may well also be scope for differing interpretations by national courts of different Member States.
20. For example, whilst the Munich Higher Regional Court had not considered the product and geographic market definition contained in a fining decision of the German NCA to be binding on the court (File no. U 5006/11, decision of 21 February 2013), the Karlsruhe Higher Regional Court adopted a different approach just a few months later, deciding that the product market definition reached by the German NCA was binding on the court (File no. 6 U 51/12 (Kart.), decision of 31 July 2013).
21. In June 2018 the Stuttgart Regional Court held that, despite a European Commission decision finding that truck manufacturers had coordinated their behaviour in respect of *gross prices* for trucks contrary to Article 101 TFEU, it could be derived from the European Commission’s finding that the *net prices* for trucks (ultimately paid by the claimants) must have also been impacted. See further section 4.4 and the discussion of the English High Court case of *Ferrexpo-v-Gilson Investments*.
22. *Loi Hamon*, No. 2014-344 of 17 March 2014, enacted by Decree No. 2014-1081 of 24 September 2014. The law entered into force on 1 October 2014. See further section 9 below.
23. *Ferrexpo-v-Gilson Investments* [2012] EWHC 721.
24. *BCL Old Co Limited & Ors-v-BASF SE & Ors* [2012] UKSC 45.
25. *Deutsche Bahn AG & Ors-v-Morgan Advanced Materials Plc (formerly Morgan Crucible Company Plc)* [2014] UKSC 24.
26. “*Brexit: exit stage left for competition damages?*”, Anneli Howard, CLJ: Brexit Special Online Edition (14 July 2016).
27. See, for example, Stuttgart Regional Court, file no. 45 O 1/17, decision of 30 April 2018; Hannover Regional Court, file no. 18 O 21/17 and file no. 18 O 23/17, decisions of 16 April 2018; Hannover Regional Court, file no. 18 O 8/17, decision of 18 December 2017.
28. The Royal Decree 9/2017 expressly states that Article 3 of Title II (which amends the Spanish Competition Act to reflect the requirements of the Directive) does not apply retroactively. In addition, Article 4 (which amends the relevant procedural rules) is stated to apply only to proceedings initiated after the Royal Decree entered into force.
29. Where the amended regime reflecting the requirements of the Directive does not apply, claims for damages arising from antitrust infringements must be brought before the Spanish courts within one year from the date the injured party obtains knowledge of the harm caused by the infringement. There is some uncertainty under Spanish law as to whether, in the case of a follow-on action, this one-year period starts to run from the date of the NCA’s original decision, or from the date at which that decision becomes definitive pending the outcome of any appeal process.
30. In the UK, a claim made in the High Court would be subject to a six-year limitation period, probably calculated from the date of the European Commission’s infringement finding, i.e. 4 May 2020 (this assumes that proceedings are initiated pre-Brexit such that the question of whether European Commission infringement decisions will be able to form the basis of a follow-on action before the English courts does not arise), and that sufficient information relating to the infringement was not in the public domain to enable the claimant to plead a *prima facie* case prior to the infringement decision. If the claim were to be brought in the CAT (in theory now the preferred forum for competition claims in the UK), the limitation period would instead be two years from the date the infringement decision became final, i.e. 4 March 2019 (due to the transitional provisions of Rule 119 of the CAT Rules 2015). (See further Chapter 14.)
31. It is also notable that in Spain, implementation of the Directive will lead to a broadening of the concept of joint and several liability. Under the previous Spanish law, joint and several liability was only imposed where the particular intervention of each party in the damaging behaviour could not be individualised. Following implementation of the Directive, it will no longer be necessary to maintain that the damaging behaviour cannot be individualised in order to bring an action against only one co-infringer.

32. For this purpose, an SME is defined as set out in Commission Recommendation C(2003)1422, i.e. fewer than 250 employees and less than EUR 50 million annual turnover.
33. It is interesting to note that the English language version of the Directive states that the entity's market share must be below five per cent "at any time during the infringement of competition law", rather than at all times/throughout the period infringement. However, it appears that this is a translation error in the Directive, and that the condition in fact requires that the entity's market share be below the five per cent threshold at all times during the infringement – see further the discussion below regarding implementation of this provision in the UK.
34. Reflected in paragraph 16(2) of Schedule 8A of the Competition Act 1998, as inserted by the UK implementing regulations.
35. In this regard, it is anticipated that the German courts will also draw on case law relating to determining responsibility for and allocation of cartel fines among group companies. In November 2014, the German Federal Court held that the following factors were relevant in such circumstances: (a) the level and nature of contribution to the illegal conduct; (b) the level of fault in relation to the illegal conduct; (c) the profits and other benefits derived from the cartel arrangements; (d) the economic capacity of the companies involved; and (e) the amount of sales affected by the cartel (Case KZR 15/12, NZKart 2015, 101).
36. For example, in the UK, contribution claims must be brought within two years under section 10 of the Limitation Act 1980. In Spain, the time limit is five years under Article 1964 of the Civil Code.
37. As discussed above, Article 10(3) of the Directive only requires that the limitation period should be "at least" five years, which leaves open the possibility of different limitation periods applying in different circumstances (albeit starting to run from the same point in time, in accordance with Article 10(2)).
38. Article 3(2) of the Directive.
39. Thereby overturning the CAT decision in **2 Travel Group PLC (in liquidation)-v-Cardiff Transport Services Limited** [2012] CAT 19, where the CAT held that where the defendant has not already been fined by a regulator (or benefited from immunity under a leniency programme) then exemplary damages could be awarded in exceptional circumstances, viz., where the defendant has behaved "outrageously" with "cynical disregard" for the claimant's rights, and was aware that its conduct was probably or clearly unlawful.
40. *Sainsbury's Supermarkets Ltd-v-Mastercard Incorporated and Others* [2016] CAT 11. The Court of Appeal considered three joint appeals, including the CAT appeal and appeals from two subsequent claims by retailers in the High Court (*Sainsbury's Supermarkets Ltd & Ors-v-Mastercard Incorporated & Ors* [2018] EWCA 1536 (Civ)). All three cases are now remitted to the CAT to produce a consistent judgment (including a reconsideration of the quantum of the claims).
41. In the particular circumstances of the case, however, the CAT ruled that Mastercard's passing-on defence failed because, although it agreed that Sainsbury's would have passed on a substantial amount of the increase in costs to its customers, it found that Mastercard had failed to identify any actual increase in retail prices causally connected with the multilateral interchange fee, as well as the class of purchasers to whom the overcharge had been passed-on who would be in a position to claim damages.
42. Paragraphs 8–11 of Schedule 8A to the Competition Act 1998, as inserted by the UK implementing regulations.
43. *Comisión Nacional de los Mercados y la Competencia*, 2018 Strategic Plan.
44. Rule 19(3) of the CAT Rules 2015 empowers the CAT to ask request information from third parties. Section 70 of the Senior Courts Act 1982, section 63 of the County Courts Act 1984 and Part 35 of the Civil Procedure Rules provide for the courts to be given assistance from assessors.
45. In the UK, section 49C of the Competition Act and the Competition Act 1998 (Redress Scheme) Regulations 2015 already provided for formal approval by the CMA of voluntary redress schemes set up by potential private action defendants (either before or after a public enforcement infringement decision is issued). The CMA's guidance on the associated requirements and procedures provides that in the majority of cases, where a voluntary redress scheme is approved the companies involved will benefit from up to a 20 per cent reduction in fines imposed in respect of the infringement. It is as yet unclear whether a similar discount would be applied by the CMA following implementation of the Directive where a settlement agreement was reached, but the formal requirements of the voluntary redress scheme (which is primarily designed for cases involving multiple claimants and consumer products) were not met.
46. Article 19(2) of the Directive prevents any non-settling co-infringers from seeking to recover contribution for the remaining claim (reduced by the relative share of harm caused by the settling co-infringer, not the amount of the settlement) from the settling co-infringer. Article 19(4) also expressly requires national courts to "take due account" of any damages paid pursuant to a settlement agreement 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. It is not entirely clear how these two provisions inter-relate, or how national courts will interpret national legislation implementing these provisions in potentially complex circumstances.
47. Recital 13 states that the Directive "should not require Member States to introduce collective redress mechanisms".
48. The Dutch regime has been in operation since 2005, pursuant to the Dutch Act on Collective Settlement of Mass Damage Claims. As at the time of writing, it has not yet been used in relation to a competition law claim (although it has been used in other types of mass claim). The UK regime, which is closely modelled on the Dutch approach, was introduced by the Consumer Rights Act 2015 and is limited to the competition claims context.
49. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (OJ L201/60, 26.7.2013). When this recommendation was adopted, the European Commission stated that it would review the position and decide whether further action was needed within four years. It has missed that deadline, but in May 2017 it initiated a consultation and sought to appoint an external consultant to assess how Member States had responded to the 2013 recommendation. The consultation is intended to collate evidence of collective actions across the EU, and any examples of when such litigation would have been appropriate but did not happen. The consultation closes on 15 August 2017. It remains to be seen what steps the European Commission will then take in response.
50. Section 47B of the Competition Act 1998, as amended by the Consumer Rights Act 2015. See further Chapter 14.
51. At the time of writing, applications for certification of four opt-out collective actions have been made to the CAT. The first was withdrawn in May 2017. The second claim was brought on behalf of 46 million customers for GBP 14 billion in follow-on damages arising from the European

Commission's *Mastercard I* decision. The application was rejected because the claimant failed to establish a reliable methodology to calculate aggregate or individual loss. The third and fourth applications are now pending (see further Chapter 14).

52. The draft bill proposes that this requirement would be fulfilled if it could be shown that: (i) the defendant is based in the Netherlands; (ii) the harmful events took place in the Netherlands; or (iii) the majority of the injured parties are domiciled in the Netherlands. The progress of this bill

through the Dutch legislative process has been delayed due to political difficulties in the Netherlands in relation to the formation of a new government. At the time of writing it is not expected that the bill will be passed into law prior to 1 January 2019.

53. OCU press release, 'Concesionarios de coches: Reclama contra los precios pactados' (15 September 2015) <<https://www.ocu.org/coches/coches/noticias/reclamacion-concesionarios>> (last accessed 6 August 2018).



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Recovering European Cartel Damages in England – A Plaintiff’s Guide

Kenny Henderson



Kate Pollock



Stewarts

1 Introduction

- 1.1 Cartels and other horizontal infringements¹ reduce competitive pressures between cartelists, lessening incentives to reduce prices, offer better services, innovate through research and development, or differentiate from competitors by other means.
- 1.2 These behaviours harm the direct and indirect customers of cartelists. Corporates and individuals that have suffered such harm (e.g., by being overcharged) are entitled to recover their losses under European law. Indeed, in many scenarios they are entitled to recover their entire European losses from a single national court. The ability to recover all losses in a single forum is very attractive for plaintiffs, as it avoids the need to file multiple proceedings in a variety of European jurisdictions.
- 1.3 Large cartels almost invariably entail cross-border behaviour and plaintiffs frequently have a choice of where to file proceedings. For European claims, the three jurisdictions which have proven most popular for plaintiffs are: England; Germany; and the Netherlands. These jurisdictions are attractive for a variety of reasons, including both favourable local procedural law and practical issues such as the relative speed by which the courts in these jurisdictions move towards trial.²
- 1.4 Cartel claims can be high value, often running to tens of millions of pounds or higher. This is in part because collusive behaviour can last for many years before detection and so the volume of commerce affected can be enormous. There have been many multimillion-pound cartel settlements in England in recent years, which, by their nature, are confidential.
- 1.5 This chapter addresses some of the key issues that a business will weigh in deciding whether to seek recovery of losses it has suffered from a cartel or cartel-like behaviour. While comparisons are drawn with other jurisdictions, the focus is on recovery in England, which is, by a considerable margin, the plaintiffs’ jurisdiction of choice.
- 1.6 Perhaps the key attraction of filing in England is that the courts take a broad U.S.-style approach to disclosure, which is particularly important in cartel cases where the underlying behaviour is hidden.³ The recently implemented opt-out class action mechanism available in the UK under the Consumer Rights Act 2015 (“CRA 2015”) illustrates the UK government’s commitment to keeping England as a jurisdiction of choice for these claims.⁴ Brexit will inevitably bring some uncertainties, but as is explored at section 5 below, the indications at the time of writing are that Brexit will have limited impact on cartel litigation and will not disadvantage plaintiffs.

- 1.7 The structure of this chapter is as follows. Section 2 summarises some specific features of cartel litigation and comments on how it differs to general commercial litigation. Section 3 briefly comments on the scope of losses that are recoverable. Section 4 addresses practicalities to be considered at an early stage. Section 5 looks to the future and the impact of the Damages Directive⁵ and Brexit. Section 6 concludes and comments on the key dynamics of cartel litigation.

2 Specific Features of European Cartel Litigation

- 2.1 Parties affected by competition law breaches are entitled to recover their losses subject to national law rules on causation and remoteness.⁶ Unlike the position under U.S. Federal law, all affected parties have standing, including indirect purchasers.⁷
- 2.2 The volume of cartel litigation in Europe has increased markedly in recent years. This cannot be put down solely to legislative initiatives, particularly as the Damages Directive has only recently been implemented in many Member States and largely does not have retrospective effect. Rather, businesses impacted in Europe are undergoing a cultural change and are increasingly willing to recover losses caused by cartelists. The sight of other corporate victims achieving recoveries naturally encourages further claims.
- 2.3 This section focuses on the two key features of cartel litigation that distinguish it from mainstream commercial litigation: (1) that plaintiffs frequently do not need to prove liability; and (2) the importance of economic evidence.

Absence of need to prove liability

- 2.4 Although all litigation should be carefully weighed, cartel claims can be significantly less risky for plaintiffs than other commercial litigation. This is because plaintiffs frequently do not need to prove the existence of a cartel and therefore liability is not an issue; the main focus of the courts is on quantum. These claims are therefore framed not as “if” the defendants will pay damages, but rather “how much” they will pay.
- 2.5 Where the European Commission has investigated and found an infringement of competition law, such ruling is binding on national courts.⁸ The findings of national regulators, such as the Competition and Markets Authority in the UK, can also be binding.
- 2.6 Even absent the procedural rule that Commission decisions are binding, many cartelists would be unable to credibly deny liability in damages actions. First, cartelists frequently admit

liability to the Commission in order to avail themselves of the regulatory settlement process which can reduce the fines imposed.⁹ Second, even if not formally bound by a regulatory decision, the national courts of many Member States (including the English courts) would likely be highly persuaded by the Commission's findings of fact, bearing in mind its extensive investigatory powers and experience in these matters. The position in the U.S. is informative in this context. Findings of liability by the Department of Justice ("DoJ") are not formally binding on the Federal courts where adjudicating on damages claims. However, defendants that admit liability to the DoJ do not routinely dispute liability in resulting damages claims.¹⁰

- 2.7 Claims within the scope of a Commission ruling/admission by an addressee are known as "follow on" claims. Claims that do not rely on a prior admission or infringement ruling are "stand alone" claims. Claims that partially fall within a decision are hybrids and plaintiffs bear the burden of proof for elements of the claim that are not "follow on".
- 2.8 Infringement decisions are binding on national courts from the moment the Commission announces its finding of infringement. However, the infringement/fine announcement typically has very limited details, merely identifying the addressees/cartelists, providing a very short summary of the wrongdoing, and also specifying the fines imposed. After the fine is imposed, the Commission will move to publish its non-confidential decision of the investigation, which sets out more details of the wrongdoing. Addressees will seek to redact commercially sensitive information before the decision is published and also to delay publication *per se* to impede damages actions.
- 2.9 A defendant that is the subject of a regulator's infringement decision may be able to appeal.¹¹ The appeal process can slow final resolution of damages claims before national courts.¹² Furthermore, if an appeal succeeds, the plaintiff may be forced to prove liability in a stand alone claim.
- 2.10 In addition to reaching final infringement decisions, the Commission can also settle cartel investigations early where the case is suitable.¹³ Settling parties will face a shorter investigation and often receive a 10% reduction in the fine they would otherwise have faced. As noted above, settlement decisions require addressees to admit liability, which is of course helpful to plaintiffs.
- 2.11 Settlement decisions typically include quite short descriptions of the underlying wrongdoing. This is because, with admissions of liability, the Commission has reduced need to set out detailed findings of fact. In contrast, non-settlement decisions set out reasoned descriptions of the wrongdoing, arming plaintiffs with useful detail on the underlying behaviour. Furthermore, at the investigative stage, addressees will attempt to admit the narrowest possible infringement thereby restricting the temporal, geographic and subject-matter scope of the decision to reduce their exposure to damages actions.

Importance of economic evidence

- 2.12 Investigating a victim's losses and achieving a good value recovery requires a solid understanding of economic concepts and theories. The relevant economic theories are complex but the key parameters are: (1) the value of relevant commerce; (2) the overcharge (which is broadly the amount by which the cartel caused prices to be higher than they would have been absent the cartel);¹⁴ and (3) "pass-on", which refers to the extent to which the overcharge may have been absorbed upstream of the plaintiff (if the plaintiff is an indirect purchaser from the cartel) and/or whether the plaintiff has passed on the overcharge to its downstream customers.¹⁵

- 2.13 Analysing pass-on is particularly complex. The U.S. Federal courts have largely avoided this vexed issue by denying standing to indirect purchasers and refusing to allow defendants to argue pass-on, i.e., direct plaintiffs can recover the entire overcharge (prior to application of treble damages) even if the economic reality is that some of this cost was passed to their customers.
- 2.14 The English courts tend to take a detailed approach to economic evidence. An expert report that relies upon case-specific underlying data and minimises reliance on generic proxies will be more persuasive to a judge and will exert increased settlement pressure. Much of the relevant data will be in the hands of the cartelists and only available through disclosure. Thus, disclosure is a key tool in building a persuasive and effective expert report.

3 Losses Recoverable in Cartel Litigation

- 3.1 In Europe, national courts typically award damages on a compensatory basis. That is to say, the plaintiffs will be awarded damages equivalent to the losses that flowed from the infringement.¹⁶ Unlike in the U.S., treble damages are unavailable.
- 3.2 Again in contrast with the U.S., pre-judgment interest is generally awarded in Europe. Interest has a very important role in cartel damages claims because there is usually a long delay between the time of the wrongdoing and any award of compensation. In fact, the interest can sometimes be greater than the damages net of interest. In certain European jurisdictions such as England and the Netherlands, plaintiffs can recover their actual interest losses; for example, lost return on investments, rather than merely simple interest. Plaintiffs in England can recover compound interest subject to leading evidence on how they borrow/invest.¹⁷

4 Practicalities

- 4.1 Once a corporate suspects that it has been significantly impacted by a cartel,¹⁸ it will inevitably investigate the options for recovery.¹⁹ The sections below consider timing and limitation, the practical steps for investigating, the approach to selecting jurisdiction and disclosure.

Timing and limitation

- 4.2 Assessing limitation in cross-border cartel claims is highly complex. In fact, different national limitation rules²⁰ can apply to different aspects of the same claim. For example, purchases by a plaintiff group's French operating company might be governed by French limitation law, whereas English limitation law may apply to other purchases within the same claim.
- 4.3 Many national rules provide that accrual of the limitation period is delayed where, as is the case with secret cartels, the wrongdoing was concealed. However, the precise point at which limitation will begin to accrue can be unclear.²¹ Losing a limitation argument will of course terminate a claim, but facing a surmountable limitation argument is also unattractive if the hurdle could have been avoided by the plaintiff moving more swiftly.
- 4.4 Accordingly, at a very early stage it is important to review the likely limitation timelines for the claim. While it may not be possible to deduce precise date milestones, a scoping exercise will at least inform the plaintiff of the general timeline to which they should work. It is possible to attempt to agree tolling/standstill agreements with potential defendants. However, this approach comes with some risks, including prompting an

“Italian Torpedo”, whereby the defendant files proceedings pre-emptively in a defendant-friendly jurisdiction.²²

- 4.5 Aside from the limitation risk in delaying investigating/asserting a claim, there can be advantages in moving promptly. As detailed in paragraphs 6.3 and 6.4 below, cartel defendants frequently defend claims vigorously, taking a scorched-earth approach. Each case must be assessed on its merits, but assertive and prompt action will help signal to defendants that the plaintiff is committed to making a recovery and will not be bought out by a low-value settlement.

Investigating a claim

- 4.6 A key early step in any investigation is to perform an analysis of losses suffered. The analysis need not be in depth and typically can be completed rapidly without any need to search for underlying purchase records (even where available). However, it is important to have a broad picture of the potential recovery as this informs internal decision making on matters such as staffing and resource allocation to the project. Also, if early settlement offers are received,²³ it is not possible to assess whether they represent good value absent some form of claim valuation.
- 4.7 Commercial relationships may discourage corporates from asserting recoveries from certain key suppliers. These concerns are often manageable. First, all liable parties are jointly and severally liable for the full losses²⁴ so a corporate can select a cartelist with a less important relationship from which to recover its total losses. Second, follow-on claims do not allege unproven egregious conduct as they rely on regulatory infringements and/or admissions of liability. There is no accusation of wrongdoing as this is already proven. Absence of need to prove liability can depersonalise the claim and assist on relationship issues with suppliers.
- 4.8 If a victim decides to seek recovery, it will be necessary to perform further investigative steps. These can be approached proportionally, but purchase and sale channels should be scoped and contracts with cartelists (if any) should be considered.

Jurisdiction

- 4.9 As noted in the introduction, plaintiffs can frequently recover all of their European losses in a single claim and may have a choice of where to file proceedings.
- 4.10 Compared with some European jurisdictions, it can be relatively straightforward to file proceedings in England. The key document is the Particulars of Claim. It is important that this document is completely accurate but it does not need to set out the full details of the wrongdoing. Also, it need not even specify the exact sum sought from the defendant(s): this can come later in proceedings. Germany, by contrast, requires more upfront investment, as plaintiffs must present a reasoned analysis of their economic arguments at an early stage.
- 4.11 The rules on jurisdiction within the EU are set out in the Recast Brussels Regulation.²⁵ The general rule is that a defendant can be sued in the jurisdiction where it is domiciled, although claims with no European connection are subject to applicable domestic rules. England has developed a long-arm view of its jurisdiction. Even if no English companies are formal addressees of a Commission decision, it is frequently possible to use an English subsidiary to “anchor” the claim to England, thereby taking jurisdiction over the non-English companies.²⁶
- 4.12 A defendant tactic that plaintiffs should seek to avoid is the so-called “Italian Torpedo”. In this approach, a cartelist that suspects that it may imminently face a claim can pre-

emptively issue a claim in a jurisdiction of its choice, typically seeking declaratory relief. The purpose of this tactic is to try to seize jurisdiction in a defendant-friendly or very slow-moving jurisdiction. If the plaintiff then files proceedings in the court of its choice, the defendant will ask said court to stay proceedings as the matter is under consideration by another European court. This is not to say that the Italian Torpedo will always succeed, but facing the challenge and any possible appeal can substantially delay recovery in the jurisdiction of the plaintiff’s choice. To avoid an Italian Torpedo, a plaintiff can file proceedings in its favoured jurisdiction before engaging in any correspondence with the would-be defendants to avoid tipping them off that a claim may be imminent.

Evidence and disclosure

- 4.13 Cartels are, by their nature, concealed, and so plaintiffs are initially disadvantaged by marked information asymmetry. The individual wrongdoers often know that their conduct is improper and so may hide their behaviour even from their own colleagues. Owing to the concealment, cartel claims are often asserted many years after the underlying wrongdoing which can cause data (both plaintiff and defendant data) to further atrophy.
- 4.14 The broad approach to disclosure in England significantly assists in overcoming the informational asymmetry.²⁷ In principle, the parties must disclose all documents²⁸ that are either helpful or unhelpful to their case or to the case of another party to the dispute.²⁹ Privileged documents and those submitted to a regulator as part of any leniency process are exempt. The parties must make a reasonable search for such documents.³⁰
- 4.15 The modern approach of the English courts is to take disclosure in stages, requiring the parties to disclose pre-identified and collated documents in parallel with searching for documents that have not yet been identified. In practice, this assists plaintiffs in obtaining early access to the Commission “File”, which the defendant will have collated during the regulator’s investigation (that typically precedes damages litigation). The staged approach to disclosure keeps the litigation moving forwards and delivers documents to the plaintiffs even as the defendants are required to search for further materials relevant to the claim. The Commission File goes to the nature of the wrongdoing, such as anti-competitive communications between cartelists. Defendants are therefore very sensitive about these materials.
- 4.16 Disclosure is not a one-way process; plaintiffs are required to provide the defendants with relevant internal materials. The areas of most interest to the defendants are those indicating the plaintiffs’ volume of purchases of cartelised products, and internal documentation indicating how much of the overcharge the plaintiffs passed on to their customers (including materials regarding pricing models). Materials that go to pricing can be very confidential. Accordingly, the court will often order a “confidentiality ring”, whereby very sensitive documents will only be available to external legal advisors and experts, and will not be available to employees of the parties to the dispute. Significantly restricting dissemination of these materials goes some way to protecting their confidentiality.
- 4.17 At trial, the English courts expect parties to lead the best evidence available. That said, the courts are sympathetic to plaintiffs that face evidential difficulties, particularly where the difficulties were caused by the defendants (i.e., concealing the wrongdoing delays the plaintiff in asserting a recovery). English law approaches such evidential difficulties with a “sound imagination” and a “broad axe”.³¹ The courts recognise that where liability has been proven, allowing the defendants to evade payment of any damages, would most

likely give them an improper windfall. This is not to say that plaintiffs can avoid the proper search and collation of evidence; merely that the courts are typically sympathetic to difficulties they may face.³²

- 4.18 Helpful documentation can sometimes be obtained other than through *inter partes* disclosure. U.S. claims are frequently brought in advance of European claims and information from their filings and economic reports can be very helpful.
- 4.19 Either where the same cartel is the subject of litigation in foreign courts or where foreign courts have jurisdiction over a potential defendant, there can be means to obtain materials with the support of the foreign court. An example of the latter is the device in Section 1782 of Title 28 of the United States Code,³³ which gives the U.S. district court the power to order a person to provide evidence for use in a foreign proceeding or international tribunal. This applies to legal proceedings which have already been initiated but also those “in reasonable contemplation”.

5 Impact of Recent Developments on Cartel Litigation

- 5.1 This section explores how Brexit and the Damages Directive may impact upon cartel damages claims in England.

Brexit

- 5.2 At the time of writing, the form of Brexit is still being negotiated between the UK and the EU. Notwithstanding that the date of the UK’s exit from the EU is fast approaching (March 2019), the final shape of Brexit remains unclear. The UK Government’s view at the time of writing is that corporates should continue to be able to seek redress for harm suffered due to competition law infringements after the UK’s exit from the EU.³⁴
- 5.3 While it remains difficult to make detailed predictions on Brexit’s impact, including on cartel litigation, it is clear that the most important issue is how and whether the cause of action on which cartel plaintiffs rely will be affected by Brexit. The main cause of action for cartel claims is breach of statutory duty³⁵ to abide by Article 101 TFEU. As part of the process of implementing Brexit, the UK Parliament will repeal the ECA 1972.³⁶ Where does this leave plaintiffs? Will they still be able to bring cartel damages claims in England? Negotiations are ongoing in relation to civil judicial cooperation, including the legal basis for follow-on claims based on Commission decisions post-Brexit, and in order to provide certainty for post-Brexit litigation which relates to pre-Brexit conduct. As is discussed below, it is quite possible that nothing will significantly change after Brexit.
- 5.3.1 First, there is a functionally identical alternative cause of action available to plaintiffs in the UK. Section 47A of the Competition Act 1998 (“CA 1998”) permits damages claims for breach of Articles 101 and 102 TFEU to be brought before the before the Competition Appeals Tribunal. At the time of writing, it is unclear whether Section 47A of the CA 1998 will be retained post-Brexit.
- 5.3.2 Second, even if Section 47A CA 1998 is repealed or otherwise amended, there will be many scenarios where an English court would apply Article 101 TFEU as a matter of foreign law where the domestic law of a Continental European country was the applicable law of the dispute.³⁷ Accordingly, where the collusive behaviour and/or the purchase channels of the cartelised goods/services had a sufficient European connection, the English court would apply Article 101 TFEU to the dispute, even if it no longer remained on the English statute book.

- 5.3.3 Third, if, post-Brexit, Article 101 TFEU is no longer available to plaintiffs in England, then claims could still be brought for breach of domestic competition law.³⁸
- 5.4 Another issue under consideration is whether post-Brexit, the English courts will be bound by infringement decisions of the Commission. In any event, as explored at paragraph 2.6 above, even if a binding is not strictly binding many denials of liability would not be credible.
- 5.5 The final point to consider briefly is whether Brexit will impact on the enforceability of English judgments. At the time of writing, the UK government remains in ongoing negotiations on civil judicial cooperation. However, given that enforcement is: (a) relevant to all commercial litigation and not just competition litigation; (b) to the benefit of the UK’s European neighbours; and (c) apolitical, it seems likely that a solution will be found. In any event, defendants to competition damages claims are often large multinationals that are well-resourced. Given that cartelists are jointly and severally liable, plaintiffs typically have a choice of solvent corporates against whom to claim against with sufficient assets in the English jurisdiction. Owing to the choice of targets with deep pockets, cross-border enforceability is not presently a significant concern for cartel plaintiffs and it seems unlikely to become a problem post-Brexit.
- 5.6 Even if, contrary to the above review, Brexit was to create some difficulties for plaintiffs, many of the features of English litigation that are so attractive to plaintiffs will remain, such as broad disclosure, a fairly fast moving judicial system, an experienced competition bar and a proven track record of good outcomes for plaintiffs.

The Damages Directive

- 5.7 The stated purpose of the Damages Directive is to make it easier for plaintiffs to recover losses caused by cartels and other competition infringements. Since being passed on 26 November 2014, the Damages Directive has now been implemented in all EU Member States.
- 5.8 The key features of the directive are as follows.
- 5.8.1 Right to full compensation (Article 3). Victims of competition infringements are entitled to recover their full losses, but should not be overcompensated through punitive or multiple damages.
- 5.8.2 Disclosure (Articles 5 and 6). The courts of Member States should order defendants or third parties to disclose relevant evidence. Documentation from the file of the investigating regulator will also be available subject to certain restrictions, including that leniency statements and successful settlement submissions will not be produced to the plaintiff.
- 5.8.3 Decisions of national regulators (Article 9). An infringement decision by a national competition regulator will be binding on its national courts, and it will also be *prima facie* evidence of infringement before the courts of other Member States.
- 5.8.4 Limitation (Article 10). The Damages Directive will standardise limitation periods across the EU, with the period being a minimum of five years from the time the claimant knows or can reasonably be expected to know that the particular defendant infringed competition law and caused the claimant harm. The limitation period will be suspended: while a regulator is investigating a breach and for a minimum of one year after any infringement decision becomes binding; and for up to two years while plaintiffs and defendants are discussing possible settlement.
- 5.8.5 Joint and several liability (Article 11). Amnesty addressees will only be liable to their own direct and indirect purchasers, thereby reducing their exposure for joint and several liability,

provided that plaintiffs can obtain full recourse from other addressees. SMEs can also have their joint and several liability restricted, but they must fulfil tight qualifying criteria.³⁹

- 5.8.6 Presumption of harm and pass on (Articles 12 to 17). There will be a presumption that cartels (but not other competition infringements) cause harm. There is also a presumption that some overcharge will have been passed on to an indirect purchaser where there is: a competition infringement; where the indirect purchaser bought the relevant product or service; and where some overcharge is shown. However, the defendant faces the burden of proving that a particular plaintiff (direct or indirect purchaser) passed on the overcharge to its customers.
- 5.9 There has been some commentary that the Damages Directive will make the domestic courts of Continental Europe significantly more attractive for bringing cartel damages claims, and that the mandatory regime for disclosure in particular will narrow the comparative advantage presently enjoyed by the English courts. However, there are a number of reasons to question this assumption. First, the wording of the Damages Directive provides that claims must meet a minimum threshold in order to force disclosure⁴⁰ and so may not be available in all claims. Second, even where disclosure is ordered, it is questionable whether judges who are culturally unused to this tool will make a broad disclosure order in the form that is so helpful to plaintiffs in the manner of U.S. and English proceedings. Third, the substantive rule changes in the Damages Directive do not have retrospective effect and will only impact upon claims where the underlying collusion post-dated the Damages Directive. There may be arguments before different national courts on whether the rules on disclosure are substantive or procedural and for several jurisdictions it is likely that changes on the approach to disclosure will not be implemented for many years.

6 Dynamics of Cartel Litigation and Conclusion

- 6.1 Given that cartels can operate undetected for many years,⁴¹ the volumes of commerce affected can be enormous. Individual corporates can suffer very significant losses, which they can then recover.
- 6.2 The binding nature of infringement decisions, and the fact that infringers frequently admit liability, gives plaintiffs a huge advantage and helps minimise the risks of any litigation. That said, the features of cartel litigation require a specialist skill set.
- 6.3 An infringement decision by a regulator/admission of liability encourages claims. Accordingly, defendants frequently engage in scorched-earth tactics, as they are conscious that perceived or actual lack of vigour in defending a claim will further encourage claims from other customers of the same cartel.⁴²
- 6.4 The key for plaintiffs and their advisors is therefore to avoid giving defendants means to delay (or even defeat) a claim. A clean follow-on claim where jurisdiction is uncontroversial and where there is no realistic limitation defence is extremely difficult to defend. However, given that the defendants need to avoid encouraging other claims, it can be logical to run arguments even with very low prospects of success if they operate to delay proceedings. It is even better if the point can be appealed to cause further delay. An experienced cartel litigator will avoid these traps and structure a streamlined claim.

Endnotes

- The key ordinance at European law level is Article 101 of the Treaty on the Functioning of the European Union (“TFEU”), which proscribes agreements, decisions and concerted practices between undertakings which distort competition in the internal market (or which are intended to have such effect). Such behaviour includes, for example, price fixing and agreements not to compete on certain markets/geographies. While this chapter focuses on cartel damages recoveries, parties that have suffered harm from an abuse of a dominant position (i.e., a breach of Article 102 TFEU) are similarly entitled to recover their losses. National law also typically proscribes equivalent behaviour.
- The threat of trial is the key lever to force defendants to engage in settlement at realistic figures. Accordingly, relative speed of procedure is a key attraction for plaintiffs.
- The Damages Directive (“**Damages Directive**”) requires other Member States to make disclosure available in competition damages cases but, as is explored at paragraph 5.10 below, there is no certainty that other European countries will take the same plaintiff-friendly approach of the English courts.
- Actions brought under the CRA 2015’s opt-out class action mechanism require a class representative; they will largely be driven by the law firm on record and the supporting litigation funder. Accordingly, this mechanism will be less attractive to large corporates who are weighing their options to take proactive steps to recover, and so this chapter does not explore the mechanism in detail. The CRA 2015 also has an opt-in mechanism, but it will likely also be of limited interest to corporates that wish to retain significant control over the conduct of a claim.
- Directive 2014/104/EU.
- C-453/99 *Courage v Crehan* (2001) ECR I-6297.
- C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*: “*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101] TFEU.*” (Emphasis added.)
- Article 16(1), Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. “*When national courts rule on agreement, decisions or practices under [Article 101 or 102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the adopted decision by the Commission.*”
- See paragraphs 2.11 and 2.12 below.
- Although they may dispute the scope of the DoJ finding.
- Grounds upon which an addressee can appeal a regulatory finding include: lack of competence; infringement of an essential procedural requirement; infringement of the EU Treaties or any rule of law relating to their application; or misuse of powers. Appealing a decision may allow addressees to delay the release of the Commission’s non-confidential version of the decision.
- Where an appeal is pending, a national court may be required to stay a claim before trial. See C-234/89 *Delimitis* [1991] ECR I-935 and C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, as enshrined in Article 16(1) Regulation 1/2003. However, claims can make significant progress – including through disclosure – while an appeal is in motion.
- The settlement procedure is contained in Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases.
- In a study prepared for the Commission “Quantifying antitrust damages – Towards non-binding guidance for courts”, Oxera reported that the mean overcharge of international cartels is 26%.

15. Where the plaintiff passed some of the overcharge to its customers, it will likely have made fewer sales owing to increased prices; resulting lost profits are typically also recoverable.
16. In the UK there has been one award of exemplary damages: *Travel Group Plc (in Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19. This was an unusual case; claiming exemplary damages will rarely be viable. First, a fine/finding of infringement by a regulator precludes exemplary damages, which are therefore unavailable in “follow on” claims. Second, the Damages Directive specifically prohibits exemplary damages, albeit the prohibition is not retrospective.
17. *Sempre Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34.
18. There are a number of ways a corporate may discover it is a victim, including sight of a fining/investigation announcement by a regulator such as the Commission and rumours of price fixing in the industry.
19. Even if, ultimately, a decision is made against seeking a recovery.
20. Which apply a wide variety of limitation periods. Countries with short limitation periods include Spain and Switzerland, whereas England has a relatively generous regime of six years.
21. In English law, limitation for such claims begins to accrue when “*the plaintiff... discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it*” (Section 32, Limitation Act 1980). The English courts have not yet closely examined how this rule applies to a concealed cartel. A plaintiff would argue that sufficient knowledge was only accrued at a late stage; for example, when the Commission released the non-confidential version of its decision. A defendant would argue for an earlier point; for example, on market rumours of a cartel or on early announcement by a regulator (perhaps a foreign regulator) that it was investigating a cartel.
22. See paragraph 4.12 below for more detail.
23. Perhaps on account of the relationship between the plaintiff and a cartel.
24. Subject to the observations at paragraph 5.8.5 below.
25. Regulation (EU) 1215/2012.
26. *Provimi Ltd v Roche Products Ltd & Others* [2003] EWHC 961 (Comm); *Cooper Tire & Rubber Company & Others v Shell Chemicals UK Ltd & Others* [2009] EWHC 2609 (Comm); *Cooper Tire & Rubber Company & Others v Dow Deutschland Inc. & Others* [2010] EWCA Civ 864; *KME Yorkshire Ltd & Others v Toshiba Carrier UK Ltd & Others* [2012] EWCA Civ 1190.
27. Other significant features that make England attractive are the relative speed of proceedings towards trial and the broad availability of specialist expertise (barristers, economists, specialist judges, etc.). Counterintuitively, the English costs shifting rule (which is uncapped) is also advantageous to plaintiffs. The normal rule is that the loser will pay the majority of the winner’s costs. Each case turns on its merits, but with liability ordinarily established the cost shifting rule can pressure defendants and increase recoveries for plaintiffs. “After the Event” insurance is also broadly available for plaintiffs who wish to further reduce the risk of “losing” on costs. A further and important feature is that the English courts are generally comfortable with awarding very high damages where supported by evidence. Accordingly, where a robust economist report shows very high losses, the English bench has no cultural instinct to reduce the damages.
28. The term “documents” is interpreted broadly, it includes paper and electronic documents plus metadata and other ways of recording data such as voicemails.
29. Civil Procedure Rules, Part 31.6.
30. Civil Procedure Rules, Part 31.7.
31. *Watson Laidlaw & Co Ltd v Pott, Cassells and Williamson* (1914) 31 RPC 104, cited by *Devenish Nutrition Limited and others v Sanofi-Aventis SA and others* [2007] EWHC 2394 (Ch), then approved by the Court of Appeal.
32. A further demonstration of the pragmatic approach of the English court is in *National Grid Electricity Transmission Plc v ABB Ltd & Others* (Claim Number: HC-2015-000269, Order of Mrs Justice Rose sealed on 24 November 2016) where the court permitted summary information to be disclosed rather than the underlying documents where it would have been disproportionately costly to obtain the latter.
33. Assistance to foreign and international tribunals and to litigations before such tribunals.
34. www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/brexit-competition/290318-Government-Response-to-HoL-EU-Internal-Market-Sub-Committee-competition.pdf.
35. The statute in question is the European Communities Act 1972 (“**ECA 1972**”), which was enacted when the UK joined the EU.
36. Through passing the European Union (Withdrawal) Bill.
37. The English courts apply a variety of regimes to determine the applicable law of a dispute over which they have jurisdiction, including the Private International Law (Miscellaneous Provisions) Act 1995 and, at present, the Rome II regime on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007).
38. UK domestic competition law has narrower territorial scope than the European equivalent. Thus, the Chapter I prohibition in the CA 1998, which is the analogue to Article 101 TFEU, prohibits collusive behaviour which “*may affect trade within the UK, and [...] have as [its] object or effect the prevention or distortion of competition within the UK*” (emphasis added), CA 1998, Section 2(1). Article 101 TFEU on the other hand proscribes equivalent conduct “*within the internal market*”.
39. Their market share of the relevant product/service must be under 5%; joint and several liability must jeopardise their economic viability; and the SME must not have led the infringement, coerced others to infringe or have previously infringed.
40. Article 5.1., the “[plaintiff must present] *a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages*”. It is open to national courts to make disclosure available even where this threshold is not met.
41. The trucks cartel operated for 14 years, from 1997 to 2011.
42. This is not to say that defendants will be unwilling to settle claims early in appropriate circumstances. Factors that defendants will weigh up include: (a) the identity of the plaintiff – are they a key long term customer?; and (b) is the plaintiff willing to settle on commercial terms rather than for cash, e.g., improved prices for an agreed time period? Factors (a) and (b) allow defendants to maintain a stance of aggressive defence, consistent with their narrative that they will not easily part with cash settlements. Theoretically, defendants should be more willing to settle a claim prior to proceedings being issued, because filing proceedings brings a degree of publicity and so settling prior to proceedings should draw less attention than post proceedings. In practice, defendants recognise that the industries in which they operate are tightknit and that the existence of confidential settlements often becomes known. The general rule is therefore that early settlement requires plaintiffs to take a substantial discount on the value of their claim. This rule is accentuated in cartel litigation as defendants will frequently demand a steeper discount in an individual settlement to outweigh the risks of encouraging other plaintiffs. Finally, once defendants consider themselves to be at significantly less risk of facing new claims, perhaps because of the passage of time, they will be more willing to agree resolution with parties that issued claims.

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A Jurisdictional Toolkit for Claimants: Establishing Jurisdiction in England and Wales for Competition Follow-On Damages Claims Post- *Vattenfall* and Post-*iiyama*

Hausfeld & Co. LLP

Scott Campbell



Luke Grimes



Introduction

So far, 2018 has produced two significant judgments – *Vattenfall*¹ and *iiyama*² – concerning the requisite tests to be satisfied by claimants in order to withstand interlocutory challenges to the jurisdictional basis of claims in the Courts of England and Wales.³ In the light of these recent judgments, this chapter will explore the nuts and bolts as to how the tests of “autonomous” and “territorial” jurisdiction apply to claims for competition damages. Whilst these two different forms of jurisdiction draw upon two sets of harmonised rules at a European level, they provide alternative but complementary purposes for claimants in founding jurisdiction in the English Courts.

The Importance of Seising Jurisdiction

Understanding the importance of seising the right jurisdiction serves as a useful yardstick when analysing the application of jurisdictional rules. Whilst jurisdictional rules establish the possibility to elect from a broad menu of 28 jurisdictions as potential fora, maybe three of those jurisdictions are currently said to be “claimant-friendly”: England; the Netherlands; and Germany. The exercise of determining the jurisdiction – whether in one of the claimant-friendly jurisdictions or elsewhere – in which the claim should be pursued requires a careful assessment of a series of both substantive and procedural factors. Of course, claimants are concerned to litigate in a jurisdiction which offers the opportunity to maximise the chances of obtaining the damages claimed as quickly as possible.

Factors that determine a jurisdiction’s attractiveness to a claimant include the ability to obtain disclosure, the efficiency of the Court, the availability of litigation funding and (where appropriate) insurance against adverse costs, the opportunity to engage in a settlement dialogue and the judiciary’s experience in handling follow-on claims. Such factors will continue to be important unless the Damages Directive (which attempts to harmonise the position in some of these factors) applies.⁴ For example, the Damages Directive, where it applies, will reduce the liability of the immunity recipient only to the loss/damage caused by their own actions.⁵ In addition, and given that the immunity recipient is not jointly and severally liable, it will have no liability in contribution to the other infringing parties.⁶ Nevertheless, the English jurisdiction was largely compliant with many of the provisions of the Damages Directive, and in many cases England remains a more attractive jurisdiction post-Damages Directive due to the wide-ranging disclosure regime and ability of the Competition Appeal Tribunal (the “CAT”) to hear collective actions on an “opt-out” basis.

Establishing Autonomous Jurisdiction in England

The English High Court

As the very ambit of obtaining jurisdiction is limited by the application of jurisdictional rules, a forum selection exercise cannot be arbitrary. Regarding autonomous jurisdiction for European Union (the “EU”) domiciled defendants, the Recast Brussels Regulation No. 1215/2012 (the “**Regulation**”) applies to proceedings which were commenced on or after 10 January 2015.⁷ As explored below, application of the Regulation often affords claimants the possibility to choose between a wide range of possible fora.

Option 1: defendant domicile

Unless the parties have agreed upon a conferment of jurisdiction to a specific Court, the possibility to establish jurisdiction is predominantly directed by the domicile of those who have been found to have engaged in anticompetitive conduct.⁸ The starting position in determining jurisdiction is principally that, per Art.4(1), the defendant *domiciled* in an EU Member State should be sued in the Courts of that Member State. The “domicile” is to be broadly interpreted as it includes the place of the registered office, the central administration and the principal place of business.⁹ Applying Art.4(1) to follow-on claims, the defendant will be an addressee of an infringement or settlement decision adopted by the European Commission (the “**Commission**”). This means that the claimant is *ostensibly* limited to those jurisdictions in which the cartelists are domiciled (and this may exclude favoured jurisdictions such as England, the Netherlands and Germany). In practice, however, one of the exceptions is usually relied upon (explored in the following sections below).

At this juncture it should be also noted that, whilst jurisdiction is predominantly determined by the defendant’s domicile, a defendant may prematurely seek to determine jurisdiction of their own accord. The *lis pendens* rules of Art.29 provide that the “*court first seised*” shall have jurisdiction. Thus, defendants have been known to deploy an “Italian torpedo” by seeking a declaratory judgment for non-infringement. This, if strategically deployed, allows defendants to cease jurisdiction in a Court that is deliberately less favourable to a claimant, which has the effect of frustrating a claimant’s attempt to bring a claim in another, more favourable, jurisdiction. In *Cooper Tire*, the defendants sought declaratory action that there was no cartel and that, in any event, any cartel would not have caused loss to the

claimant.¹⁰ However, the effectiveness of the Italian torpedo – so as to cause a concern for the possibility of irreconcilable judgments – is now questionable in circumstances where the High Court has refused to stay English proceedings where Italian proceedings would otherwise take so long to resolve. It is perhaps for this reason that an Italian torpedo has not yet been successful in sinking a follow-on claim, and that it is somewhat of a blunt tool for defendants.

Exception one – avoiding irreconcilable judgments

As well as limiting jurisdiction to the domicile of the defendant, a further net effect of applying Art.4(1) gives rise to difficulties for victims of mass torts, such as global cartels, where there are multiple defendants domiciled in several jurisdictions – and potentially both inside and outside of the EU. Art.8 remedies this by providing that the jurisdiction over one defendant may be extended to include other defendants, provided that the claims are “so *closely connected* that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separating proceedings” (our emphasis). As the recital to the Regulation explains, this is so that the rules on jurisdiction are “highly predictable” so as to “avoid the possibility of the defendant being sued in a court of a Member State which he could not have reasonably foreseen”.¹¹ Thus, the application of Art.4(1) as discussed above is not absolute. This means that, in a cartel follow-on claim, a claimant need not sue each and every defendant in their Member State of domicile. This is also supported by the current principles governing joint and several liability, as the claimant need not sue all potential defendants in order to recover the total loss caused by the cartel. Furthermore, a claimant may strategically opt to sue only one or some of the addressees of a decision, thereby leaving those defendants to claim for Part 20 contribution proceedings against the others. Although both of these principles are slightly amended by the Damages Directive, the point remains that a claimant is permitted to sue in one Member State, provided that at least one of the defendants is domiciled there at the time of filing the claim.

Exception two – anchor defendants

The EU doctrine of “single economic unit” has also helped to remedy the “pot luck” nature of Art.4 and Art.8. This doctrine sets out that the notion of an “undertaking” should be widely construed, with a view to the “personal, tangible and intangible elements which pursue[s] a specific economic aim on a long-term basis” and thus which “can contribute to the commission of an infringement”.¹² Accordingly, it provides that an action for a claim may be anchored by bringing it against a member of the addressee’s economic unit and where that economic unit is domiciled. In this regard, an “anchor” entity would usually be a subsidiary of an addressee, but not an addressee itself (and therefore a subsidiary of a defendant where Art.8 would apply). This has the effect of expanding the list of potential jurisdictions with a view to the domicile of anchor subsidiaries.

Where an anchor defendant is included, then the claim in respect of that anchor defendant is theoretically one of stand-alone and not one of follow-on.¹³ However, it has been held that the label attached to a claim – namely whether it is a stand-alone or follow-on claim, or a hybrid of the two – is irrelevant, as is also the consideration of what further evidence may be obtained and argued at trial is irrelevant in a strike-out/summary judgment hearing.¹⁴ Rather, what is important is whether the claim has a real prospect of success in the light of a decision finding. It follows that a claim for follow-on damages does not allow claimants to fully particularise their case *vis-à-vis* the anchor defendant and there is a presumption of generosity in

favour of the claimant in respect of what is principally a stand-alone claim.¹⁵ Thus, the position is, as stated in *Toshiba Carrier*,¹⁶ which built upon *Provimi*¹⁷ and *Cooper Tire*,¹⁸ that the anchor subsidiary had knowingly implemented the cartel, and knowledge is capable of being imputed from the parent company having exercised a degree of “decisive influence” over its subsidiary.¹⁹ We return to this discussion below in the light of a recent judgment.

Option 2: local damages

The above regime provides one method to establish autonomous jurisdiction. Art.7(2) alternatively provides that a defendant may be sued in the Courts of the place “where the harmful event occurred or may occur”. EU case-law has interpreted this to mean the place: (i) where the damage occurred; or (ii) where the event giving rise to the damage occurred.²⁰ This shifts the test from defendant domicile to the nature and effect of the tort giving rise to a claim. However, this alternative is not entirely satisfactory where there are cross-border elements, because mass torts – such as global cartels – often inevitably span across several jurisdictions and/or continents. In such a case, it may be difficult to contend that the place of the harmful event is in one sole jurisdiction. That leaves only the possibility to found jurisdiction based on the place where the damage occurred, which also means that damages must be sought – unlike Art.4 – on a jurisdiction-by-jurisdiction basis.²¹ It is for this reason that Art.7(2) tends not to resonate with multi-national claimants seeking losses that have occurred in several jurisdictions. Therefore, founding jurisdiction upon Art.7(2) in response to a worldwide or European Economic Area (“EEA”)-wide cartel may be likened to fitting a square peg in a round hole, the potential result of which is an ineffective compensation recovery strategy.

The CAT

Up until October 2015, the same principles and flexibility as set out above were not capable of being cross-applied to the jurisdiction of the CAT. In *Emerson Electric*, whereby claimants sought follow-on damages pertaining to the carbon and graphite products cartel, it was held that only the addressee of a decision and not its subsidiaries were capable of being sued on the basis that those subsidiaries are not bound by the infringement decision (a point which was later affirmed by the Court of Appeal (the “CoA”).²² However, this particular finding is now outdated and it is indicative of the CAT’s previously limited jurisdiction to mirror the flexibility afforded to the High Court. The changes brought about by the Consumer Rights Act 2015 have, *inter alia*, resulted in an expansion to the CAT’s jurisdiction so that it allows the CAT to hear stand-alone claims for competition damages – and thus claims against non-addressee entities. Accordingly, an anchor may be selected to found jurisdiction in the CAT just like in the High Court. However, this does not necessarily mean that the CAT is now *the* Court of choice in England, as other factors remain to be considered when choosing between the High Court and the CAT.

Autonomous jurisdiction: *Vattenfall*

Thus, the first building block for claimants is to consider whether their preferred forum has the authority to hear the claim as a matter of national procedural autonomy. For claims issued in the High Court and CAT, a defendant may indicate its intention to challenge jurisdiction and the Court’s power to hear the claim as early as acknowledging the service of the claim form. This attracts an assessment of how the legal framework governing autonomous jurisdiction applies on a strike-out/summary judgment basis.

Should the defendant(s) fail to indicate this intention early on and, instead, engage with pleadings, then this will likely be construed as a submission to the jurisdiction. However, as defendants are ever more focussed upon identifying ways to challenge a claim at the outset, jurisdiction regularly presents the first opportunity to do so. Indeed, the application for summary judgment/strike-out in *Vattenfall* is the most recent in the body of English case-law to apply the above-discussed framework.

Case background

In 2014, the Commission fined 11 producers of underground and submarine high-voltage power cables – used to connect grids and distribute electricity – for an almost decade-long cartel that begun in 1999. The fines totalled almost €302 million.²³ Several claims for follow-on damages have been brought against the addressee cartellists and their subsidiaries – and more may be expected.²⁴ Crucially, the Commission adopted an infringement decision and not a settlement decision. Due to the rules surrounding the rights of those that are mentioned in the decision and/or the Commission’s file, early versions of decisions are barely helpful to those who have suffered loss as a result of a cartel. As an infringement finding, only a provisional non-confidential version of the decision has recently been made publicly available (the addressees were unsuccessful in challenging the Commission’s publication of the decision – which was eventually published on 4 July 2018).²⁵ The secretive nature of cartels means that it is difficult for claimants to know, and thus particularise in their pleadings, the extent to which the cartel will have caused monetary loss and damage. For this reason, obtaining a copy of the unredacted decision and access to the Commission’s file is often crucial.

Vattenfall, a Swedish power company that supplies energy in several EEA markets, is one of several corporate groups currently pursuing follow-on damages relating to the power cables cartel. Shortly after filing its claim in March 2017 against two corporate groups of the addressees,²⁶ NKT and Prysmian – including two UK-domiciled subsidiaries that were not addressees in the decision (Prysmian Cables & Systems Ltd and NKT Cables Limited) – the defendants applied for summary judgment/strike-out of Vattenfall’s claim in June 2017 on the basis that Vattenfall could not argue that those anchor subsidiaries are liable for the damage caused by the cartel. Vattenfall argued that the two UK anchor subsidiaries are sued on the basis of “knowing implementation” of the power cables cartel – attracting a two-pronged test requiring both knowledge and clear evidence of implementation of that knowledge.²⁷ Had the defendants been successful in arguing that the UK anchor subsidiaries should be struck-out of the claim, then Vattenfall would be estopped from relying on the above-discussed principles providing claimants with the ability to sue anchor defendants, resulting in a failure to cease English jurisdiction. Following a three-day hearing in February 2018, the High Court handed down its judgment on 4 June 2018 – the reasoning of which is explored below.²⁸

Knowledge of the cartel

As regards knowledge, Vattenfall pleaded that it could not – without an unredacted copy of the decision and in the absence of disclosure of contemporaneous documents – plead that either of the defendants’ UK subsidiaries “*knowingly implemented*” the cartel. NKT attempted to refute this presumption in a witness statement that neither the UK nor the UK subsidiary’s personnel are mentioned in the decision. However, NKT’s attempt to level the playing field by adopting an “all cards on the table” approach by offering up a witness statement (which would have the effect of demonstrating the NKT

is no longer in exclusive knowledge) was firmly rejected as “*it can [...] be reasonably expected that documents may emerge that may show assistance by D12 in relevant implementation and knowledge of cartel activities*”.²⁹ As such, the High Court has mounted a high bar for defendants to meet when attempting to demonstrate the non-involvement of UK subsidiaries for the purposes of knowledge. In this regard, *Vattenfall* may be treated as providing claimants with a presumption that an addressee’s subsidiary entities are privy to actual knowledge of the cartel. In addition, it was irrelevant that the anchor subsidiary was not 100% owned by the parent addressee – there was no evidence that the UK defendants determined their own conduct independently of the parent or any other member of the respective corporate group.³⁰

Implementing knowledge

The High Court furthermore set a low threshold for claimants by listing non-exhaustive types of behaviour that would amount to the implementation of the cartel by an anchor subsidiary. This was perhaps driven by the fact that previous case-law had left this point open for defendants to exploit. Such behaviour would include: (i) the provision of indirect sales; (ii) the involvement of employees in activities that fall within the scope of the cartel; (iii) the anchor entity being a “*fiscal representative*” of an addressee; and (iv) the anchor subsidiary dealing with customers on behalf of other group members.³¹ In addition, the Court has confirmed that there is no financial bar to establishing implementation as the *de minimis* sales made by the UK subsidiary (to the value of £8,000) were held to be irrelevant in dealing with this test.³² Accordingly, the notion of implementation is, in line with previous authority, not subject to rigid criteria and may be established by claimants without much difficulty.

The threshold for summary judgment/strike-out

In order to refute such an application, the claimant must ultimately have a realistic prospect of success – one that is neither fanciful nor one which is merely arguable (but, instead, carries a degree of conviction). In the context of competition damages claims, however, the High Court judge was satisfied by the mere fact that the UK anchor defendants “*should have foreseen*” that they might become anchor defendants in England provided that they “*knowingly implemented the cartel*”.³³ As such, it is “*properly arguable*” for the claimants to plead that the close connection test of Art.8(1) applies.³⁴ The High Court has therefore confirmed that issues such as causation and overcharge, which rely heavily on disclosure and the involvement of experts, are not capable of being answered on a summary basis due to the asymmetry of information available between claimants and the cartelist defendants at the time of filing the claim.

Establishing Territorial Jurisdiction in England

The framework

Cartels sanctioned by the Commission are increasingly global in scope.³⁵ Furthermore, cartelised markets for products that are part of a global chain of supply and demand, and that are typically manufactured in the Far East, have frequently raised the question of whether the territorial application of EU law extends to infringers of Art.101³⁶ who engage in collusive conduct outside of the EEA.

Thus, once jurisdiction has been seised, there remains a question whether – as a matter of substantive law – the claim falls beyond the scope of the rules that determined the infringement by assessing whether the sales in question fall within the territorial scope of Art.101. This issue is arguably one that combines both jurisdiction and applicable law. Unlike the issues before the Court in *Vattenfall*, such a “pure” interlocutory application need not be raised by defendants when acknowledging service of the claim – but it should be sought as soon as possible.³⁷

As a matter of international competition law, whether Art.101 is capable of extra-territorial reach has been the subject of decade-old jurisprudence in the EU Courts. *Woodpulp* founded a test of “implementation” which focuses upon the place where anticompetitive behaviour is implemented, as opposed to where such behaviour is agreed.³⁸ In addition, *Gencor* established a test of “qualified effects” which looks at whether the anticompetitive behaviour would result in “immediate, foreseeable and substantial” effects.³⁹ Though closely related, the two different tests resulted in uncertainty as to whether the tests must be satisfied in tandem or whether the satisfaction of one of the tests would suffice. The very recent decision of *Intel* expressly endorsed the application of the “qualified effects” test, ruling that it pursues the same objective as the “implementation” test.⁴⁰

***iiyama* – first instance decisions**

iiyama – a Japanese-domiciled electronics company – issued two claims in the High Court in December 2014 in respect of the CRT glass,⁴¹ Cathode Ray Tubes⁴² and LCD⁴³ cartels.⁴⁴ Although an indirect purchaser of the cartelised products, long-established principles confirm that *iiyama*’s right to compensation is no-less worthy when compared to direct purchasers. However, *iiyama*’s position in the supply chain lead the defendants to question whether *iiyama*, having purchased particular specifications of computer monitors from original equipment manufacturers before *iiyama* itself shipped the end-products intra-group to its European subsidiaries, had a right to claim competition damages in circumstances where its indirect purchases of the cartelised components were made outside of the EEA. In determining this question, the High Court in *iiyama* was required to apply the same test of “real prospect of success” as was the case in *Vattenfall*, albeit through a different lens.

Regrettably, the High Court was unable to reach a unanimous conclusion on the issue. Whilst Mann J found in favour of the defendants in respect of the CRT glass and Cathode Ray Tube cartel claim, holding that the effect of the cartel was plainly “knock-on”,⁴⁵ Morgan J agreed with *iiyama* in its LCD claim in holding that, had the cartel not been implemented within the EU, then *iiyama*’s computer monitors would have been available in the EU at a lower price.⁴⁶ Crucially, neither Mann J nor Morgan J had the benefit of *Intel* – and it is questionable whether the interlocutory challenge would have been made in the first place had *Intel* been of assistance to the parties and the Court. Nevertheless, the CoA heard a combined appeal by both sets of unsuccessful parties in late 2017, following which Mann J’s decision was overturned and Morgan J’s decision was upheld.⁴⁷

***iiyama* – combined CoA outcome**

The CoA held that there is no basis for strike-out/summary judgment where it *may* be shown that a cartel has been implemented, regardless of whether the cartelised product was sold directly or indirectly to the claimant: the effects of the cartel must not only have been “immediate, foreseeable and substantial” but also “systemic”,

thereby satisfying the “qualified effects” doctrine as endorsed in *Intel*.⁴⁸ In determining whether there is “directness of effect” when assessing immediacy, it was held that the “mere existence of even one prior sale to an innocent third party outside the EU at an early stage of the supply chain” is not enough to fail the test for immediacy.⁴⁹ Mann J’s characterisation of the cartel’s effects as merely knock-on was an “over-simplified approach to a complex problem” – and the CoA was ultimately persuaded by the fact that the cartel was intended to have a worldwide effect.⁵⁰ This means that the Commission’s jurisdiction to adopt an infringement finding is incapable of being distinguished *vis-à-vis* the territorial scope of a follow-on claim for damages.

iiyama therefore provides a persuasive precedent for claimants in that it is a question of substantive law whether Art.101 applies on an extra-territorial basis. Although not the same as a full decision as to whether there was sufficient causation between the supply of the cartelised components to *iiyama* and the implementation and/or qualified effects of the cartel within the EEA, the judgment has set the stage for an argument in favour of a wide territorial scope to Art.101 – and one less argument for defendants to deploy in their *modus operandi*.

A World Post-*Vattenfall* and Post-*iiyama*

Having suffered a defeat and with permission to appeal to the Supreme Court refused by the CoA, the defendants in *iiyama* sought to appeal the CoA’s decision directly at the Supreme Court. However, permission was refused by the Supreme Court in July 2018 as the panel of Justices were unconvinced that the applications raised a point of law of general public importance. This, alone, confirms the high bar that must be met when appealing to the Supreme Court. It further bolsters the impetus of the CoA’s decision by crystallising it as a precedent for the claimant bar. Subject to any appeal by the defendants to the CoA in *Vattenfall*,⁵¹ both *iiyama* and *Vattenfall* provide welcome clarification on the comparatively low bar for claimants to meet the differing tests for “implementation” across both autonomous and territorial jurisdiction. As such, a defendant’s use of interlocutory tools should not invite the Court to hear a mini-trial, as it has been previously noted that “there can be more difficulties in applying the “no real prospect of success” test on an application for summary judgment [...] than in trying the case in its entirety”.⁵²

Thus, to echo the CoA in *Cooper Tire* and *Toshiba Carrier*, the approach endorsed by the Courts in *Vattenfall* and *iiyama* remains “appropriate [...] prior to the disclosure of documents” as the ability to determine jurisdiction depends so heavily upon a factual and legal assessment of the impact of the cartel. It is anticipated that the net effect of these two judgments will be to deter defendants from using jurisdictional issues as an attempt to reduce their liability for private follow-on damages by maintaining the high bar that must be met. At the same time, the two judgments provide further support to the starting position for potential claimants when pleading their claim, as the level of detail to be particularised regarding knowledge of implementation is sensibly low owing to the secretive operation of a cartel. As such, it remains “business as usual” in the English jurisdiction as at least *iiyama* may now proceed to trial.

Concluding Remarks

Having explored the “jurisdictional toolkit” available to claimants seeking follow-on damages following *Vattenfall* and *iiyama*, a question remains whether there is such a thing as “proper”

jurisdiction to balance the entitlement of claimants who are in pursuit of compensatory damages, and the rights of the defendants who (notwithstanding their anticompetitive conduct) may be at risk of multiple jeopardy and over-compensation. However, to tilt the balance in favour of the defendants would be plainly wrong where claimants would otherwise be at the mercy of an inappropriate jurisdiction resulting in no or inadequate compensation. As such, the application of jurisdictional rules should not exhibit a bar to claims that are ultimately encouraged by public policy at both the national and EU levels. This represents the underlying theme in both *Vattenfall* and *iiyama*.

A further, unanswered, question is whether Britain's imminent departure from the EU will prompt a change in claimants' selection of a forum to litigate cartel claims. In the short term, the referendum's immediate aftermath has not instigated a sudden decline in follow-on claims being issued in England. However, and notwithstanding how Brexit may transpire, the experienced English judiciary and favourable body of case-law – such as *Vattenfall* and *iiyama* – will nevertheless remain as positive and attractive factors for claimants considering bringing a claim in England. Indeed, *iiyama* may constitute the high watermark in that – in the absence of the Regulation – the English Courts may be reluctant to serve outside of the jurisdiction.

In summary, any dispute as to the appropriateness of a claimant's entitlement to damages – based on the autonomy of a Court or the territorial reach of Art.101 – should continue to attract a common-sense approach where such issues are raised prematurely. Accordingly, the judgments of *Vattenfall* and *iiyama* should be welcomed by the claimant bar and provide encouragement to claimants who are considering bringing claims for follow-on damages in England.

Endnotes

1. See *Vattenfall AB & Others v. Prysmian SPA & Others* [2018] EWHC 1656 (Ch).
2. See *The LCD Appeals* [2018] EWCA Civ 220.
3. References to “England” and the “English Courts” are to be construed as references to England and Wales, respectively.
4. Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014/104/EU); as implemented in the United Kingdom by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.
5. *Ibid* at [15].
6. *Ibid* at [16(2)].
7. For proceedings that commenced between 1 March 2002 and 9 January 2015, the original Brussels Regulation No. 44/2001 applies. In respect of signatory states, then the Lugano Convention applies. Note that, for claims that are not caught by the subject-matter or territorial scope of the Regulation, then national laws will apply when determining jurisdiction.
8. All references to Articles in this Chapter are to the Articles of the Regulation, unless stated otherwise.
9. Art.62 of the Regulation.
10. See *Cooper Tire and Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others* [2009] EWCA 2609 (Comm); and *Cooper Tire and Rubber Company and others v. Shell Chemicals UK Limited and others* [2010] EWCA Civ 864.
11. Recital (16) to the Regulation.
12. See Case T-11/89, *Shell International Chemical Co v. Commission* [1992] ECR II-757, at [311].
13. A distinction must be drawn between Art.288 TFEU, on the one hand, which holds that a decision of the Commission is only binding upon those “to whom it is addressed” and the ability of claimants, on the other hand, to sue an anchor defendant in order to file a claim against the addressees where the addressees themselves are domiciled in a different jurisdiction.
14. See *Bord Na Móna Horticultural Ltd & Anr v. British Polythene Industries Plc* [2012] EWHC 3346 (Comm).
15. See *Nokia Corporation v. AU Optronics Corporation* [2012] EWHC 731 (Ch) at [62–67].
16. See *KME Yorkshire Ltd & Ors v. Toshiba Carrier UK Ltd & Ors* [2012] EWCA Civ 1190.
17. See *Provimi Ltd v. Roche Products Ltd and other actions* [2003] EWHC 961 (Comm).
18. *Supra* note [10].
19. *Supra* note [17].
20. See Case 21/76 *Bier v. Mines de Potasse d'Alsace SA* [1976] ECR 1735.
21. See Case C-68/93, *Shevill v. Press Alliance* [1995] ECR I-415.
22. See *Emerson Electric v. Morgan Crucible* [2007] CAT 30.
23. Power Cables (COMP/39.610) (2 April 2014).
24. See, for example, Britned Development Ltd (Claim Number HC-2015-000268), National Grid Electricity Transmission (Claim Number HC-2015-000269) and Scottish Power (Claim Number HC-2015-000275).
25. Order of the Vice-President of the Court of Justice of the European Communities [2018] EUECJ C-65/18P(R)_CO (12 June 2018).
26. Claim Number HC-2017-000682.
27. See *Vattenfall's Particulars of Claim* at paragraphs [45] and [47].
28. *Supra* note [1].
29. *Supra* note [1] at [86].
30. *Supra* note [1] at [62].
31. *Supra* note [1] at [72–74].
32. *Supra* note [1] at [64–66].
33. *Supra* note [1] at [51].
34. *Supra* note [1] at [36].
35. Recent examples of Commission-decided cartels – excluding those considered in *iiyama* – involving non-EU domiciled addressees include: (i) Smart Card Chips (COMP/39.574) (3 September 2014); (ii) Rechargeable lithium-ion batteries (COMP/39.904) (12 December 2016); and (iii) Capacitors (COMP/40.136) (3 March 2018).
36. Treaty on the Functioning of the European Union.
37. It is noted that the defendants in *iiyama* had submitted to English jurisdiction by engaging in pleadings.
38. See *Ahlström Osakeyhtiö and others v. Commission of the European Communities* (C-89/85 A) [1988] ECR. I-5913.
39. See *Gencor Ltd v. Commission of the European Communities* (T-102/96) EU:T:1999:65.
40. See *Intel Corp v. Commission* (C-413/14 P) EU:C:2017:632 at [57].
41. CRT glass (COMP/39.605) (19 October 2011).
42. Cathode ray tubes (COMP/39.437) (5 December 2012).

43. LCDs (COMP/39.309) (8 December 2010).
44. Claim Numbers HC-2014-001979 and HC-2014-001980.
45. See *iiyama Benelux v. Schott* [2016] EWHC 1207 (Ch).
46. See *iiyama (UK) Ltd v. Samsung* [2016] EWHC 1980 (Ch).
47. *Supra* note [2].
48. *Supra* note [2] at [98].
49. *Ibid.*
50. *Supra* note [2] at [104].
51. Pursuant to paragraphs 8 and 9 of the Order by Mr. Anthony Ellera QC dated 6 August 2018, the defendants' application for permission to appeal was refused. Accordingly, the defendants have until 27 August 2018 to seek leave to appeal the High Court's judgment from the CoA.
52. See *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical* [2006] EWCA Civ 661 at [5].



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The Right to Contribution Among Cartelists: A Progress Report

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Joint and several liability between cartelists is one of the main reasons why defendants in US civil antitrust damages proceedings are under tremendous pressure to reach a settlement once plaintiffs have survived motions to dismiss and have obtained class certification.¹ This is because, under US law, cartelists do not have a right to claim contribution from their co-cartelists, meaning that each runs the risk of being left liable for the full (treble) damages resulting from the cartel.

Prior to the EU Antitrust Damages Directive,² it was generally expected that undertakings who engage in cartel activity would be held jointly and severally liable³ towards any victims of their illicit behaviour under the applicable laws of most, if not all, EU Member States. It was less clear whether co-cartelists had a right to contribution against each other and, even where that issue was settled, a number of practical difficulties were unresolved (such as how to determine the law applicable to the right to contribution, which may differ from the law applicable to the plaintiffs' damages claims; how to determine the share each cartelist should end up being responsible for; how to apply statutory limitations).

With the adoption of the EU Antitrust Damages Directive, some of these uncertainties have been removed or attenuated. However, many questions remain and this is a topic that will continue to evolve as more civil damages litigation proceedings reach final judgment stage in the EU.

Joint and Several Liability and the Right of Contribution Under Common Law: The Position in England & Wales Before the Directive

While there was no judicial authority on this in the antitrust damages context, it was generally accepted under English tort law that, if multiple entities are responsible for actionable damage (such as losses in the form of increased prices because of a cartel), then a claimant can claim the entirety of the damages from any one of these jointly and severally liable entities.

This principle of joint and several liability (and other features such as the availability of pre-trial disclosure) made English courts an attractive venue for competition law damages claims since a claimant could bring a single claim for all of its losses against just one single defendant or a limited number of potential defendants. For example, in the Air Cargo damages action, the claimants only brought claims against British Airways notwithstanding that tens of airlines were allegedly responsible for having caused damages in the form of higher prices for the transport of cargo shipped by air.⁴

Under the Civil Liability (Contribution) Act 1978, if two or more parties are liable to a claimant for the same damage they have the

right to claim an indemnity or contribution for any damages they are liable to pay.⁵ The indemnity or contribution can be claimed against another defendant in the proceedings or against a third party.

The right to contribution arises either when a court has ordered a party to pay damages to a claimant or when the party has paid damages under a settlement agreement. The right must generally be exercised within two years of it having arisen.⁶ In practice, a defendant would normally begin contribution proceedings, under Part 20 of the Civil Procedure Rules, against its fellow cartelists (or alleged cartelists) shortly after a defendant has initiated its damages action.

The Civil Liability (Contribution) Act 1978 entitles the party who has paid damages to obtain a "just and equitable" contribution from another party that is (jointly and severally) liable for the same damage.⁷ Although it has not been tested in practice, a court would likely consider awarding a contribution that was proportionate to the other party's contribution to the relevant loss or commensurate to that party's responsibility for the relevant loss.

The Position in a Traditional Civil Law Country: Belgium Before the Directive

Joint and several liability of co-participants in a joint violation of a legal norm giving rise to liability is a long-established principle of Belgian civil law.⁸ Articles 1213 and 1214 of the Civil Code formally recognise the existence of a right to contribution in case of joint and several liability but Belgian courts limited the scope of these provisions to contractual liability. Nevertheless, the courts agreed that a right of contribution could be claimed in other cases of joint and several liability, based either on the right of subrogation⁹ or on the general principle against undue enrichment.

The statute of limitation for all extra-contractual liability claims is five years.¹⁰ Given that the launch of proceedings against any of the jointly and severally liable parties interrupts the statute of limitations as regards all jointly and severally liable parties,¹¹ there would not seem to be any limitation issue restricting the right to seek contribution, at least when this is based on the right of subrogation to the plaintiff's rights.

The right of contribution requires determining how much each co-participant has contributed to the damage. This is done by assessing the importance of each participant's role in the violation, either based on the seriousness of the violation each committed or on the impact each of their actions had on the damages caused. No guidance existed on how this should be applied in the antitrust damages context.

The Position in a Modern Civil Law Country: The Netherlands Before the Directive

The Dutch Civil Code also provides that co-participants in joint tortious behaviour are jointly and severally liable towards their victims.¹² The Code additionally sets out principles on how the right of contribution should be exercised. The principle is to take into account how the circumstances having contributed to the damage can be attributed to each of the co-participants, although considerations of fairness may lead to other circumstances being taken into account.¹³

The statute of limitation for damages claims based on torts is five years.¹⁴ It is not clear whether this limitation applies to actions in contribution, which in the Netherlands tend to be launched as soon as a victim sues one or several cartelists for damages. If the limitation for damages claims does not apply, then the limitation period for claims in contribution should be 20 years.¹⁵

The Odd-One Out? Germany Before the Directive

In Germany, co-cartelists are jointly and severally liable for damages caused to victims of their conduct.¹⁶ The right of contribution is enshrined in the Civil Code, which provides both for a right to contribution among joint tortfeasors (setting the principle that each tortfeasor shares equally in the contribution, unless otherwise decided)¹⁷ and the automatic transfer of the rights of the victim to a tortfeasor who compensates the victim in full.¹⁸

However, both of these ways for co-cartelists to claim contributions from each other were in practice always time-barred.

The direct right to claim contribution was subject to a three-year limitation period.¹⁹ Under case-law unrelated to antitrust damages actions, the right to contribution arises when the actions giving rise to the joint and several liability occurred,²⁰ i.e. in cases of cartels when the unlawful activity begins. The standard limitation period commences either at the end of the year in which the owner of the claim (here: the cartel member having contribution claims against its fellow cartelists) obtains knowledge of the circumstances giving rise to the claim and of the identity of the potential defendant, or when the owner of the claim would have obtained such knowledge if he had not shown gross negligence.²¹ Due to the brevity of the limitation period, this means that, in most cases, the right to contribution would be time-barred long before the first victim initiates damages proceedings against any cartel member, thereby nullifying in practice the right to contribution.

The same is true of the transfer of the rights of the victim to a cartel member who has compensated the victim in full. If a victim sues one of the cartel members only (e.g. the leniency applicant) and not the other cartel members, the limitation period for the plaintiff's damages claim against the other cartel members continues to run. Bringing an action against one cartel member only suspends the limitation period as regards the particular joint and several debtor that the cartel victim has sued (*inter partes* effect of an action). When the cartel member who has been sued actually pays the plaintiff and thereby receives the damage claims the plaintiff has against the other cartel members, those claims are practically worthless because the other co-cartelists can raise the objection that the claim is time-barred. This is because, in case of a transfer of claims, the debtor can raise the same objections he was entitled to raise against the previous owner of the claim at the time of the assignment/transfer.²² In other words, the other co-cartelists who were not sued by the original plaintiff can claim that the transferred claim is time-barred against them, which by that time it most probably will be.

The EU Antitrust Damages Directive Enshrines the Right to Contribution

From the start, the EU legislator made it clear that the aim of the Antitrust Damages Directive was to introduce a more fair and balanced system that would ensure the protection of the rights of antitrust damages victims to obtain full compensation for their losses, while avoiding the many perceived excesses of the US system.

In keeping with this paramount goal,²³ the Directive enshrines the principle of joint and several liability among co-cartelists,²⁴ while at the same time providing for an express right of contribution.²⁵

Co-cartelists are therefore now able to claim contribution as a right under EU law, meaning that the concrete enforcement of these rights by national courts is governed by general principles of EU law, including the principle of effectiveness, which requires that national procedural rules governing actions for safeguarding individual rights derived from EU law "do not render practically impossible or excessively difficult the exercise of rights" conferred by EU law.²⁶

It would seem clear that the German rules on limitation periods, as they applied to claims in contribution amongst cartelists, render such claims practically impossible, which means that they run contrary to the principle of effectiveness.

Germany Fixes Its Rules to Comply with the Directive

The German legislator clearly perceived this issue. The German Act against restraints of competition has been amended to formally include the joint and several liability of co-cartelists and the right of contribution among them. Crucially, a special provision was introduced, whereby the limitation period for a contribution claim shall now only begin at the time of the initial damages payment to the victim.²⁷ This means that the limitation period for the contribution claim now only commences when one of the joint and several debtors pays damages to cartel victims, and not when the cartel is formed as had been the case. Therefore, when a cartel member pays damages it has three years to sue fellow cartelists for contributions.

However, this new provision only applies for claims that arose as from its entry into force, i.e. as from 27 December 2016.

The issue has thus been fixed for the future. To the extent that a similar problem would exist in other EU Member States who have not found a similar legislative solution, cartelists should be able to rely on the EU Antitrust Damages Directive to set aside provisions of national law, such as unreasonably short limitation periods, that would tend to render practically impossible or excessively difficult their right to seek contribution from other cartel participants. Thus, the balance sought by the Directive will be preserved.

Many Issues Remain Open

While the principle and the exercise of the right to contribution are now set in stone, many questions remain.

The Directive does not contribute to, let alone resolve, the debate on the applicable law for the right to contribution. As regards the apportionment of damages among co-cartelists, it sets the principle that this "shall be determined in the light of the relative responsibility for the harm caused by the infringement".²⁸ While this principle definitely sets aside any notion that damages may be apportioned equally among all cartelists, it provides no guidance on

what criteria should be used to determine each carteliser's *relative responsibility*. Public enforcement decisions, based on the concept of participation in a single and continuous infringement, are unlikely to provide much assistance. They may, however, provide some indications as to the degree of involvement of each party in the conduct but, given the enforcers' reluctance to go very deep into concrete implementation and effects of anticompetitive practices, other arguments and facts will likely have to be taken into account.

In certain respects, the Directive has in fact added more complexity. For example, the concrete implementation of the limits applying to the contribution duty of the immunity applicant and of settling cartelisers is likely to give rise to intense debate in the years to come, ensuring that the right to contribution will lead to developing discussions among practitioners and increasing work for the courts.

Acknowledgment

The author would like to acknowledge the co-authors of this chapter, Cormac O'Daly and Dr. Peter Gey.

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Endnotes

1. Other reasons include the unpredictability of jury trials, the threat of treble damages and the inability to recover (significant) legal defence costs from the plaintiffs in case of victory at trial.
2. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1 of 5 December 2014.
3. The idea of joint and several liability has long existed in civil law, where it encompasses different concepts such as "solidaire" liability, or liability *in totum* or in *solidum*.
4. *British Airways v Emerald Supplies Limited & Others*, HC-2008-000002. See also the follow-on actions arising from the European Commission's decisions on the Paraffin Waxes cartel and the Smart Card Chip cartel.
5. Civil Liability (Contribution) Act 1978, Section 1(1).
6. Limitation Act 1980, Section 10.
7. Civil Liability (Contribution) Act 1978, Section 2(1).
8. Belgian Supreme Court (Cour de Cassation), 15 February 1974, *Pas.*, 1975, I, 632.
9. Art. 1251 (3), Belgian Civil Code. Any person who is jointly held to the payment of a debt and who has an interest in paying it, benefits from the automatic transfer of the rights of the debt-holder upon payment of the debt to the latter.
10. Art. 2262*bis*, Belgian Civil Code. Time starts running from the moment the victim is aware that it has a cause of action, with an absolute limit of 20 years from the actions which caused the damages.
11. Art. 1206, Belgian Civil Code.
12. Art. 6:102 and 6:166, Dutch Civil Code. However, the peculiar wording of the latter provision has led to debate as to its exact scope in the context of antitrust damages actions.
13. Art. 6:102 and 6:101, Dutch Civil Code. Note that Art. 6:166 establishes the different that each co-participant is held to contribute in equal parts to the damages, but this is unless another way of apportioning the damages is justified under the particular circumstances of the case.
14. Art. 3:310, Dutch Civil Code. Time starts running from the moment the victim is aware that it has a cause of action, with an absolute limit of 20 years from the actions which caused the damages.
15. Art. 3:306, Dutch Civil Code.
16. Section 830, German Civil Code.
17. Section 426 (1), German Civil Code.
18. Section 426 (2), German Civil Code.
19. Section 195, German Civil Code.
20. German Federal Court of Justice, Judgment of 8 November 2016, VI ZR 200/15.
21. Section 199 (1), German Civil Code.
22. Sections 412 and 404, German Civil Code.
23. Other examples of the conscious decision to deviate from the US example include enshrining the passing-on defence in the Directive (Art. 12 and 13) and safeguarding the rights of indirect purchasers, who are often the real victims of the behaviour (Art. 12 and 14).
24. Art. 11(1) of the Directive, with conditional limitations for SMEs and the immunity applicant.
25. Art. 11(5) of the Directive, with a limitation on the right to seek contribution from the immunity applicant. In addition, conditional limitations on the right to seek contribution from a co-cartelist who reached a settlement with a victim apply by virtue of Art. 19 (2) and (4) of the Directive.
26. Court of Justice, judgment of 20 September 2001 in *Courage v Crehan*, case C-453/99, ECLI:EU:C:2001:465, point 29.
27. Section 33h(7), German Act against restraints of competition.
28. Art. 11(5) of the Directive.

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Australia



Zaven Mardirossian



Matthew Lees

Arnold Bloch Leibler

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

A wide range of claims may be brought for breach of competition law under the *Competition and Consumer Act 2010* (Cth) (“Act”). They include:

- (a) “Cartel conduct”, of which there are four types:
 - (i) price-fixing;
 - (ii) restricting outputs in the production and supply chain;
 - (iii) allocating customers, suppliers or territories (market sharing); and
 - (iv) bid-rigging.
- (b) Contracts, arrangements, understandings and “concerted practices” (not necessarily between competitors) that have the purpose, effect or likely effect of substantially lessening competition in a market.
- (c) “Secondary boycotts”, which involve, among other elements, two or more persons acting in concert to hinder or prevent the supply of goods or services.
- (d) “Misuse of market power” – a firm with a substantial degree of market power engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition.
- (e) “Exclusive dealing”, which covers certain types of restrictions on the supplier or acquirer of goods or services – such as not supplying/acquiring goods or services to/from others or to particular places – and which is prohibited if it has the purpose, effect or likely effect of substantially lessening competition.
- (f) “Resale price maintenance”, which involves a supplier attempting to induce an acquirer not to resupply the suppliers’ goods or services for less than a price specified by the supplier.
- (g) Mergers and acquisitions (of shares or assets) with the effect or likely effect of substantially lessening competition.

Some exceptions to these prohibitions are discussed in question 5.1. Cartel conduct can be prosecuted as either a criminal offence or a civil contravention. The other prohibitions are civil. However, the Australian Competition and Consumer Commission (“ACCC”), which is the government competition regulator, can seek pecuniary penalties for civil contraventions (see question 3.1).

In addition, the Act includes regimes for:

- (a) access to essential facilities;
- (b) the energy industry;

- (c) industry codes – which are in place for the franchising, horticulture, food and grocery, and oil industries;
- (d) the telecommunications industry;
- (e) international liner cargo shipping; and
- (f) prices surveillance.

An explanation of those regimes is beyond the scope of this chapter.

There is also a common law doctrine that a contractual restraint of trade is void unless it is reasonable in the parties’ interests and in the public interest (*Buckley v Tutty* (1971) 125 CLR 353). This doctrine is commonly invoked in cases concerning the validity of postemployment contractual restraints, and is also beyond the scope of this chapter.

1.2 What is the legal basis for bringing an action for breach of competition law?

The ACCC and private parties may apply to the court under Part VI of the Act for various remedies (see question 3.1).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The Act is a statute passed by the Parliament of the Commonwealth of Australia. Due to constitutional limitations on the Commonwealth Parliament’s legislative power, the State Parliaments have all legislated to give the main competition law part of the Act a broader application, thus creating the “Competition Code”.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The Federal Court of Australia has jurisdiction to hear competition matters under the Act. The Federal Court’s work is organised by reference to nine National Practice Areas, one of which is “Economic Regulator, Competition and Access”.

An accused being criminally prosecuted for cartel conduct has a constitutional right to a jury trial.

The Federal Circuit Court (a lower federal court) has only limited jurisdiction to hear competition law cases and is not considered further in this chapter.

The Australian Competition Tribunal (“Tribunal”) is a specialist tribunal. It can review the ACCC’s decisions whether to authorise a merger, acquisition or other anticompetitive conduct.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Standing depends on the particular penalties or remedies being sought:

- (a) Criminal prosecutions for cartel conduct are carried out by the Commonwealth Director of Public Prosecutions (“DPP”) in conjunction with the ACCC.
- (b) Only the ACCC can seek a pecuniary penalty for civil contraventions.
- (c) The ACCC or any person may apply for an injunction; only the ACCC can do so to restrain an anticompetitive merger or acquisition.
- (d) The ACCC or any other person may apply for a divestiture order in respect of an anticompetitive merger or acquisition.
- (e) Damages can be claimed by any person who suffered loss or damage as a result of the breach.
- (f) The ACCC and/or the DPP can apply for:
 - (i) a “non-punitive order”;
 - (ii) an “adverse publicity order”; and/or
 - (iii) an order disqualifying a person from managing corporations.
- (g) A wide range of compensation orders may also be sought:
 - (i) by a person who suffers (or is likely to suffer) loss or damage; or
 - (ii) by the ACCC on behalf of one or more such persons (with their prior written consent).

These remedies are explained in question 3.1.

Class actions (officially, “representative proceedings”) may be brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth). This requires at least seven persons who have claims that are against the same person, arise out of the same or similar circumstances and give rise to a substantial common issue of law or fact. One person may commence a representative proceeding on behalf of others – even without obtaining their consent – but they have a right to opt out.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Act applies to conduct that occurs within Australia. It also applies to conduct that occurs outside Australia committed by a body corporate incorporated or carrying on business in Australia, or by an Australian citizen or resident.

Further, there are specific provisions concerning misuse of market power in a “trans-Tasman” (Australia and/or New Zealand) market and mergers and acquisitions that occur outside Australia, but affect competition in Australia.

The prohibitions on exclusive dealing and resale price maintenance also extend to conduct that occurs outside Australia in relation to the supply of goods or services within Australia.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

At present, it is difficult to see any such trend. The Act has

been applied to cartel conduct occurring (at least partly) outside Australia; e.g., *Air New Zealand Ltd v ACCC* [2017] HCA 21. Also, Australia is an attractive destination for class actions, but to date these have mainly been in the nature of claims about securities and other investments.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial, but the Federal Court has broad case management powers.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, see question 2.2.

2.2 What interim remedies are available and under what conditions will a court grant them?

The court can grant an interim injunction, which may be prohibitory (prohibiting something from being done) or, less commonly, mandatory (compelling something to be done).

To obtain an interim injunction, the plaintiff’s claim must raise a serious question to be tried or be sufficiently likely to succeed (*ABC v O’Neill* (2006) 227 CLR 57). The court will consider whether the “balance of convenience” favours preserving the *status quo*. The court may refuse to grant an injunction if the plaintiff delays in making the application.

To obtain an interim injunction, a plaintiff (other than the ACCC, the relevant Minister and the DPP) must also give the “usual undertaking as to damages”. This requires the plaintiff to compensate any party adversely affected by the interim injunction. The amount of compensation is what the court considers just.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

A wide range of final remedies is available under the Act:

- (a) For individuals involved in criminal cartel conduct, up to 10 years’ imprisonment and/or a fine of up to A\$420,000 (per offence).
- (b) For individuals involved in other contraventions (including civil cartel contraventions), a pecuniary penalty of up to A\$500,000 (per contravention).
- (c) For corporations, a fine (for criminal cartel conduct) or a pecuniary penalty (for civil cartel and other contraventions) up to a maximum (per offence/contravention) of the greatest of:
 - (i) A\$10,000,000;
 - (ii) three times the total benefit obtained by the corporation from the conduct; or
 - (iii) if the court cannot determine that benefit, 10% of the annual turnover of the corporation (and any related bodies corporate).

- (d) An injunction – where a person has engaged, or is proposing to engage, in a contravention.
- (e) A divestiture order – where a merger or acquisition has contravened section 50.
- (f) Damages – see further question 3.2.
- (g) A “non-punitive order”, which may require:
- (i) community service;
 - (ii) that the contravener is put on probation and must establish a compliance programme;
 - (iii) disclosure of certain information; or
 - (iv) corrective advertising.
- (h) An “adverse publicity order”, which is a punitive measure, whereas corrective advertising is about raising public awareness.
- (i) Disqualification from managing corporations.
- (j) Section 87 empowers the court to “make such order or orders as the Court thinks appropriate” against the contravener to compensate a person who has suffered loss or damage as a result of the contravention, or to prevent or reduce the loss or damage. This encompasses:
- (i) declaring a contract void in whole or part;
 - (ii) varying a contract;
 - (iii) refusing to enforce part of a contract;
 - (iv) directing the return of money;
 - (v) directing the payment of compensation;
 - (vi) directing the repair of goods; and
 - (vii) directing the supply of specified services.
- (k) Declarations where the court considers it appropriate.

See question 1.5 regarding which parties may seek these remedies.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

The amount of damages awarded to a person is the amount of actual loss or damage the person suffered by the contravention. This imports notions of causation and remoteness.

Exemplary damages (or “punitive damages”) are not available under the Act (*Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251).

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

No, the measure of damage is determined by the loss or damage suffered by the plaintiff (see question 3.2).

An award of damages may indirectly reduce the amount of a fine or pecuniary penalty. To the extent that an award reduces the defendant’s capacity to pay, the court may take this into account in setting the fine/penalty (*ACCC v NW Frozen Foods* [1996] ATPR 42,435).

Further, if a defendant is liable to pay a pecuniary penalty (or fine) and compensation, and has insufficient resources to pay both, the court must give preference to the compensation order.

4 Evidence

4.1 What is the standard of proof?

Apart from criminal cartel proceedings, competition law cases are civil proceedings. In civil proceedings, a case is proved on the balance of probabilities. However, the court may take into account the gravity of the matters alleged (*Briginshaw v Briginshaw* (1938) 60 CLR 336).

In a criminal cartel proceeding, the prosecution must prove its case beyond reasonable doubt. To the extent required, the defence need only prove its case on the balance of probabilities.

4.2 Who bears the evidential burden of proof?

The plaintiff bears the burden of proof in civil proceedings.

In criminal cartel proceedings, the prosecution bears the burden of proof but the defendant bears an evidential burden in relation to certain defences, such as for joint ventures.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

If a court makes a finding of fact in certain proceedings under the Act, that finding of fact is *prima facie* evidence in subsequent proceedings for damages.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The parties may adduce evidence if it is “admissible” (relevant and not excluded).

The main exclusionary rules are for:

- hearsay;
- opinions;
- admissions made under duress;
- character evidence;
- evidence of judgments and convictions;
- tendency and coincidence evidence;
- credibility evidence;
- identification evidence;
- client legal privilege; and
- settlement negotiations (“without prejudice” privilege).

There are exceptions to these exclusionary rules. For example, there is an exception to the opinion rule for expert opinions. The expert opinion must be wholly or substantially based on specialised knowledge based on training, study or experience. Further, under a mandatory code of conduct, an expert has a duty to the court and must not act as an advocate for a party.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

During a civil proceeding, each party must ordinarily undertake “discovery”. This involves making available to the other parties

documents in a party's possession, custody or power that are relevant to the issues in the proceeding. Documents subject to client legal privilege or "without prejudice" privilege are excluded. A party may also be entitled to resist disclosure during the proceeding on the basis of self-incrimination privilege or "penalty privilege" (that disclosure might tend to expose the party to a penalty).

In criminal prosecutions, the prosecutor has a duty of disclosure.

Persons who are not parties to the proceeding may be compelled to produce documents pursuant to a subpoena. A subpoena must not be issued without leave of the court. Less commonly, a third party may be ordered to make "non-party discovery".

Before proceedings have begun, a person may apply to the Federal Court for an order for "preliminary discovery" by another person. This may be sought to (i) ascertain the identity of a prospective defendant, or (ii) obtain information to decide whether to commence proceedings.

There are, however, protections for confidential information given to the ACCC about cartel conduct ("protected cartel information"). The ACCC cannot be required to disclose such information:

- by preliminary or non-party discovery; or
- otherwise (for example, by subpoena) except with the court's leave.

If the information was given to the ACCC by an informant, the court must take into account that disclosure may discourage informants in the future.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Generally, a witness may be compelled by subpoena to give evidence in court. An ACCC official cannot, however, be required to disclose "protected cartel information" except by leave of the court (see question 4.5).

A party is entitled to cross-examine a witness who is called to give evidence by another party. In some situations, a party may also be permitted to cross-examine a "hostile" witness the party has called.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

No, but the ACCC is able to authorise conduct that would otherwise breach the Act (see question 5.1). The Tribunal is able to review such decisions by the ACCC (see question 1.4).

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

A party cannot refuse to discover documents merely because they are confidential. The parties must not, however, use documents produced compulsorily for any purpose other than the proceeding.

In practice, the lawyers for one party are often given access to the confidential documents of another party on condition that they undertake not to disclose the documents to their client.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The ACCC has a special role to assist the Australian Competition Tribunal – including by providing its views – in matters that come before that Tribunal. The ACCC may intervene as a "friend of the court" in court proceedings to which the ACCC is not a party, but this is rare.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no general defence of justification or public interest. There are, however, important exceptions and an authorisation process.

Exceptions

There are exceptions for:

- (a) joint ventures (for cartel conduct and exclusionary provisions);
- (b) intellectual property rights;
- (c) compliance with official standards;
- (d) the protection of goodwill after the sale of a business; and
- (e) employment/partnership conditions and post-employment/partnership restrictions.

There is also a defence for secondary boycotts with a dominant purpose relating to working conditions, environmental protection or consumer protection.

Authorisation

The ACCC can authorise conduct that would otherwise breach certain parts of the Act if the conduct would result in a public benefit that outweighs the anticompetitive detriment. A party may apply to the Tribunal for review of the ACCC's decision (see question 1.4).

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

These issues have not yet been decided by the courts. Because damages awards under section 82 of the Act are compensatory, it is arguable that a plaintiff's damages award should be reduced by the amount of any loss "passed on" to subsequent purchasers, and that subsequent purchasers are entitled to damages if they can prove causation and loss.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

In civil proceedings, a defendant is able to join other alleged cartel participants, and attempt to shift the defendant's liability to those parties by making claims for contribution and/or apportionment.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

There are different limitation periods for different penalties/remedies:

- The ACCC must bring an action for a (civil) pecuniary penalty within six years of the contravention.
- Actions for damages must be brought within six years after the cause of action accrues, which is when damage is suffered.
- An application for a divestiture order must be brought within three years of the merger.
- An application by a private party or the ACCC in a representative capacity for a compensation order under section 87(1A) must be brought within six years after the loss or damage was suffered or became likely to be suffered, whichever occurred earlier.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

It typically takes about two years from the time a competition law proceeding is commenced until judgment. It may take several years if the matter is particularly large or complex, or if there are interlocutory disputes or appeals. The timeframe may be shortened if the matter is urgent.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

If a settlement involves the court making certain orders, the parties must apply jointly to the court for those orders. This occurs when the ACCC and defendant agree on pecuniary penalties. It is ultimately the court's decision whether to make the orders sought, but courts generally recognise the desirability of negotiated settlements.

See question 7.2 regarding class action settlements.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Class actions are commonly settled on a collective basis. The court's approval is required for such settlements.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The usual rule in civil proceedings is that the unsuccessful party must pay the successful party's legal costs. However, this is usually on a "party and party basis", which is typically about two-thirds of the actual legal costs incurred.

There are also costs sanctions against a party who rejects a settlement offer and obtains no better result from a judgment.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers in Australia are not permitted to charge "contingency fees" – that is, fees based on a proportion of the money awarded to the client in litigation.

In some jurisdictions, lawyers' fees may be wholly or partly conditional upon a successful outcome. Any "uplift fee" that is conditional upon success must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Litigation funding is permitted and no longer prohibited as champerty and maintenance (*Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386).

9 Appeal

9.1 Can decisions of the court be appealed?

A decision at first instance of a single Federal Court judge may be appealed to the Full Court of the Federal Court (three judges).

A Full Court decision may only be appealed to the High Court of Australia (the highest court in Australia) if the appellant obtains "special leave". This is generally only granted where the matter involves an important question of law or a matter of national significance.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Under the ACCC's immunity policy for cartel conduct, the first cartel member to come forward, make admissions and cooperate with the ACCC is (subject to certain other requirements) entitled to immunity from criminal prosecution and ACCC-initiated proceedings.

Under the ACCC's cooperation policy for enforcement matters, the ACCC will consider granting immunity or, more commonly, leniency to a party who admits its contravention and cooperates with the ACCC.

An applicant (whether successful or not) under the immunity policy or the cooperation policy is not immune from civil claims (except by the ACCC if immunity is granted).

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An applicant (whether successful or not) under the immunity policy or the cooperation policy is not permitted, in subsequent court proceedings, to withhold evidence disclosed in the application process.

The ACCC will, however, accept oral applications under the immunity policy. The ACCC will keep written records but will ensure, as far as possible, those records do not prejudice the applicant.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Significant reforms came into effect in November 2017 as a result of the recommendations of the 2015 Competition Policy Review (also known as the “Harper Review”). The reforms included:

- (a) major changes to the law on misuse of market power;
- (b) a new prohibition on “concerted practices”;
- (c) “third line forcing” (a type of exclusive dealing) only being prohibited if it has the purpose, effect or likely effect of substantially lessening competition (the previous prohibition applied strictly whether or not there was such a purpose, effect or likely effect);
- (d) an amended cartel defence for joint ventures; and
- (e) repealing a specific prohibition on price signalling.



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Matthew is a published author and has contributed submissions to numerous Australian government reviews. He is also an accomplished speaker, delivering seminar presentations at academic institutions, bar associations, professional organisations and many of Australia's largest companies.

Arnold Bloch Leibler

Lawyers and Advisers

Arnold Bloch Leibler is a premium Australian commercial law firm renowned for advising clients on high-stakes transactions, commercial issues and disputes. Our partners and lawyers are often at the centre of law reform and regularly advise on landmark matters.

Our difference is often best demonstrated by the way we work and our approach to problem solving. We pride ourselves on providing strategic guidance and solving complex issues related to our clients' commercial interests, legal position and reputation. With offices in Melbourne and Sydney, the firm is operated as a professional practice rather than a corporatised business. The firm has a small firm feel with a big firm reputation, possessing influence within legal, business and political circles.

Austria

Preslmayr Rechtsanwälte OG

Mag. Dieter Hauck



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Enforcement by private competition litigation has some tradition in Austria, not restricting these concepts to damage claims. Starting with the Cartel Act 1993 (*Kartellgesetz*), standing was afforded to private bodies to file for cease and desist (*Abstellung*) orders or for decisions of finding (*Feststellung*) before the Cartel Court (*Kartellgericht*). Such actions for cease and desist or finding are attractive where no decisions for a fine by a competition authority is or is yet available. The Cartel Court has never had jurisdiction to hear claims for damages – such jurisdiction rests with the general civil courts.

An infringement of competition law may also be an infringement of Sec 1 of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*). The Unfair Competition Act also provides a basis for cease and desist (*Unterlassung*) orders. In such cases, recovery (*Beseitigung*) and/or damages (*Schadenersatz*) may be awarded by the commercial courts (*Handelsgerichte*), hearing cases under the Unfair Competition Act. Under the Cartel Act as well as under the Unfair Competition Act, final decisions can be published.

The civil courts hear cases for finding, cease and desist, recovery and damage actions, as well as actions to have a contract voided. However, while there are several follow-on cases pending after the Austrian Elevators cartel case and an Austrian Banking case, there are, to date, only very few final decisions on private cartel law enforcement before the civil courts. These relatively small cases, relating to a driving school cartel, were not reviewed by the Supreme Court (*Oberster Gerichtshof – OGH*).

The European Court of Justice (ECJ) rendered in 2014 a preliminary ruling judgment on the question of damages claimed by customers of third parties (so-called “umbrella claims”). This resulted from the case of the Austrian National Railway claiming damages following the Elevators cartel. Although the Austrian Supreme Court had ruled that Austrian law provides no basis to assert such claims, the ECJ found that “Article 101 TFEU must be interpreted as meaning that it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions” (ECJ 5.6.2014, C-557/12). Consequently, a victim of

umbrella pricing, i.e. an indirect customer, may claim compensation for the loss caused by the members of a cartel, even if it had no contractual links with any of them, where it is established that the cartel at issue was, under the circumstances of the case and, in particular, considering the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of the cartel. It is up to the referring court to determine whether those conditions were met.

A related request for a preliminary ruling was sent to the ECJ in May 2018 (OGH 17.5.2018, 9 OB 44/17m), where the Austrian Supreme Court wanted to know whether European law (Article 85 EC, 81 EU and Article 101 TFEU) is to be interpreted as meaning that, in order to maintain the full effectiveness of those provisions and the effectiveness of the prohibition resulting from those provisions, it is also necessary that persons can claim from cartellists compensation for damages which are not active as suppliers or customers on the market, but affected by the cartel, but under legal rules for subsidies grant loans to customers of the products offered on the market affected by the cartel. The damage done to these persons is that the loan amount granted is a percentage of the product costs and was higher than it would have been without the cartel agreement, which is why they could not invest these amounts profitably. The Supreme Court reasoned that, under national Austrian law, such damages would not be recoverable as the legal connection was not sufficient. However, the Court had doubts whether such result was compatible with European law.

No decisions on umbrella claims have been handed down so far by Austrian Courts.

Certain infringements of competition law can qualify as criminal offences. The Criminal Act (*Strafgesetzbuch*) explicitly penalises bid-rigging in Sec 168b. Cartel behaviour may also constitute fraud; however, in such case the prosecution would need to prove the damage caused and intended. Anyone harmed by such offences (*Privatbeteiligter*) can join the criminal proceedings seeking compensation.

Finally, breaches of competition law may cause labour law litigation, e.g. where an employee having engaged in anti-competitive behaviour challenges his termination.

1.2 What is the legal basis for bringing an action for breach of competition law?

Actions could be based on the Cartel Act, the Unfair Competition Act and/or general civil law in conjunction with competition law.

However, some actions are only available to certain plaintiffs – see the answer to question 1.5.

A 2017 amendment to Austrian competition law introduced a new chapter, Sec 37a to 37m, into the Cartel Act and transposed the EU Damages Directive into national law.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for private damage actions is national law (see the answers to questions 1.1 and 1.2). Following the case law by the ECJ on private enforcement (ECJ 20.9.2001, C-453/99 *Courage/Crehan* and ECJ 13.7.2006, C-295 and 298/04 *Manfredi*), Articles 101 and 102 TFEU are directly applicable but do not contain explicit rules on damages. However, it is long-standing case law that the possibility for anybody to claim damages greatly enhances the effectiveness of competition rules. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to establish the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, including those on the application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed (ECJ 13.7.2006, C-295 and 298/04; ECJ 5.6.2014, C-557/12).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The **Cartel Court** is a specialised division of the Court of Appeals of Vienna (*Oberlandesgericht Wien*) and has exclusive jurisdiction to hear actions under the Cartel Act. Its decisions can be appealed to the Austrian Supreme Court sitting as the Cartel Court of Appeals (*Kartellobergericht*).

Civil courts hear actions under the Unfair Competition Act and under general civil law for damages. Except for Vienna, where special commercial courts exist both at district and regional level, the ordinary civil courts sit as commercial courts in such cases. See also the answer to question 1.6.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Any undertaking or association of undertakings with a legal or economic interest may file an action before the **Cartel Court**. This criterion of interest is not applied strictly. However, an application for finding requires a special interest. In the past, applications for findings were rejected for lack of interest (OGH 8.10.2008, 16 Ok 8/08), e.g. where the interest for a declaratory action was based on damages sought. See the answer to question 3.1. A 2013 amendment introduced an explicit provision into the Cartel Act, establishing that seeking compensation for damages creates a sufficient legal interest for an action for declaratory relief. This new rule applies to any application filed on or after March 1, 2013, irrespective of the time the infringement occurred.

Private individuals do not have standing before the Cartel Court. However, applications may be brought by the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*), the Chamber of

Employees (*Bundeskammer für Arbeiter und Angestellte*) and the Presidents’ Committee of the Austrian Agricultural Chambers (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*). Further, the Federal Competition Agency (*Bundswettbewerbsbehörde*), the Federal Antitrust Prosecutor (*Bundeskartellanwalt*) and the sector-specific regulators have standing before the Cartel Court.

The above-mentioned representative bodies or competitors may (alternatively or additionally to an application before the Cartel Court) file a desist and/or recovery action under the **Unfair Competition Act with the commercial courts**. Damages can also be claimed by customers (OGH 24.2.1998, 4 Ob 53/98t) in case of a culpable breach.

Both the Austrian and the EU prohibition of cartels and abuse of market dominance provisions are generally considered as protective rules (*Schutzgesetze*) according to the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). Moreover, literature mostly agrees that competition law does not only protect free competition (and thereby competitors), but also customers. Therefore, competitors as well as customers may bring a **tort claim in civil or commercial courts** if they suffered harm. Possibly, agreements in place can also support claims depending on their contents, e.g., plaintiffs could argue that defendants had infringed (pre-)contractual information or notification obligations by not disclosing (allegedly) cartel-inflated prices. Further, an agreement may be void because of a breach of competition law. The indirectly harmed (e.g. the customer of someone who purchased from a cartel) have a valid claim under certain circumstances (see also the answer to question 5.2).

Both individuals and companies having a civil law claim can also seek compensation before the **criminal courts**, provided criminal proceedings were initiated. Such criminal proceedings are not always initiated, and damages will only be adjudicated in very clear-cut cases.

For **collective claims**, a draft amendment to the Austrian Civil Procedure Code (*Zivilprozessordnung*) was proposed some years ago, aiming to introduce group trials and exemplary legal proceedings, but did not become law. Consequently, possibilities for collective claims are limited. Under certain conditions, proceedings initiated individually can be joined by the trial court. It is also possible to sue several defendants together, even if only one of them is domiciled in Austria. Claimants may assign their claims to one entity which then asserts the assigned claims in its own name. As persons concerned must act in assigning their claims, such a “group action” could be considered to be based on an “opt-in” basis. Such assignment does not necessarily mean that the values of the individual claims are added up for reasons of establishing jurisdiction. Consequently, the district (generally competent for claims of up to EUR 15,000) rather than the regional court may have jurisdiction to hear such a “group action”.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The **Cartel Court** has exclusive jurisdiction to hear applications pursuant to the Cartel Act and the **commercial courts** to hear claims based on the Unfair Competition Act. All other (civil) matters are heard by the general civil courts. A district court will hear claims with a value of up to EUR 15,000, except for some special matters. The regional courts have jurisdictions for higher amounts. Claims against an entrepreneur (*Unternehmen*) registered in the commercial register (*Firmenbuch*) and relating to a commercial agreement (*unternehmensbezogenes Geschäft*) will be heard by the commercial courts.

The location of the court having jurisdiction (*örtliche Zuständigkeit*) is determined by the Act on Civil Jurisdiction (*Jurisdiktionsnorm*). Normally, the domicile or commercial seat of the defendant will be the decisive factor for the location of the court.

Criminal courts will only enforce private damage claims connected with criminal proceedings against the civil defendant, i.e. only the criminal court trying the respective defendant has jurisdiction. As experience teaches, the criminal court will only give judgment if the claims are obviously well-founded and/or uncontested, otherwise the criminal court will refer the matter to the civil courts.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The Austrian Supreme Court has explicitly ruled that Austrian civil courts have jurisdiction to hear private damage claims in cases where at least one of the cartelists resides or has its corporate seat in Austria. Consequently, actions may be filed with Austrian courts even if there is a link to various other countries. In a case relating to banking cartel case, the Austrian Supreme Court confirmed that all market participants (including the indirectly damaged) have standing to bring private damage claims.

When the EU Damages Directive was implemented into Austrian law in 2017, several provisions improving the procedural position of plaintiffs have been introduced – see below for more details.

1.8 Is the judicial process adversarial or inquisitorial?

Before the **Cartel Court**, judicial proceedings are inquisitorial, following a special procedural law also applicable to other matters where the public state takes care of certain matters pertaining to its subjects. However, on the applicant – a private or public agency – rests the practical burden to submit the facts necessary for establishing an infringement.

Criminal proceedings are basically inquisitorial, and the criminal courts and public prosecution services focus on whether the defendant is guilty of a criminal offence. However, criminal courts will only rule on damage claims if those are obviously clearly founded and/or uncontested. A private party, having joined criminal proceedings claiming damages, may also present further evidence to be heard and question witnesses. Otherwise, the persons harmed will be referred to civil litigation.

Proceedings before the **commercial and general civil courts** are adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes – see the answer to question 2.2.

2.2 What interim remedies are available and under what conditions will a court grant them?

Both the **Cartel Act** and the **Unfair Competition Act** provide for interim injunctions (*einstweilige Verfügungen*). The Cartel Court may grant interim relief where the requirements for issuing a cease and desist order are attested to a certain degree (*bescheinigt*), which means a lower standard of proof than for an actual cease and desist

order (see also under question 4.1). The commercial courts can also impose interim measures to safeguard a later cease and desist order.

While under the Cartel Act and the Unfair Competition Act it is not necessary to show that without the interim injunction the effectiveness of the principal application if finally granted would be put at (significant) risk, interim relief under general civil law is subject to such requirement.

The **criminal courts** cannot grant interim relief to a party seeking compensation in criminal proceedings.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The **Cartel Act** provides for cease and desist orders and decisions of finding upon application by enterprises. Only certain official parties may move for fine decisions. A cease and desist order will be issued if there (still) is an actual infringement of competition law at the point of time of the decision. In one case, the Cartel Court of Appeals held that where the infringement has already ended but there are still consequences from the infringement, an order may still be issued (OGH 19.1.2009, 16 Ok 13/08); the case was referred to the first instance and then settled. If the infringement has ended, the Cartel Court may adopt a decision of finding (that there was an infringement), subject to the applicant establishing a special interest in such finding. The Cartel Act explicitly also allows for a decision of finding in preparation of actions for damages. However, the Cartel Court has no jurisdiction to hear damage claims.

A cease and desist order pursuant to the **Unfair Competition Act** requires that the infringement occurred in the conduct of business (*im geschäftlichen Verkehr*), a criterion normally met in competition cases. Moreover, the effect on competition by the infringement must be appreciable. Finally, it must be likely that the infringement will occur or will be repeated. After an infringement has occurred, its repetition will be assumed. It falls to the defendant to prove that such risk can be excluded or is extremely unlikely to materialise. When an infringement has occurred, and an unlawful situation still exists, the court may, upon request, also issue a recovering order. The defendant is then obliged to remedy such unlawful situation to the extent within his abilities.

Damages for infringing the Unfair Competition Act may be awarded under the general requirements. However, the relevance of the Unfair Competition Act for private antitrust enforcement has been somewhat reduced by a Supreme Court decision, ruling that an antitrust law infringement only constitutes an infringement of Sec 1 of the Unfair Competition Act where the former infringement cannot be justified by any plausible interpretation of the law (*vertretbare Rechtsauffassung*) (OGH 14.7.2009, 4 Ob 60/09s *Anwaltssoftware*).

The (new) Sec 37c para 1 of the Cartel Act confirms the earlier state of the general civil law that anyone who has infringed competition law is obliged to reimburse the damages caused. Further, the same provision contains a rebuttable assumption that a cartel among competitors, i.e. a horizontal infringement, causes (some) damage. However, the causation and the amount of such damage still needs to be proven by the plaintiff.

Where a plaintiff (also) relies on a contract, the provisions thereof and their interpretation play an important role.

The general requirements for an award of damages in competition cases are the following:

- (i) the defendant has infringed national or EU competition law; and
- (ii) such infringement has (adequately) caused (measurable) harm to the defendant; said harm must be within the protective scope of the infringed competition provision (*Rechtswidrigkeitszusammenhang*); and the defendant must have acted negligently or with intention (fault).

The concepts of **adequate causation and protective scope** need further explanation: under Austrian law, the infringement in question not only has to be a *conditio sine qua non* for the harm, but the behaviour of the defendant also needs to be, by its general nature, capable of causing the harm; i.e. the harm has not occurred only because of an extraordinary chain of events. The protective scope concept means that the rule infringed aims at protecting from such harm as has occurred. The textbook example is the case of an underground cable being damaged during construction works. While the company owning the cable is clearly protected by the rules on property, its customers (e.g. being supplied with electricity or communications) are arguably not within the protective scope of these rules (protecting the property of the utility company), even if they suffer damages because of, e.g., the interruption of supply.

Where a **prior final decision by a competition authority** is available, which is the normal case in follow-on actions, the courts deciding on damages are bound to such decision to the extent it states the infringement and its unlawfulness.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under Austrian law, as in most European countries, exemplary (punitive) damages are not available, but only actual harm (*positiver Schaden*) and loss of profit (*entgangener Gewinn*) can be claimed. Actual harm has occurred if existing property or rights are affected. Loss of profit encompasses harm to future opportunities. While previously a claim for loss of profit was subject to the defendant having acted grossly negligent or intentional, under the new law on cartel damages the compensation generally includes loss of profit. Further, the plaintiff is entitled to interest from the day on which the damage occurred. This is consistent with ECJ case law, as the *Manfredi* judgment ruled that, in any case involving a breach of Article 101 TFEU, loss of profit must be compensated.

Where it is established that a party is entitled to damages, but the exact amount is impossible or unreasonably difficult to establish, the court is entitled by law to assess the amount in its discretion (*nach freier Überzeugung*). In this context, the 2017 amendment to the Cartel Act containing a (rebuttable) presumption that a cartel causes harm, has a special effect: unless defendant cartelists can prove the opposite, it is established that damage has occurred, and the exact amount thereof should be ascertained by estimation. If some claims raised within the same action are insignificant or where single claims do not exceed EUR 1,000, the court may even assess both: (i) whether damages should be granted at all; and (ii) the amount that should be awarded. Further, upon request by a trial court, the Cartel Court, the Federal Antitrust Prosecutor and the Federal Competition Authority may support the civil court in determining the amount of the damage.

To date, there are only few final decisions dealing with private cartel law damage claims. At this moment, no decision, in which damages were awarded, is publicly available, only one has been decided, i.e.

the Grazer Driving School case, where damages have been awarded. However, the decision is not publicly available as only judgments by the Supreme Court are published (the final decision in the Driving School case came from the Appeal Court of Graz). The reason why this case was not finally decided by the Supreme Court may be the relatively small amounts claimed.

There are cases pending which in the future may see the award of damages. However, cases may be terminated by settlements before reaching the final stages with the courts.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Upon motion by the Federal Cartel Agency or the Federal Cartel Prosecutor, the Cartel Court may impose fines of up to 10% of the global group turnover (like EC Rules) for breach of national or European competition rules, and the Court has done so several times in the past. Damages are assessed by the civil or commercial courts based on the harm suffered by plaintiff (see, however, question 3.2 above). Whether or not fines have been imposed on the defendant by the Cartel Court generally has no impact on the amount of damages, except that it was argued that the fine imposed indicates actual damages suffered.

In Austria, there is no special redress scheme (apart from private damage claims) available for persons harmed by a competition infringement.

4 Evidence

4.1 What is the standard of proof?

Generally, for damages to be awarded, the court must, based on the evidence presented, be fully convinced that the asserted facts are true. The courts are free in their evaluation of the evidence (*freie Beweiswürdigung*) and, generally, may consider any evidence that is brought to their attention.

The Supreme Court has lowered the standard of proof for damages claimed under the Unfair Competition Act where the plaintiff must only establish that (some) harm has occurred with a high probability (OGH 15.9.2005, 4 Ob 74/05v), and the defendant may prove the opposite, otherwise the amount of damage may be estimated by the Court. The case dealt with an illegal rebate scheme and the damages claimed by a customer who was discriminatorily not granted such rebate.

Where plaintiff for objective reasons has considerable difficulties in proving something, courts may accept *prima facie* evidence. For example, in predatory pricing cases, it was held sufficient that the applicant established that sales by defendant were below costs by presenting data of comparable undertakings (OGH 9.10.2000, 16 Ok 6/00; 16.12.2002, 16 Ok 11/02; 29.5.2018, 4 Ob 232/17x).

On the rules for estimation by the court, see the answer to question 3.2. On the closely related question of the burden of proof, see question 4.2 below.

4.2 Who bears the evidential burden of proof?

In principle, plaintiffs must submit conclusively and prove all facts supporting the claim. Normally in a follow-on action, where existence of the cartel and its illegality are established by the decision of a

competition authority, this is the causation of damage and the amount thereof. For competition claims, conclusive submissions are sufficient, to the extent they are based on the reasonably available evidence.

Where a damage claim is based on the infringement of a protective rule or an agreement, the defendant must, if this is established, prove the lack of fault. Moreover, according to court practice, the plaintiff only needs to prove the infringement and that harm has occurred; with respect to causality, a rebuttable *prima facie* proof will be assumed (OGH 16.9.1999, 6 Ob 147/99g). Also, in this case, the plaintiff must submit and prove the occurrence of damages and their amount (OGH 15.5.2012, 3 Ob 1/12m).

If a defendant raises the defence that the plaintiff has passed on any price surcharge resulting from the infringement of competition law, the defendant bears the burden of submission and proof in that respect.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Austrian Code of Civil Procedure recognises the possibility for the courts to estimate damages – see the answer to question 3.2.

Since the 2017 amendment, Austrian law has contained a rebuttable presumption that a cartel (among competitors) causes harm. In combination, rules allowing the judge to estimate the amount of damages by discretion strengthened the plaintiffs' positions. Further provisions support this effect, such as the binding effect of final decisions by European or national competition authorities: the final decisions of such competition authorities, by which a violation of antitrust law has been established, are binding (*Bindungswirkung*) on the Austrian civil courts. Defendant cartellists can no longer challenge the existence and illegality of a cartel once it has been finally established by a competition authority.

Where a damage claim is based on the infringement of a protective rule or an agreement, the plaintiff only needs to prove the infringement and that harm has occurred; with respect to causality, rebuttable *prima facie* proof will be assumed (OGH 16.9.1999, 6 Ob 147/99g).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Austrian law generally does not restrict the forms of permissible evidence. Only very rarely is evidence inadmissible by its very nature or the way it was obtained.

Expert evidence is accepted and widely used. While opinions by expert witnesses instructed by one of the parties may be useful for the parties, especially for the preparation of the action or the defence and may be presented as documents into evidence, they carry relatively little weight with the court. For the judgment, normally the courts heavily rely on expert witnesses they have appointed themselves. Such experts will work closely with and in support of the judge. The importance of their activities in collecting, analysing and interpreting data and the written opinions they eventually will deliver cannot be overestimated and shall receive the utmost attention.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Until the 2017 amendment, Austrian law did not contain discovery

rules in the strict sense, which changed as required by the EU Damages Directive. Under general civil procedure law, upon motion by a party the court can, during proceedings, order the other party to produce certain documents. For this objective, the requesting party needs to specify the documents in detail. The law sets out grounds on which the production of a document can or cannot be refused. However, even if a refusal is unjustified, the court cannot enforce production orders, but the refusal will be considered in the court's judgment. Consequently, these rules on document production have carried little practical importance so far.

Under the 2017 amendment to the Austrian competition law, upon reasoned motion by a party, the court can, during proceedings – after having balanced the mutual interests – order the opposing party or even a third party to disclose specific pieces of evidence. The evidence plaintiffs seek will likely concern the effects of a competition law infringement, whereas defendants will likely request the disclosure of documents proving passing on of overcharges. In case of confidential information, the court must order effective measures for the protection of such confidential information (see also the answer to question 4.8). For confidential information, the defendant of the application can demand that the evidence is only disclosed *vis-à-vis* the court, which then decides on the disclosure to the other party or takes the information into account when rendering its decision.

Also, the disclosure of evidence contained in the files of competition authorities can be requested by parties. Upon such motion, the court must additionally consider the effectiveness of the public enforcement when judging the proportionality of the request. Documents, which were prepared specifically for the proceedings conducted by the competition authority, which the competition authority has created and sent to the parties during its proceedings and settlement submissions which have been withdrawn, are sometimes called “**grey list documents**”. The disclosure of such grey list documents must not be ordered before the proceedings before the competition authority have been closed.

Even stricter restrictions apply to leniency and (non-withdrawn) settlement submissions in cartel cases (i.e. proceedings concerning cartel behaviour between competitors, not including vertical agreements). The disclosure of these so-called “**black list documents**” must not be ordered at any time, unless such documents or information is available independently from the competition procedure.

Further, under general procedural rules, the parties to a trial may ask each other questions in court with a view to establish the facts of a case and the relevant documents.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Summoned witnesses are obliged to appear. If they do not appear, they may be fined by the court and must bear any costs that their non-appearance may cause. As this may include lawyers' fees, the costs could be substantial. Further, though rather unusual, the court could impose compulsory attendance on a witness. Finally, witnesses not appearing before the court may be liable for damages to the parties.

Witnesses may, however, refuse testimony to avoid criminal prosecution or a direct financial disadvantage; or if they are bound by professional secrecy or would otherwise disclose business secrets.

Any witness may be interrogated by either party. In practice, the judge starts the interrogation and either party may ask (additional) questions. All parties could ask all questions relevant to the case, though the judge has a wide discretion as to topics and decisions on objections to questions.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Yes. National courts must not issue decisions concerning agreements or concerted practices within the meaning of Articles 101 or 102 TFEU, which would contradict a Commission decision on the same agreements or concerted practices.

The binding effect (*Bindungswirkung*) of final decisions by European or national competition authorities has been explicitly reiterated by the 2017 amendment. The binding effect encompasses the verdict and those facts necessarily supporting such verdict, but not each part of the reasoning.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Generally, Austrian procedural law does not have express rules on the protection of business secrets amongst (a multitude of) parties to specific proceedings. However, both under the Cartel Act and the Unfair Competition Act, the public may, upon request, be excluded from oral hearings if this is necessary for the protection of business secrets or confidential information.

A joinder of proceedings initiated by the Federal Competition Agency or the Federal Cartel Prosecutor to proceedings instigated by another party must not take place absent the consent of the parties because of the investigative powers vested in the public entities. The relevant provision of the Cartel Act provides that, in principle, third persons may only access the respective court files with the consent of the parties to the proceedings concerned. The ECJ (C-536/11 *Donau Chemie*) ruled that this is incompatible with EU law. The Austrian Supreme Court (28.11.2014, 16Ok10/14b and 16 Ok 9/14f) has further held that access to file must also not be generally denied in cases not containing “a foreign element”. The Austrian Supreme Court further stated that the criteria for being granted access to a file must not impose an excessive burden on those claiming damages. Finally, it was clarified that the Cartel Court’s file must be forwarded to the criminal prosecutor (*Staatsanwalt*) upon request (OGH 22.6.2010, 16 Ok 3/10).

The disclosure of evidence as established by the 2017 amendment implementing the EC Damages Directive may also include evidence containing confidential information. However, the court, prior to ordering disclosure, must hear the affected parties and balance the legitimate interests of all parties and third parties concerned. The court shall order appropriate and effective protection measures; such as the presentation of a non-confidential excerpt, the exclusion of the public from the hearings or the imposition of a limit on the group of people that can acquire knowledge of the evidence. Obviously, the parties and their counsel cannot be excluded. Moreover, the parties’ rights (to be heard) must not be unduly restricted. Finally, the court can order an expert witness to prepare a summary not containing any confidential information.

In criminal proceedings, the public can be excluded from hearings where this is necessary for confidentiality reasons. While access to file for third parties is limited (they need to have a reasoned legal interest [*begründetes rechtliches Interesse*]), parties seeking compensation in criminal proceedings have access to files and a right to be present at the hearings, which can be restricted only in exceptional cases (to avoid obstruction of the investigation).

Decisions by the Cartel Court, including the full names of the parties, are published. The Cartel Court shall give the parties the ample opportunity to specify those parts of the decision which they would like to exclude from the publication; subsequently, the judge must decide on the version to be published. Following the 2017 amendment, the final decision rejecting or dismissing an application and decisions on requests for an interim injunction must also be published.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

In proceedings before the Cartel Court, the Austrian Federal Competition Agency and the Federal Cartel Prosecutor both have standing. As they normally initiate such proceedings, it is necessary for them to participate in such proceedings. On the other hand, neither the Federal Competition Agency nor the Federal Cartel Prosecutor have standing before civil courts, pursuant to national law. However, the civil court can request assistance from the Cartel Court, the Federal Competition Agency and the Federal Cartel Prosecutor when determining the amount of the damage. This has rarely occurred so far.

Under European law, the European Commission and national competition authorities can, on their own initiative, submit written statements (*amicus curiae briefs*) to Member State courts, if this is required for a coherent application of Articles 101 or 102 TFEU. In Austria, the respective national competition authority is the Federal Competition Agency. So far, we are not aware of any case where the European Commission or the Federal Competition Agency has exercised this right.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no defence of justification by public interest available.

There is a general exemption from the cartel prohibition (Article 101 para 3 TFEU and Sec 2 of the Cartel Act) stating that cartels which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and which do not a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question, shall be exempt. This contains some “public” elements and therefore should be mentioned here.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

The 2017 amendment to the Cartel Act introduced an explicit provision governing passing on situations, stating that the passing on defence is admissible. The burden of proof for passing on rests on the defendant. However, this seems to be not much different to the law pre-amendment as derived from general principles of damage law. While the case law in Austria is not very far developed on passing on, German courts, while generally accepting the defence, recently discussed concepts to restrict this defence.

Further, the 2017 amendment confirmed that indirect purchasers have standing if they can establish that damages were passed on to them. For this, the indirect purchaser can invoke a rebuttable presumption that damages have been passed on. The presumption requires that the indirectly harmed customer establishes an infringement, a cartel mark-up on the level of the direct purchaser and that he obtained goods or services subject to the cartel behaviour.

Both for the passing on defence and for the argument of standing of the indirect customer, the possibilities of orders by the court for the presentation of evidence by the opposing party are available, subject to a balance of interest.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

In private civil law proceedings, as opposed to public fine proceedings, third parties with a legal interest in the outcome can support the position of the original party by accessory intervention (*Nebenintervention*). A defendant can notify other cartel participants, arguing that they have such legal interest to join (*Streitverkündung*). Whether or not they join is the notified parties' decision. However, once notified, a party can no longer (e.g. in procedures on recourse claims) argue as a defence that the case was not handled properly by the notifying party.

As stated explicitly in the law after the 2017 amendment, in passing on situations, the defendant can notify either the indirect purchaser or its direct customers (depending on who is suing) with a request to join the proceedings.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

With respect to the claims possible, it is necessary to distinguish between **claims for cease and desist** or **for findings** to be heard by the Cartel Court of the civil courts on the one hand and **claims for damages** to be heard by the civil courts only on the other hand.

The **Cartel Act** does not establish limitation periods for applications for cease and desist orders or decisions of findings. However, cease and desist orders can only be issued if the infringement is still ongoing. For decisions of finding, the required special interest will be more difficult to argue the more time has passed since the infringement has terminated.

Under the **Unfair Competition Act**, the limitation period for cease and desist orders is six months as of the point in time when the (potential) plaintiff has learned about the infringement and the identity of the (potential) defendant. Moreover, cease and desist claims are limited to three years after the end of the infringement. However, this is not the case where an illegal situation continues to the present. If this is the case, desist and/or recovery claims may be still brought.

Under **general civil law**, the limitation period for damage claims is three years from knowledge of the harm and the identity of the (potential) defendant. Under certain circumstances (where also a criminal offence is committed by a natural person), it could be argued that a 30-year period is relevant.

Again, the 2017 amendment brought significant changes about the statute of limitation. The Cartel Act now explicitly stipulates that damage claims based on an infringement of competition law become time-barred after five years from the point of time at which the harmed person becomes aware (or should have reasonably become aware)

of the infringer, the damage and that the behaviour which caused the damage constitutes a competition law infringement. This is supplemented by an objective limitation period, according to which the claim for compensation becomes time-barred in 10 years after the occurrence of the damage. None of these limitation periods starts unless the infringement was terminated. This new law applies to older claims which have not been time-barred on December 26, 2016, unless old rules effective on that date are more beneficial for the harmed party.

Under certain circumstances, the limitation of the claim for compensation is suspended (e.g. for the duration of the proceedings before or investigations by competition authorities and for settlement negotiations). The suspension ends one year after the decision of the competition authority has become final or one year after the proceedings were terminated otherwise. In case of settlement negotiations, after their abortion, an action must be filed or continued within reasonable time.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The duration of proceedings varies considerably and could take several years. Durations of proceedings with the Cartel Court (or another European or national competition authority) for fines, cease and desist or findings on the one hand and with civil courts for damages on the other hand need to be regarded separately. With the Cartel Court and criminal courts, one level of appeal must be considered, with the civil courts two appeals are possible if the case goes up to the Supreme Court.

Except waiving/skipping appeals, there are limited possibilities to speed up proceedings. Obviously, the better the preparation for bringing an action, the sooner the appointment of a court expert (for causation and amount of damages) and a judgment can be expected.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Parties do not require court permission to discontinue proceedings for damages in civil courts. The situation is different with proceedings before the Cartel Court. While parties can terminate proceedings, the Federal Competition Agency and/or the Federal Cartel Prosecutor can, within a period of 14 days as of service of the declaration that applications by private parties (e.g. for cease and desist or for findings) are revoked, continue proceedings against the defendant in their own name as Official Parties.

Moreover, in appeal proceedings before the Cartel Court of Appeals, the application initiating the proceedings can only be revoked with the consent of the defendant and the Federal Competition Agency, as well as the Federal Cartel Prosecutor.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As described in the answer to question 1.5, there are no collective claims in the narrow sense in Austria. If a "group action" based on assigned claims is settled, which is possible, the settlement is binding on all assigned claims.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In proceedings pursuant to the **Cartel Act**, there is only a reimbursement of costs if the application or defence was wanton (*mutwillig*), which is rarely awarded.

Under general **civil law**, the unsuccessful party must reimburse the winning party for (quite substantial) court fees, lawyers' fees and expenses. If success is only partial, the costs will be awarded *pro rata*. The amount of recoverable costs is determined by law in a system depending on the amount in dispute and the various activities (e.g. action, statement of defence, other briefs, hearings by the hour).

A party joining **criminal proceedings** is entitled to have its costs reimbursed if it succeeds in receiving compensation.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers under Austrian law are not permitted to act on a pure contingency fee basis, i.e. the fee is a part of the recovered amount in case of success. Other fee arrangements like hourly rates, even with a success bonus, are possible.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Funding by third party litigation financing is permitted. While we are not aware of antitrust cases where this has been used, in other areas of law such third party litigation financing occurs frequently.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions by the Cartel Court can be appealed to the Cartel Court of Appeals which is a special senate of the Supreme Court. However, the Cartel Court of Appeals does, beside the review of questions of law, review the facts established by the trial court only to a very limited extent, though this was improved by the 2017 amendment. A decision may now also be appealed to the Cartel Court of Appeals claiming that, according to the case files, there are substantial doubts about the correctness of the facts supporting the Cartel Court's decision.

Decisions by the civil district, regional or commercial courts can be appealed on two levels; the final appeal is heard by the Supreme Court. Generally, however, the Supreme Court will only hear cases showing fundamentally new questions of law.

Decisions by the criminal courts can be appealed as well.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is available under Austrian law. Leniency applications

must be filed with the Federal Competition Agency and may result in full immunity from fines for one applicant and/or a reduction of fines for any others. However, no general immunity from civil claims is granted. Since the 2017 amendment, the law grants a small benefit to the successful leniency applicant in that he is liable for damages only *vis-à-vis* his own direct or indirect customers, though harmed plaintiffs cannot receive payment from other defendants.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

In Austria, leniency is exclusively administered by the Federal Competition Agency; there is no leniency in court proceedings. However, the Cartel Court has a large discretion in determining fines and may well (negatively) consider when evidence is withheld. The leniency applicant has no general right of refusal, and just a few categories of documents are protected against disclosure. For more details, see the answer to question 4.5.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The amendment to Austrian competition law implementation of the EU Damages Directive entered into force on May 1, 2017, which led to a further strengthening of private enforcement. The Cartel Act now contains a rebuttable presumption that cartel infringements cause harm.

Under certain circumstances, small- or medium-sized undertakings and the leniency applicant receiving full immunity from fines are privileged in that they will be held liable only *vis-à-vis* their direct and indirect purchasers and providers.

Quite new to Austrian civil procedure is the introduction of disclosure provisions. Even third parties can be ordered to disclose evidence, subject to a balance of interests. Furthermore, evidence as contained in the files of courts and authorities may be subject to disclosure. For such evidence, the balance of interest also must consider the effectiveness of public enforcement. Documents which include, among others, information which was prepared specifically for these proceedings may only be disclosed after the competition authority has terminated the proceedings. Leniency statements and settlement submissions must not be disclosed at any time.

In the past, experience has shown that plaintiffs may have trouble when conclusively stating the facts to support their claim. This is mitigated under the new law, as "*the action has to be at least substantiated to the extent that it contains those facts and evidence which are reasonably available to the plaintiff and which sufficiently support the plausibility of a claim for compensation*" (see also the answer to question 4.2 above).

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Damages Directive has been implemented.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The (new) Sec 37a to 37m of the Cartel Act implement the EU Damages Directive. Sec 37a to Sec 37g are applicable to damages claims, concerning harm which occurred after December 26, 2016 only. Therefore, *inter alia*:

- the rebuttable presumption that cartel infringements caused harm;
- the exception concerning small- or medium-sized enterprises and the respective counter-exception;
- the restriction of the liability of immunity recipients; and
- the provision expressly governing passing on,

are only applicable to damages which occurred after December 26, 2016.

The new rules on disclosure apply to all proceedings in which the brief initiating the proceedings is (or has been) submitted after December 26, 2016.

Concerning limitation, the new limitation provision of the Cartel Act applies to claims which have not been time-barred on December 26, 2016. However, in case the infringements happened prior to and were not time-barred by that date, the old rules (e.g. limitation period of three years, or suspension of only six months after a final

decision or other termination of the proceedings before competition authorities instead of one year) apply in case they are more beneficial for the damaged party (see also the answer to question 6.1).

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

There are no other proposed reforms relating to competition litigation.



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Mag. Dieter Hauck earned his Master of Laws from the University of Vienna in 1989. After completing a postgraduate course in International Studies at the University of Vienna in 1990, he began practising as a lawyer, and has been a partner in the firm since May 1995. A member of the Studienvereinigung Kartellrecht e.V. (Cartel Law Academic Society), he specialises in EU, public procurement, merger and cartel law and follow-on cartel damage procedures. In all these matters, sound legal and tactical advice – in and out of court – is for Dieter Hauck as essential as a solution-oriented direct approach, effective case management and quick reactions to challenging situations.



Preslmayr Rechtsanwälte are experts in business law. Our clients, both from Austria and around the world, are primarily large and medium-sized businesses in manufacturing, banking, trade, information technology, advertising, tourism and telecommunications. We also advise investors. Many of our clients have depended on us to solve their complex legal problems for many years. We regard this as a sign of our clients' trust and satisfaction. Close cooperation with our clients is an essential element of our mutual success.

In advising our clients, we consider not only legal aspects but, above all, commercial objectives as well. We view ourselves as legal guides and problem-solvers with a knack for business, who work together with experts from other disciplines whenever necessary. This synergy of legal expertise, business sense and service-oriented management will also ensure the excellence of our services in the future.

Belgium

Thierry Bontinck



Pierre Goffinet



DALDEWOLF

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Under Belgian competition law, breach of competition actions can be brought before both the Belgian Competition Authority (“ABC”) and the judicial courts.

The ABC has jurisdiction to open an investigation for breach of competition rules (Articles IV.1 and IV.2 of the Belgian Economic Law Code – “ELC” – transposing Articles 101 and 102 of the Treaty on the Functioning of the European Union – TFEU).

Before the judicial courts, actions may be brought by individuals and undertakings on the basis of contractual responsibility (Articles 1146 *et seq.* of the Civil Code (“BCC”)) and/or extra contractual responsibility (Articles 1382 *et seq.* BCC).

Interim measures, including injunctions, are also available before the ABC and the judicial courts.

Moreover, the Belgian class action procedure (Article XVII.35 *et seq.* ELC) allows a representative to file a legal claim on behalf of a group of consumers, including in cases of breach of competition rules (EU regulations and Belgian law).

Finally, on 6 June 2017, the Belgian legislator adopted the Act on actions for damages for infringements of the competition law provisions (published in the Belgian Official Gazette (*Moniteur Belge*) on 12 June 2017, p. 63596; hereinafter the *Belgian Competition Law Damages Act*). This Act implemented Directive 2014/104 in the Belgian legal order and inserts a third chapter in Book XVII ELC (Articles XVII.71 *et seq.*).

1.2 What is the legal basis for bringing an action for breach of competition law?

The primary legal basis is Book IV ELC (antitrust practices, merger control). Moreover, class actions can be brought on the basis of Article XVII.35 *et seq.* ELC and, more specifically, actions for competition law damages can be brought on the basis of Article XVII.71 *et seq.* ELC.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from both national law and EU law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

In first instance, except for cases falling under the competence of the ABC, there are no specialised competition law courts (competence of the court of first instance or the commercial court, depending on the identity of the parties, the location of the registered office and the application of rules of private international law). Moreover, according to Article XVII.35 ELC, the Courts of Brussels are exclusively competent for class actions.

Appeals against ABC decisions are lodged before the Markets Court, part of the Brussels Court of Appeal (“BCA”) and specialised for litigation in regulatory matters.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Before the ABC, actions can be brought (i) on the ABC’s own initiative, (ii) on the basis of a complaint by any individual or undertaking demonstrating a direct and actual interest, or (iii) at the request of the Minister of the Middle Classes, Self-Employed, SMEs, Agriculture and Social Integration.

Before the judicial courts, any person or legal entity justifying a sufficient interest has standing to bring a claim based on contractual and/or extra-contractual liability.

In the Belgian legal framework, class actions are permitted on an “opt-in” or “opt-out” basis. For Belgian residents, the judge has the choice between an opt-in system and an opt-out system. For non-residents, only the opt-in system is available.

Furthermore, according to Article 8 of Regulation n° 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“*Regulation Brussels Ibis*”) and the *AKZO* case (CJEU, 21 May 2015, C-352/13, *Cartel Damages Claims / AKZO*), cartel participants may expect to be jointly sued in the courts of a Member State where one of them is domiciled.

On 22 March 2018, the Belgian Members of the Parliament approved a bill of law extending the scope of the class actions provisions to SMEs. The notion of SME shall mean undertakings employing less than 250 employees and whose annual turnover does not exceed

EUR 50 million and whose annual balance sheet does not exceed EUR 43 million.

Under the bill, the representation mechanism will be endorsed by an association with legal personality, approved by the Minister of Middles Classes, whose purpose is directly connected to the collective harm suffered by the group and which does not pursue an economic aim on a long-term basis. The bill should soon be published in the Belgian Official Gazette (*Moniteur belge*). It will enter into force 10 days as from its publication.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Brussels Courts have exclusive jurisdiction for class actions (Article XVII.35 ELC).

Moreover, in accordance with Article 7 of the Brussels *Ibis* Regulation, participants in an infringement may be sued before the courts of the place where the harmful event occurred or may occur.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Belgium should be seen as a favourable and attractive jurisdiction to bring a competition law claim, particularly since (i) the class action in Book XVII ELC entered into force on 1 September 2014, and (ii) the adoption of the Belgian Competition Law Damages Act.

As will be explained, Belgian law allows, among other things, (i) production of evidence in French, Dutch and English before the ABC, (ii) compensation for moral damages even in class actions, and (iii) limited legal costs.

Regarding the private enforcement, the Belgian Competition Law Damages Act transposes Directive 2014/104 in Belgian law. The Act contains certain points that go beyond the Directive (for example, a wider definition of cartels including horizontal but also vertical agreements and concerted practices concluded between competitors or between non-competitors).

On 27 April 2018, the Belgian Council of Ministers approved a draft bill setting up the “Brussels International Business Court” (“*BIBC*”). The *BIBC* will be an English-speaking court with jurisdiction over international commercial disputes between companies. The court will be highly-specialised and composed of non-professional judges. The new court is expected to deal with cases in a faster way than the common courts. The creation of the *BIBC* seeks to participate in making Brussels an attractive place for settling international disputes. The *BIBC* is expected to operate in January 2020.

1.8 Is the judicial process adversarial or inquisitorial?

Before the ABC, the pre-trial phase is inquisitorial and the trial phase is adversarial.

Before the judicial courts, the procedure is adversarial and public.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available under Article IV.64, §1, ELC.

2.2 What interim remedies are available and under what conditions will a court grant them?

The ABC is empowered, upon request of a party, to adopt interim measures in cases where there is an imminent risk of serious and irreparable prejudice for other parties or the public interest.

According to Article IV.64 ELC, the hearing is set within one month following the submission of the claim with a possible extension of one two-week term. The college of the ABC shall have one month to reach a decision, which is subject to appeal before the Markets Court of the Brussels Court of Appeal.

Upon request, in case of duly justified urgency, judicial courts can also impose interim measures, specifically within the legal framework of interlocutory proceedings (*référé*).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The ABC can (i) order interim measures as well as the termination of an anticompetitive practice, (ii) negotiate settlements, and (iii) impose fines of up to 10% of global turnover and a penalty of up to 5% of the average daily turnover (in cases where an interlocutory or final decision is not respected).

Before the judicial courts, in both class actions and individual claims, the damages will cover the entirety of the damage incurred (including moral damage) so as to restore the victims to the situation they would have been in were it not for the existence of the cartel (including, compensation for actual loss and for loss of profit, plus the payment of interest). The compensation will take the form of a financial indemnity covering the entire period of the damages and, *a priori*, without taking into account the fines possibly imposed by the Commission or the ABC.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Damages are an available remedy under Belgian law, while exemplary damages cannot be awarded by Belgian courts.

In principle, the damages will cover the entire incurred prejudice which has to be demonstrated by the applicant (this notably requires a test of the different theories of harm under competition law (*e.g.*, to calculate the effective prices in case of pricing abuses) and to assess the different models designed to estimate damages). The damages could only be compensated by means of a financial indemnity.

If necessary, an expert can be appointed to give a report on the extent of the financial prejudice (costs shall be borne by the parties) (see question 4.4).

Moreover, the Belgian Competition Law Damages Act allows the judge to ask the Belgian Competition Authority for assistance in the quantification of the damages (Article IV.77, §2 ELC).

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Fines imposed by competition authorities are not taken into account by the judicial courts. The plaintiff can seek integral compensation of the damage incurred.

4 Evidence

4.1 What is the standard of proof?

In Belgium, the standard of proof is subject to general rules applicable to judicial proceedings. Each litigant should demonstrate the factual elements he invokes in his writ, and the judge must be convinced.

According to the Belgian Judicial Code (Article 870 *et seq.*), these elements can be established in many ways: a document; through expertise ordered by a judge; corroborating presumptions; and testimony, etc.

However, the Belgian Competition Law Damages Act provides (i) that the infringement caused by a cartel is refutably presumed to incur damage, and (ii) that a final decision of the ABC or the Brussels Court of Appeal is an irrefutable presumption of competition law infringement.

4.2 Who bears the evidential burden of proof?

In principle, the burden of proof lies with the litigant who alleges a fact. However, according to the Judicial Code, litigants have the obligation to collaborate in administering evidence. Under some conditions, the judge can order any litigant to produce the evidence at its disposal. Especially when there are serious reasons to suspect that a litigant or a third party has a document that supports a relevant fact, the judge has the power to order him to produce this document. In practice, judges tend to balance the relevance of the evidence, the legality of a refusal and the opportunity to deliver an “order to produce evidence”.

Given the asymmetrical position of the parties in competition law litigation, in most cases relevant evidence that can establish damages are in the hands of the opposing party or a third party. The Belgian Competition Law Damages Act facilitates the burden of proof for the claimant; for example, by easing the condition under which the judge can (i) under certain circumstances, give access to the BCA’s file (Articles XVII.78 *et seq.* ELC), and/or (ii) order the opposing party or a third party to produce documents that are in its hands (Articles XVII.74 *et seq.* ELC), with the exception of settlement proposals and leniency applications (and any related element).

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

According to the Competition Law Act, an infringement of competition law found by a final decision of the ABC or the Brussels Court of Appeal is deemed to be irrefutably established for the purpose of an action of damages brought before a national court. Furthermore, the Belgian Competition Law Damages Act creates a rebuttable presumption that a cartel causes harm.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There is no limitation regarding the forms of evidence that litigants can use before judicial courts. However, a litigant can invoke commercial confidentiality to refuse to provide the judge and other parties with some evidence (see question 4.5 for the condition under which a judge can order the production of evidence covered by confidentiality). In addition, as above-mentioned, declarations made in a leniency procedure and/or in a settlement procedure are strictly confidential and cannot be disclosed.

The Judicial Code provides that the judge may appoint experts to reach conclusions or to give technical advice. The judge may appoint experts chosen by the parties, or choose another expert with a reasoned decision. Beyond that, the Code regulates precise conditions under which experts can be revoked, the performance of the expertise, the interaction between experts and the litigants, etc. It also provides that the judge has no obligation to follow the final report written by the experts.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

As a general principle, Article 879 of the Judicial Code provides the judge with different ways to balance the obligations of litigants to collaborate in administering evidence and the protection of business confidentiality. As mentioned above, the judge has the power to order a party to produce a document under certain conditions: (i) the written evidence has to contain the proof of a relevant fact for the final decision (in order to avoid a so-called “fishing expedition”); (ii) the written proof regards a document; (iii) there are serious reasons to suspect that a litigant or a third party, including competition authorities, has the document; and (iv) the document has to be in the hands of a litigant or a third party.

However, even if these four conditions are met, the judge still has a margin of appreciation to decide whether or not the document has to be produced. In addition, in practice, many authors have observed that courts are still reluctant to order the production of confidential documents.

Furthermore, the Belgian Competition Law Damages Act specifies in which circumstances and under which conditions a private party could obtain access to evidence from another party, a third party or the BCA. However, the Belgian Competition Law Damages Act excludes the production of any settlement proposals and/or leniency applications (and any related element) (Articles XVII.74 *et seq.* ELC). For the other types of evidence, the judge keeps a certain margin of appreciation, and determines on a case-by-case basis whether the document has to be produced.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses are rarely called before the courts. Nevertheless, theoretically, according to Articles 924–936 of the BJC, any person above the age of 15 could be called as a witness in civil proceedings. However, the witness could refuse to testify if he has a legitimate reason (*i.e. force majeure*, professional privilege). In case of refusal to testify without a legitimate reason, the witness could be fined by the court.

Article 942 of the BJC allows cross-examination of witnesses, although this cross-examination is not equivalent to the one existing in Anglo-Saxon countries. More concretely, witnesses are only interrogated by the judge on the basis of the questions listed by the litigants. The latter are forbidden to interrupt a witness or to directly ask a question.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The Belgian Competition Law Act provides that an infringement of competition law found by a final decision of the ABC or the Brussels Court of Appeal is deemed to be irrefutably established for the purpose of an action of damages brought before a national court. Conversely, a final decision of another national competition authority or the appeal authority shall only be considered as *prima facie* evidence of the infringement (Article XVII.82 ELC).

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As mentioned above (see question 4.5), the discussion regarding commercial confidentiality is frequently raised in case a litigant asks for the production of a document. We mentioned that the judge has the power to order the production of a document under some conditions prescribed in Article 877 of the Belgian Judicial Code. However, it should be noted that, even if the legal conditions are met, the judge retains a margin of appreciation, and analyses on a case-by-case basis whether the document has to be produced. They have to balance the relevance of the evidence, the legality and legitimacy of a refusal based on commercial confidentiality and the opportunity to deliver an “order to produce evidence”. In practice, many authors have observed that courts are still reluctant to order the production of confidential documents.

Under the Belgian Competition Law Damages Act, judges are required to take appropriate measures to ensure the protection of confidential information (such as the possibility of redacting sensitive passages in documents, restricting the persons allowed to see the evidence, or instructing experts to produce summaries of the information in a non-confidential form).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

According to Article IV.77 ELC (*amicus curiae*), the BCA might, *ex officio* or at the request of a court, give its observations on a pending case.

However, in practice, the BCA barely appears in courts as *amicus curiae*.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Article IV.5 ELC allows the Belgian legislator to adopt a royal decree setting out the practices exempted from the application of

Articles VI.1 and IV.2 ELC. Such a decree has not been proposed so far.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

The Belgian Competition Law Damages Act introduces the “passing-on defence” (Articles XVII.83 *et seq.* ELC) in Belgian law.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Articles 30, 566 and 856 of the BJC regulate questions of related actions and the possibility to join the cases.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Before the BCA, according to Article IV.80 ELC: five years for infringement of competition law; and three years for infringement of procedural obligations.

Before the judicial courts, general rules regarding limitation periods apply (Articles 2262 *et seq.* of the BCC). The limitation period is 10 years for contractual liability and five years for extra-contractual liability from the day after the claimant became aware of the issue (and 20 years from the day following the day the event giving rise to the action took place).

In addition, the Belgian Competition Law Damages Act provides that the limitation period starts the day after the infringement ended. Moreover, the limitation period is (i) interrupted by any action taken by the ABC proceedings in respect of an infringement of competition law to which the action for damages relates (and the limitation period restarts the day after the final decision of the ABC), or (ii) suspended by consensual dispute resolution mechanisms, except arbitration (the suspension is limited to a maximum two-year period when the legal proceedings were instituted before the initiation of a consensual dispute resolution mechanism).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Depending on how complex the case is, the average length of proceedings can be estimated at:

- Before the BCA, six months for infringement of competition law (average period, BCA annual report 2015) and between 30 days and two months and two weeks for interim measures.
- Before the civil and commercial courts, one to two years.
- Before the courts of appeal, three to seven years.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

In class actions, a settlement has to be submitted to the court for

validation (*homologation*). However, in actions for damages, the parties are free to end by negotiating a settlement.

Before the ABC, the settlement procedure is initiated on the ABC's own initiative.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Individual consumers are represented by a "group representative", previously identified (i) as a consumer organisation with legal personality which is also represented in the "*Raad voor Verbruik*" / "*Conseil de la Consommation*" or is recognised by the Minister of Economic Affairs, or (ii) as an association which has had legal personality for over three years, which has a corporate purpose directly related to collective damages, which does not pursue an economic purpose in a sustainable manner, and which is recognised by the Minister. The Minister has discretionary powers in this regard.

It is important to note that the Belgian Constitutional Court annulled Article XVII.39 ELC as it does not allow entities from other Member States to bring a representative action before the Belgian courts (Decision n°41/2016 of 17 March 2016, published in the Belgian Official Gazette (*Moniteur belge*) on 2 June 2016, p. 33,969). Consequently, any qualified entity from other Member States where the interests protected by that qualified entity are affected by the infringement, may bring an action before a Belgian court (new Article XVII.39 ELC, entered into force on 4 May 2017).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The awarding of legal costs in civil and commercial actions is intended to compensate the successful party for some of its legal costs.

Legal costs comprise (i) the fees and charges to be paid to the court, (ii) the bailiff's fees, (iii) the possible experts' fees, and (iv) the procedural indemnity (supposed to cover the lawyers' fees or at least a part of them).

Procedural indemnity is set by the court on the basis of Article 1022 of the Judicial Code and the Royal Decree of 26 October 2007 in proportion to the value of the case; it varies between a minimum of €150 and a maximum of €30,000.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are free to determine the amount of their fees and their method of calculation. Part of the fee could be determined on a contingency basis, although the client's prior approval is needed.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

In class actions, the group representative covers the charges and fees of the proceedings.

Otherwise, Belgian law does not prohibit third party funding including legal expenses insurance.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the ABC can be appealed before the Brussels Court of Appeal (Markets Court) within 30 days as from their notification (Article IV.66, §2, ELC).

The decisions of the court of first instance and of the commercial court can be appealed before the Court of Appeal.

Furthermore, the decisions of the courts of appeal can be appealed in cassation before the Supreme Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Article IV.46 ELC provides for undertakings and individuals to apply for a leniency programme. In 2016, the Belgian Competition Authority adopted new Leniency Guidelines (hereinafter "*LG 2016*"). The Guidelines are still limited to cartel cases, with express exclusion of other types of agreements or abuses of dominance.

Pursuant to paragraph 10 of the LG 2016, the exemption solely applies to sanctions imposed by the Belgian Competition Authority under Book IV ELC.

However, according to Directive 2014/104, the Belgian Competition Law Damages Act limits the liability of a company which has been granted immunity from fines under a leniency programme to an amount not exceeding the amount of the harm it caused to its own direct or indirect purchasers or providers.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

A successful or unsuccessful leniency applicant is not required to produce any confidential documents in subsequent court proceedings.

Furthermore, pursuant to paragraph 78 of the LG 2016, the Belgian Competition Authority is not allowed to release any document related to a leniency and/or immunity application to the judicial courts in the course of a procedure of private enforcement.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

In Belgium, the judicial case-law in competition matters is not as developed as it could be for several reasons, including access to

evidence, legal uncertainty, limitation periods or problems with damage assessment.

The Belgian Competition Law Damages Act shall facilitate judicial proceedings in competition law matters (see question 11.2 below).

To date, the Belgian jurisdictions have not yet rendered any decision on the application of the Belgian Competition Law Damages Act.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

Directive 2014/104 has been transposed in Belgian law with the Belgian Competition Law Damages Act. The Act entered into force on 22 June 2017.

The Act applies to every infringement of competition law, irrespective of whether it constitutes a violation of Belgian or EU antitrust rules. The Act applies in conjunction with the provisions of liability contained in the BCC (Article XVII, 7, §2, ELC).

The main features of the Act are as follows:

- The Act provides full compensation for the victims of a cartel (as the general rule in Belgian law).
- The Act creates a rebuttable presumption that an antitrust infringement causes harm. The Act also creates a non-rebuttable presumption that a decision from the BCA or the Court of Appeal proves the existence of an antitrust infringement.
- The Act shall ease the collection of evidence. Under the Act, courts are entitled to request from a party or a third party, such as the BCA, to produce any evidence, with the exclusion of leniency applications and settlement proposals.
- As mentioned above, the Act introduces in Belgian law the concept of “passing-on” defence, *i.e.* the right to mitigate the company’s liability by demonstrating that all or some overcharges have been passed on to the victims’ customers.

- Under the Act, the infringers are jointly and severally liable for the harm caused by the violation of the antitrust rules. Accordingly, each of them is obliged to fully compensate the harm caused by the antitrust violation, and the victim has the right to request each infringer a full compensation until he has been fully compensated. However, SMEs and immunity recipients are liable *vis-à-vis* their sole own customers and suppliers. But they remain liable towards other injured parties where full compensation could not be obtained from the other participants in the antitrust infringement.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The Belgian Competition Law Act shall apply only to proceedings introduced after 26 December 2014, without any other limitation.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Three years after its entry into force, a remedial bill to the ELC could be adopted.

Acknowledgment

The authors would like to acknowledge the third author of this chapter, Laure Bersou.

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Based in Brussels, DALDEWOLF is composed of 35 lawyers, whose expertise is widely recognised in their respective fields. Working closely with our clients, we are organised in expert teams, set up in order to meet our clients' needs in their business.

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Brazil



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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Civil lawsuits are available for all types of anticompetitive practices. The Brazilian Competition Act (Federal Law 12,529/2011) is the primary competition law in Brazil. It prohibits unreasonable restraint of trade and monopolisation. It lists examples of punishable anticompetitive practices, such as price fixing, tying and predatory pricing, among others. Further, it deems illegal any act that produces or can produce the effects of (i) limiting, restraining, or harming competition or free enterprise, (ii) controlling a relevant market, (iii) arbitrarily increasing profits, or (iv) abusing a dominant position.

The Brazilian Industrial Property Act (Federal Law 9,279/1996) deals with civil lawsuits for unfair competition acts. It lists 14 acts, including gaining a competitive advantage by publishing false information about a competitor, and obtaining a competitor's confidential information illegally. Negative impacts on competition are not required to that end; acts that merely harm a competitor are punishable under said law.

Plaintiffs may invoke civil and consumer protection federal law in addition to the Competition Act.

1.2 What is the legal basis for bringing an action for breach of competition law?

The Brazilian Competition Act authorises plaintiffs to seek damages, injunctive reliefs, or both for anticompetitive practices.

While the Competition Act contains a specific provision on the recovery of damages, plaintiffs can sue under the Civil Code (Federal Law 10,406/2002), which establishes that plaintiffs can recover damages for illegal acts.

The Consumer Protection Code (Federal Law 8,078/1990) applies if the anticompetitive practice involves a consumer. It contains specific procedural and substantive rules that govern lawsuits involving consumers. For instance, it provides double damages awards, and shifts the burden of proof to the vendor.

The Public Civil Action Act (Federal Law 7,347/1986) governs class actions in Brazil, including those involving anticompetitive matters.

The Brazilian Industrial Property Act (Federal Law 9,279/1996) reads that a competitor may seek redress of losses caused by another competitor for certain unfair competition acts. States cannot regulate competition law in Brazil for federal pre-emption on this subject.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The Brazilian Constitution gives federal and state courts jurisdiction to hear anticompetitive matters. While state courts can hear most cases, federal courts have jurisdiction over limited types of cases. Federal courts will primarily hear cases involving harm to the federal government or a federal company.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

In 2017, the National Council of the Federal Justice recommended the creation of specialist courts in competition and international trade law. Federal courts in the Southeast region and in the Federal District have started considering this possibility. Courts in the Rio de Janeiro and Espírito Santo states launched specialist courts, but apparently they have not yet been assigned any cases.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Anyone directly or indirectly injured by an anticompetitive practice has standing to sue. Generally, a plaintiff must show injury in fact to have standing.

The judge may order the joinder of parties or claims even if the parties have filed separate lawsuits. Multiple plaintiffs and defendants are possible in the same civil lawsuit: if they are in any way related to the same anticompetitive practice; if they are subject to the same jurisdiction; and if plaintiffs have made similar claims.

Plaintiffs can seek recovery of damages through class actions when there are multiple plaintiffs or multiple defendants involved in a common question of fact. The injured parties usually do not have standing to file a class action. The Public Civil Action Act contains an exhaustive list of those who have standing to bring a class action, namely: the Public Prosecutor's Office; the Public Attorney's Office; federal, state and local governments; state-owned companies or foundations; and specific associations.

Despite the usual lack of standing, injured parties can join the case as assistants to the plaintiff. A plaintiff in class actions must identify

the injured parties, and can add new ones as the case develops. Injured plaintiffs in a separate lawsuit regarding the same matter can ask for a stay in proceedings until the judge of the class action issues a final decision.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The court is entitled to take on a competition law civil claim if it has personal jurisdiction where the plaintiff is domiciled or the anticompetitive practice took place. The courts will hear the case if the defendant is domiciled in Brazil, the act took place in Brazil, or the defendant must perform the relief in Brazil.

State or federal courts will hear the case if they have subject-matter jurisdiction. State courts have general subject-matter jurisdiction to hear civil antitrust claims. The jurisdiction of federal courts is governed by the Federal Constitution (article 109, paragraph 1), which reads that federal courts have exclusive jurisdiction over cases in which the Federal Government, a federal agency, or a federal state-owned company is a plaintiff, defendant, or intervenes on the matter.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Although possible for decades, damages lawsuits are still uncommon in Brazil. In the last decade, however, complaints have gained traction with some help of the Brazilian antitrust authority (CADE). While CADE enforces the Competition Act in the administrative sphere, by imposing administrative penalties, it is shaping its opinions to be better suited as evidence in damages suits. Also, CADE has forwarded its decisions to potential plaintiffs alerting them about the possibility of a civil lawsuit.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial. The Public Prosecutor's Office can initiate a mostly inquisitorial procedure that precedes a class action. This proceeding is used to gather evidence of anticompetitive practice. After collecting the evidence, the Prosecutor must litigate the case in an adversarial judicial process before the courts.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, they are.

2.2 What interim remedies are available and under what conditions will a court grant them?

Preliminary injunctions are the principal interim remedy available in Brazil. The plaintiff must show: that irreparable harm looms unless the injunction is granted; that the remedy is necessary to preserve the plaintiff's rights; and that the effects of such injunction are reversible if the plaintiff's claims are eventually defeated. The courts may issue an injunctive order before or after hearing the defendant. Usually, courts render it after hearing the adverse party. In exceptional circumstance the courts determine interim remedies. Courts are more likely to grant interim measures if there is evidence

that the anticompetitive conduct is ongoing and causing harm to the plaintiff and the plaintiff convinces the judge that it is likely to be successful on the merits of the case. Courts will deny preliminary injunctions if the harm is merely monetary damage and the defendant is not suspected of dissipating its assets to avoid payment.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Courts can grant damages or an injunctive relief if the plaintiff succeeds in the lawsuit. The defendant may be sentenced to pay compensatory damages, including expectation damages and, in more specific cases, consequential damages. Expectation damages usually encompass the sum of the plaintiff's financial losses. Judges can also award compensation for moral damage. The law does not have a strict rule on how to calculate moral damages. However, judges usually consider the gravity of the offence, as well as the financial status of the plaintiff and the defendant.

Courts have broad discretion to determine injunctive reliefs. An injunctive order usually summons the party to cease the anticompetitive conduct, such as stop market allocation and start offering the product in specific markets.

If the commercial relationship between the litigants qualifies as a consumer relation under the Consumer Protection Code, the defendant may be sentenced to pay double damages (i.e., twice the amount unduly paid in excess), plus indexation and interest.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

The plaintiff must present a substantiated computation of damages. The court may order the defendants to provide their financial records for calculation of overpricing if such information is necessary to calculate the plaintiff's losses.

Double damages are already available in consumer cases. Because the damages usually take into consideration confidential financial information, the damages awarded are secret.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Damages awarded by courts in civil claims do not prevent criminal courts from imposing fines in addition to other criminal penalties, and do not prevent CADE from imposing administrative sanctions against the plaintiff.

4 Evidence

4.1 What is the standard of proof?

Civil law does not establish a specific standard of proof. The judge

must issue a sound judgment based on the evidence submitted by the parties. Under the law, the standard of proof in civil procedures is lower than in criminal proceedings. In criminal cases, plaintiffs are required to show their claim beyond any reasonable doubt. In civil litigation, judges usually decide based on the preponderance of evidence standard.

4.2 Who bears the evidential burden of proof?

Generally, the plaintiff initially bears the burden of proof. In addition to stating the matters of fact, the plaintiff must substantiate its claims and indicate how additional evidence is to be obtained. Once the plaintiff has proved a fact, the burden of proof switches to the defendant, who should convince the judge otherwise by sufficient counter-evidence.

This general burden of proof does not apply to consumer relations under the Consumer Protection Code. Plaintiffs may only state the facts that support their reasonable claim, while defendants carry the burden of proving that those asserted facts are incorrect, false or unrelated to the claim.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Only criminal convictions are binding on civil courts in terms of fault, fact and existence of damage. The parties in civil litigation have almost no room to challenge the conclusions issued in criminal cases. While presumptions may apply on the existence of damage, the criminal convictions will not determine the actual loss caused to the plaintiff. However, criminal case dismissals are not conclusive for civil cases because a criminal procedure has a higher standard of proof than civil proceedings.

Decisions issued by other civil courts on the same matter and decisions issued by CADE in the administrative sphere are persuasive but not conclusive.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Courts accept any legal and moral real, documentary and testimonial evidence. The Civil Procedure Code does not limit the elements admissible into evidence in civil litigation. For instance, hearsay or character evidence is not prohibited.

Judges accept expert evidence and may hire an expert to serve the court. The parties may submit reports prepared by expert witnesses or hear them as a witness. Expert witnesses can use any extrinsic evidence for their opinion. The other litigant or the judge may order the expert witnesses to submit the evidence they relied on in rendering the opinion.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The Civil Procedure Code authorises any type of evidence, provided that it was legally and morally obtained. Hearings, documents, expert opinions and copies of other public proceedings are examples of evidence usually admitted in private antitrust litigation.

Courts admit documents produced in CADE investigations. The Superior Court of Justice – STJ has authorised a party to have access to a full copy of the confidential leniency agreement executed with CADE after issuance of its final decision on the case. According to the STJ, CADE is obliged to provide a copy of the leniency agreement in a private antitrust litigation after CADE's Tribunal (the decision-making body of the antitrust authority) issues its final decision.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses can be forced to appear by court order. Cross-examination of witnesses is possible.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Courts in Brazil normally take foreign decisions into consideration, despite the non-binding nature of such alien documents.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

The Superior Court of Justice – STJ has ruled that the judge receiving the copy of a leniency agreement could have certain competition-sensitive excerpts of such document redacted. Otherwise, the document should be available to the parties. Further, the STJ has decided that if the procedure contains confidential information, the civil lawsuit should be kept sealed.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The court must notify CADE about any civil litigation involving the Competition Act. CADE can decide to participate in the case as an assistant. CADE's Attorney General represents the authority in the lawsuit.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Generally, there is no defence of public interest available. The law is enforced against any party that infringes the Competition Act. However, for companies that are active in highly-regulated markets, a common defence is that they comply with regulation allegedly conflicting with the Competition Act.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The passing on defence is available. In specific circumstances, indirect purchasers may have legal standing on showing the damage caused and causation.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Defendants may join their own directors and officers as well as companies of their own economic group as jointly liable for the anticompetitive practice. The court may order the joinder of other cartel participants as defendants if the judge believes that they also caused damage to the plaintiff. These new co-defendants are jointly and severally liable for the damage caused to the plaintiff.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Plaintiffs have three years to file the damages lawsuits. As a general rule, the limitation period starts running when the event triggering the liability occurred. Some contend that the limitation period should begin to run only when the affected party is aware of the infringement. The issue is extremely controversial and is being disputed before the Brazilian courts. Bills at the Brazilian Congress are trying to establish the issuing of CADE's final decision on the violation as the moment when the limitation period starts to run for the affected parties to file a damages lawsuit.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

A typical breach of competition law claim can take more than 15 years until a final and conclusive judgment is issued. Expedited proceedings are not available, but stakeholders, such as CADE, are discussing bills that would accelerate the proceedings.

Under the Civil Procedure Code, the parties to a dispute can agree on some specific deadlines for responses and appeals. However, these changes would have a marginal impact on the time that the procedure would usually take.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

The parties must get the settlement recognised by the judge so that the case can be formally shelved. In certain very specific cases, the parties can settle without the consent of the judge. In those cases, the parties must require the court to close the lawsuit.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Collective settlements are also permitted when the plaintiff in a class action is the Public Prosecutor's Office, given the powers that the Brazilian Constitution and federal law have bestowed on such institution. However, injured parties may decide not to join the settlement (opt-out).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The unsuccessful party has to reimburse the prevailing party for the court costs (including filing fees, expert fees and other expenses). Further, the unsuccessful party has to pay the counterparty attorneys' fees. Under the Civil Procedure Code, court-defined attorneys' fees range from 10% to 20% of the value of the lawsuit. Those fees have no connection to the contractual attorneys' fees, i.e. the ones negotiated between the parties and their lawyers.

Exceptionally, the court may dismiss entities and individuals from paying court costs and fees on evidence that they lack financial resources.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes. In Brazil, it is quite common for lawyers to work on a contingency fee basis.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Under Brazilian law, third parties are not expressly prohibited from funding litigation. Third party funding is not conventional but seems to be growing in Brazil.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes. Parties can appeal against interlocutory and final decisions. The Civil Procedure Code provides for filing of various appeals, not only to the trial judge and to the court of appeals, but also to the Superior Court of Justice – STJ (when federal law issues are involved) and/or to the Federal Supreme Court – STF (when direct violations of the Federal Constitution are involved). Only the court of appeals can review *de novo* the facts and evidence made available to the first instance court judge. The STJ's and the STF's reviews are limited to legal issues, i.e. they are not allowed to review facts or evidence discussed in the lower courts.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

CADE has offered leniency agreements since 2000. CADE's programme is considered very successful, and over 80 leniency agreements have already been executed. Neither successful nor unsuccessful applicants are given immunity from civil claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The Superior Court of Justice – STJ has ordered CADE to share a copy of a confidential successful leniency agreement to the courts in a civil litigation. Although there is no decision by superior courts on the obligation to share with courts an unsuccessful leniency agreement, the Competition Act establishes that CADE will keep the proposal of a leniency agreement by unsuccessful applicants confidential.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable in Brazil.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable in Brazil.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable in Brazil.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The Brazilian Congress is currently discussing a number of bills that aim at fostering private litigation in Brazil while protecting the Brazilian leniency programme. The most important bill, No. 283, proposes several changes to the law. On the one hand, it increases protection of the defendant who signed the leniency agreement (the lenient). For instance, it provides that violators, except the lenient, must pay double damages. The bill also establishes that the lenient should not be jointly and severally liable. On the other hand, it contains provisions that benefit the plaintiff. For example, it includes rules extending the limitation period after CADE issues its decision. The bill further authorises the court to expedite the judicial proceedings by giving full faith and credit to CADE's decisions.

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Pinheiro Neto Advogados' Competition Law Practice Group is part of the firm's highly regarded Litigation Department. The experienced team has in-depth knowledge of the judicial proceedings underway in the various Brazilian courts and has particular expertise and knowledge in appellate litigation before the country's superior courts sitting in Brasília. Pinheiro Neto has equity partners and complete teams of associates with expertise in competition law not only in São Paulo but also in Brasília, where the authorities conduct the investigations and judgments. The team has recently been very active in helping clients in the review and/or implementation of internal investigations and compliance training programmes. The team members have published various articles in the field and have been constantly recognised by *Who's Who*, *Chambers & Partners*, *Best Lawyers*, LACCA Approved and other institutions as leading practitioners in Brazil.

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The key legislation in Canada for the regulation of competition is the Competition Act, R.S.C. 1985, c. C-34 (Act). The purpose of the Act is to maintain and encourage fair competition in Canada by ensuring that Canadian firms and markets operate competitively. The Act includes provisions that regulate civil practices (such as mergers, refusals to deal, price maintenance, exclusive dealing, tied selling, abuse of dominance, competitor collaborations and deceptive marketing practices) and those that prohibit criminal conduct (e.g., conspiracies, bid-rigging, etc.).

Civil breaches of the Act are enforced by the Commissioner of Competition (Commissioner), an independent law enforcement official who is responsible for the administration and enforcement of the Act. The Commissioner is the head of the Canadian Competition Bureau (Bureau), an independent branch of the Federal Government, which investigates civilly reviewable matters under the Act.

Where parties have breached the civil provisions of the Act, the Commissioner can apply to the Competition Tribunal (Tribunal) (a specialised court responsible for adjudicating applications relating to civilly reviewable matters) to have the matter heard. The nature of the remedies that can be granted by the Tribunal vary depending on the civil provision that has been breached.

Breaches of the criminal provisions are prosecuted by the Public Prosecution Service of Canada (PPSC), a part of the Federal Department of Justice. While the Bureau investigates criminal violations, where there is evidence of a criminal offence, the matter may be referred to the PPSC for prosecution (along with the Bureau's analysis and assessment of the matter, as well as its recommendations on immunity/leniency (if applicable) and sentencing).

Thus, competition litigation may arise in the context of the Commissioner enforcing the civil provisions of the Act or the PPSC enforcing the criminal provisions of the Act.

Additionally, section 36 of the Act provides that any person who has suffered loss or damage arising out of conduct that contravenes the criminal provisions of the Act, or as a result of a breach of a Tribunal (or court) order, has the right to commence a private right of action to recover the damages suffered (limited to the actual loss), plus legal costs. Under section 36, a claimant must establish (on a balance of probabilities – the civil standard of proof): (a) the elements of the offence; and (b) the actual loss or damage suffered (as a result of the

illegal conduct). A civil action can be launched by a claimant acting either in an individual capacity or as a representative of a class of claimants in a class action.

The criminal provisions that are the subject of section 36 actions are typically sections 45, 46 and 47 of the Act. (Actions have also been commenced for breaches of the criminal misleading advertising provisions of the Act, but these are not the focus of this chapter.) Section 45 of the Act prohibits naked restraints on competition (conspiracies), specifically, any agreements or arrangements between competitors (or potential competitors) to fix prices, allocate customers or markets, or restrict output. Section 46 of the Act prohibits the implementation, by a corporation, of a foreign directive or instruction that gives effect to an agreement that would have contravened Canadian law if it had been arranged in Canada. Section 47 of the Act prohibits bid-rigging (that is, an agreement between two or more parties, to submit a pre-arranged bid or not to submit a bid, in response to a call for bids or a request for tenders). (Where the agreement has been made known to the person requesting the bid, at or before the bid is submitted, the agreement is not illegal.)

Actions commenced under section 36 are generally accompanied by claims for breaches of various common law torts (e.g., civil conspiracy) and equitable relief. Section 36 actions are commenced by private parties, not the Commissioner.

This chapter will focus on civil competition litigation arising: (i) out of the Commissioner's enforcement of the civil provisions of the Act; and (ii) actions launched under section 36 of the Act. It will not consider criminal litigation arising from the PPSC's enforcement of the criminal provisions of the Act.

1.2 What is the legal basis for bringing an action for breach of competition law?

See our response to question 1.1 above.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

National law. The Act is a federal statute; Canadian provinces do not have their own competition law legislation.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Civil Provisions

As discussed above in the response to question 1.1, civil breaches of

the Act are reviewed by the Tribunal, a specialised court responsible for adjudicating applications relating to civilly reviewable matters under the Act. Appeals of decisions of the Tribunal are heard by Canada's Federal Court of Appeal.

Section 36 Actions

Claims commenced under section 36 of the Act can be commenced in Canada's provincial courts or the Federal Court of Canada.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Civil Provisions

The Act confers on the Commissioner alone the authority to bring applications to enforce the civil provisions of the Act, subject to one exception under section 103.1. This section allows private litigants a limited right to seek relief directly from the Tribunal (with leave from certain restrictive agreements or practices (namely, refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction).

Section 36 Actions

As discussed above in the response to question 1.1, section 36 of the Act provides that any person who has suffered loss or damage arising out of conduct that contravenes the criminal provisions of the Act, or as a result of a breach of a Tribunal (or court) order, has standing to commence a private right of action to recover the damages suffered (limited to the actual loss), plus legal costs. Such actions can be launched by a claimant acting either in an individual capacity or as a representative of a class of claimants in a class action. (Each of Canada's provinces (and the Federal Court of Canada) has class action legislation.)

Whether an action will be certified as a class action will depend on whether it meets the criteria for certification in that jurisdiction. Typically, the following criteria must be met: (a) the claim must establish a viable cause of action; (b) there must be an identifiable class of two or more people who are willing to be represented by a representative plaintiff; (c) the claims of the class members raise common issues; (d) a class action would be the preferable procedure for resolution of the action; and (e) there is an appropriate representative plaintiff. Whether parties can "opt-in" to or "opt-out" of a class varies by jurisdiction.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Civil Provisions

Canadian administrative tribunals derive their jurisdiction from two sources: (i) express grants of jurisdiction (explicit powers); and (ii) the common law doctrine of jurisdiction by necessary implication (implicit powers) (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 1 S.C.R. 140, at para. 38). The Tribunal derives its explicit powers come from the Act and the *Competition Tribunal Act*, R.S.C 1985, c.19.

Section 36 Actions

Provincial courts and the Federal Court of Canada have jurisdiction to hear section 36 actions, whether brought on behalf of an individual or on behalf of a class.

Where a claim concerns conduct that has taken place outside of Canada, an issue may arise as to whether the court can assume jurisdiction over the proceedings. This will depend on whether there is a "real and substantial" connection between the action and the jurisdiction. Canadian courts have considered a court's jurisdiction to hear section 36 actions arising from conduct which occurred outside of Canada and have typically found in favour of plaintiffs (e.g., *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, 2002 20 C.P.C. (5th) 351 (Ont. S.C.J.); *Fairhurst v. Anglo American PLC*, 2012 BCCA 257). However, in a recent case (*Shah v. LG Chem, Ltd.*, 2015 ONSC 2628), an Ontario court found in favour of the defendants. Applying the presumptive connecting factors outlined by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, the court found it had no jurisdiction over the two defendants that brought the application. In *Van Breda*, the court identified four presumptive connecting factors, where a tort is pled, that *prima facie* entitle a court to assume jurisdiction over a dispute: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province. The court noted these factors were not exhaustive and new ones could be identified in the future.

The court must also have personal jurisdiction over a party, in that the party must be properly served with the action. Rules of procedure in each province (and the Federal Court) outline the requirements for service on parties located outside of Canada.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

No, it does not.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process in Canada is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available for breaches of the civil provisions of the Act. They are not available for section 36 actions.

2.2 What interim remedies are available and under what conditions will a court grant them?

The Commissioner may seek interim remedies, both before and after he has commenced an application under the civil provisions of the Act.

For example, prior to bringing an application to challenge a merger, the Commissioner may ask the Tribunal to issue an interim order (a section 100 order) that would prevent the completion or implementation of the proposed merger. The Tribunal will issue such an order where it finds that in the absence of the interim order, it is likely that an action would be taken that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition because the action would be difficult to reverse (or where there has been a breach of the notification provisions of the Act, which require that certain transactions be notified to the Commissioner before they are completed).

Similarly, the Commissioner may, prior to bringing an application challenging conduct that constitutes a refusal to deal, price maintenance, exclusive dealing, tied selling, market restriction or abuse of dominance, ask the Tribunal to issue an interim order (a section 103.3 order) that would prevent the continuation of the conduct. The Tribunal will issue such an order where the Commissioner certifies that an inquiry is being made into such conduct (e.g., the conduct is being investigated) and in the absence of an interim order, the following could happen: (a) injury to competition that cannot be adequately remedied by the Tribunal is likely to occur; (b) a person is likely to be eliminated as a competitor; or (c) a person is likely to suffer a significant loss of market share, revenue, or other harm that cannot be adequately remedied by the Tribunal.

After an application has been made to challenge certain civil conduct, the Tribunal may, on application by the Commissioner, issue an order (a section 104 order) it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. The Supreme Court of Canada has identified these principles as: the applicant must establish there is a serious issue to be tried; irreparable harm would be caused to the applicant if the injunctive relief was not granted; and the balance of convenience favours the granting of the order (*RJR-Macdonald Inc. v. Canada (Attorney General)*, 1994 1 S.C.R. 311).

Interim remedies can also be ordered under the deceptive marketing provisions of the Act. Remedies vary depending on the practice (e.g., they can include prohibition orders; interim restitutionary orders, etc.).

Private parties can also seek interim remedies, however, only after they have filed an application to challenge conduct that constitutes a refusal to deal, price maintenance, exclusive dealing, tied selling or market restriction. The order is sought under section 104 and private parties must meet the same test as the Commissioner.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Civil Provisions

Remedies are available under the civilly reviewable matters where the Tribunal finds that the conduct results in a substantial lessening or prevention of competition (SPLC) in a relevant market (in the case of mergers, exclusive dealing, tied selling, market restriction, competitor collaborations or abuse of dominance) or an adverse effect on competition (in the case of a refusal to deal and price maintenance).

The basic remedy available to the Tribunal is to issue an order prohibiting the conduct. But certain provisions have more specific relief. For example, in the case of mergers, the Tribunal could order: (i) dissolution of the merger; (ii) disposition of assets or shares; or (iii) any other action with the consent of the person against whom the order is directed. In the case of a refusal to deal, the Tribunal could require a party to supply customers on usual trade terms. In an abuse of dominance or deceptive marketing case, the Tribunal can order administrative monetary penalties.

Whether or not an order will be issued will depend on whether a party has breached the provisions of the Act. Briefly:

Mergers (section 92)

The substantive statutory test applied to all mergers is whether the merger is likely to result in a SPLC in a relevant market. In making this determination, the Tribunal will look at many factors (e.g., remaining

competition, substitutes, barriers to entry, etc.) and consider whether the merged firm will be able to exercise market power. The Tribunal will also consider any efficiencies resulting from the proposed merger, as section 96 of the Act sets out an express efficiencies defence to anti-competitive mergers, where the efficiencies from the merger are likely to be greater than and offset any effects of the SPLC.

Refusal to Deal (section 75)

These provisions apply where a supplier refuses to supply a customer with an adequate supply of a product, which results in an adverse effect on competition in a market.

Price Maintenance (section 76)

These provisions apply where a supplier “by agreement, threat, promise or any like means” influences upward or discourages the reduction of the price at which a reseller supplies a product within Canada, which results in an adverse effect on competition in a market. It can also include a refusal to supply a product to, or otherwise discriminate against, a person for their low pricing policy (where it results in an adverse effect on competition in a market).

Exclusive Dealing, Tied Selling and Market Restriction (section 77)

The provisions apply where competition is substantially lessened by the following conduct: (a) a practice of requiring or inducing a customer to deal only or primarily in products of the supplier by means of more favourable terms or conditions (exclusive dealing); (b) a practice of requiring or inducing a customer to buy a product as a condition of supplying the customer with another product (tied selling); and (c) a practice of requiring a customer to sell a product only in a defined market as a condition of supplying that product (market restriction).

Abuse of Dominance (section 79)

For the Tribunal to find an abuse of dominance, the Commissioner must prove that dominant firm(s) has/have engaged in a practice of anti-competitive acts, which have or are likely to result in a SPLC in a relevant market.

Competitor Collaborations (section 90.1)

Legitimate (i.e., non-cartel) collaborations, agreements and arrangements between competitors, which are likely to result in a SPLC, are not allowed under the Act.

Deceptive Marketing

Deceptive marketing practices include misrepresentations to the public, improper representations as to the ordinary selling price of a product, improper representations as to tests and testimonials, bait and switch selling, sales of a product above the advertised price and improper promotional contests. There are specific tests for establishing each practice.

Section 36 Actions

Under section 36, a party is entitled to damages, plus costs. The party must prove the breach of that section and the damages suffered, on a balance of probabilities (the civil standard of proof).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Civil Provisions

Damages are not available for a breach of the civil provisions of the Act, unless the breach results in a breach of a Tribunal order. In such a case, the party can seek damages under section 36 (see response below).

Section 36 Actions

Plaintiffs will seek general damages, to compensate for the losses they suffered as a result of a breach of section 36.

Section 36 actions are typically brought because of alleged breaches of the criminal provisions of the Act (e.g., conspiracy, bid-rigging). In such cases, plaintiffs will often claim relief for the breach of various torts and thus also seek exemplary damages (which are designed to punish the defendant and to deter the defendant and other potential wrongdoers) tied to these torts. In addition, they will seek restitution and disgorgement of profits the defendants allegedly earned from the illegal conduct.

Section 36 breaches are compensable by actual damages, plus costs. However, to the extent that common law claims are also brought, available remedies may be broader.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Civil Provisions

This is not applicable.

Section 36 Actions

No section 36 actions (brought on the basis of breaches of the conspiracy or bid-rigging provisions of the Act) have ever gone to trial. Hence, it is not clear whether Canadian courts will take into account any fines imposed by Canadian courts for criminal conduct and/or any redress scheme already offered to those harmed by the infringement.

4 Evidence

4.1 What is the standard of proof?

Civil Provisions: Balance of probabilities.

Section 36 Actions: Balance of probabilities.

4.2 Who bears the evidential burden of proof?

Civil Provisions: The Commissioner or private litigant(s) bringing the application.

Section 36 Actions: The plaintiff(s).

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

In Canada, there is no presumption of loss. Both the loss and the quantum of damages need to be proven.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Civil Provisions

The type of evidence that can be put before the Tribunal is governed by the Act and the Competition Tribunal Rules. Generally, applicants (i.e., the Commissioner or private litigant(s)) and responding parties can rely on witness testimony and documentary evidence. Expert evidence may also be heard and accepted by the Tribunal.

Section 36 Actions

The admissibility of evidence is governed by the common law rules of evidence. The plaintiff(s) and defendant(s) will rely on witness testimony and documentary evidence. Section 36 provides that where a party has been convicted of a criminal offence (either at trial or as a result of a guilty plea in the context of a leniency settlement) or convicted of or punished for breaching a Tribunal or court order, the record of the court proceedings can also be used as evidence in proving the conduct, in the absence of evidence to the contrary. Expert evidence may also be heard and accepted by the courts.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Civil Provisions

Prior to the commencement of an application, the Commissioner may seek documents from the target of his investigation (or other third parties) pursuant to section 11 of the Act, which provides that the Tribunal can issue an order requiring the production of documents or other records. Section 11 is not available to private litigants.

Once an application has been commenced, parties are required to prepare and provide to the other side an affidavit of documents, which identifies the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party.

Section 36 Actions

Parties do not have discovery rights prior to the commencement of litigation. Once litigation has commenced, as part of the discovery process, parties are required to provide the other side with all documents that are relevant to the litigation (rules vary on the extent of documentary discovery, depending on the jurisdiction in which the action is brought). In the case of class actions, discovery does not occur until after the action has been certified as a class action. (Thus, there is limited documentation before the courts at the certification stage.)

Parties may also have certain rights to obtain documents from third parties, depending on the rules of procedure in the jurisdiction in which the action has been commenced.

Plaintiffs in section 36 actions may seek to obtain disclosure from the Bureau. The issue of disclosure was addressed in two recent cases by the Supreme Court of Canada (the highest level of court in Canada). In the first case, the plaintiffs sought access to wire-tap evidence collected by the Bureau in the course of its investigation. The Supreme Court of Canada ultimately ruled in favour of the plaintiffs and ordered the disclosure (see *Imperial Oil v. Jacques*, 2014 SCC 66). In the second case, the plaintiffs sought to examine the Bureau's senior investigator. The Supreme Court of Canada ruled against the plaintiffs and refused to order the disclosure on the basis that there was no obligation on the Crown to submit to proceedings in which it was not a party (see *Canada (Attorney General) v. Thouin*, 2017 SCC 46).

With respect to information provided to the Bureau as part of an immunity or leniency application, the Bureau takes the position that all information disclosed in the context of such an application is confidential and not subject to disclosure, unless ordered by a court. It may even seek a protective court order to prevent such disclosure. However, confidentiality is not guaranteed and it is possible that plaintiffs could seek documentation provided to the Bureau, and this may become discoverable under a court order in the context of a private action. Issues relating to such access have not been finally resolved by Canadian courts. (See also the response to question 10.2.)

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Civil Provisions

Prior to an application being commenced, the Commissioner may seek to examine a witness in person, or through written interrogatories, pursuant to section 11 of the Act, which provides that the Tribunal can issue an order requiring the witness to appear or deliver written responses (under oath). Section 11 is not available to private litigants.

Once an application has been commenced, parties have the ability to cross-examine witnesses that have been put forward by the other side. A party may also obtain a subpoena, to force a witness to testify.

Section 36 Actions

Prior to discovery, parties may (depending on the jurisdiction in which the action is commenced) have the right to examine witnesses that put forward evidence at the certification stage (such as an affiant from a company or an expert witness).

At the discovery stage, parties have the right to examine a representative of the other side. Depending on the jurisdiction in which the action is commenced, they may also have the ability to examine more than one representative.

At trial, parties have the right to cross-examine the other side's witnesses. A party may also obtain a subpoena, to force a witness to testify.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Civil Provisions

Damages are not available under the civil provisions of the Act.

Section 36 Actions

As discussed above in the response to question 4.4, section 36 provides that where a party has been convicted of a criminal offence (either at trial or as a result of a guilty plea in the context of a leniency settlement) or convicted of or punished for breaching a Tribunal or court order, the record of the court proceedings can also be used as evidence in proving the conduct, in the absence of evidence to the contrary. This only applies to breaches of Canadian law.

Plaintiffs may seek to adduce into evidence decisions of international competition authorities relating to the conduct alleged. In broad terms, such evidence could be used by the courts (but could face admissibility challenges).

Additionally, plaintiffs may seek to adduce into evidence civil judgments in other jurisdictions or may seek to rely on such decisions in a summary judgment motion.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Civil Provisions

The Tribunal can issue confidentiality orders to protect competitively sensitive information arising in both testimonial and documentary evidence (e.g., testimony could be heard *in camera*; documents could be redacted).

Section 36 Actions

Courts can issue confidentiality orders to protect competitively

sensitive information arising both in testimonial and documentary evidence (e.g., testimony could be heard *in camera*; documents could be redacted).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Civil Provisions

Section 103.2 provides that where a party is granted leave to bring an application under section 103.1, the Commissioner can intervene and participate in the proceedings.

Section 36 Actions

The Commissioner will not generally intervene in section 36 actions or comment on them.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

No, there is not.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Civil Provisions

This is not applicable.

Section 36 Actions

In 2013, the Supreme Court of Canada ruled that the passing on defence is not available and that indirect purchasers have legal standing to sue (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57).

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Civil Provisions

This is not applicable.

Section 36 Actions

Depending on a jurisdiction's rules of civil procedure, defendants may have the ability to cross-claim or bring a third party claim against a party they allege is liable to the defendant for all or part of the plaintiffs' claim.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Civil Provisions

The relevant civil provisions will typically identify the time period during which an application must be brought. For example, section 97 provides that the Commissioner may not bring an application challenging a merger more than one year after the merger has been substantially completed. Section 79 provides that the Commissioner

may not bring an abuse of dominance application more than three years after the practice has ceased. With respect to section 103.1 applications by private litigants, these must be brought no more than one year after the practice or conduct that is the subject of the application has ceased.

Section 36 Actions

With respect to breaches of the criminal provisions of the Act, section 36(4) of the Act provides that an action must be commenced within the later of: (i) two years from the day on which the conduct was engaged in; or (ii) two years from the day on which any criminal proceedings relating to the conduct were finally disposed of. As there is no statute of limitations in Canada for the laying of criminal charges, it is possible that a section 36 action could be brought more than two years after the alleged conduct has ceased.

Moreover, plaintiffs argue that the limitation period does not begin to run until the conduct is discoverable. In two recent decisions, two Canadian appellate courts have agreed. In 2016, the Ontario Court of Appeal (in *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation*, 2016 ONCA 621) found that the discoverability principle applies to part (i) of section 36(4). Although noting the principle probably did not apply to part (ii) of section 36(4), the court did not consider this to be a problem, finding there was no rule that suggests that both limitation periods in section 36(4) had to operate in the same way. More recently, in 2017, the Court of Appeal for British Columbia (in *Godfrey v. Sony Corporation*, 2017 BCCA 302) found that the provision was subject to the discoverability rule and adopted the reasoning of the court in *Fanshawe*. The Supreme Court of Canada has granted leave to the defendants to appeal the *Godfrey* decision (SCC 37810). At the time of publishing, the appeal had not yet been heard by the court.

With respect to breaches of a Tribunal (or court) order, section 36(4) of the Act provides that an action must be commenced within the later of: (i) two years from the day on which the order was contravened; or (ii) two years from the day on which any criminal proceedings relating to the conduct were finally disposed of.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Civil Provisions

Applications under the civil provisions of the Act could take one to two years before they are heard by the Tribunal. Appeals of such decisions could take several more years (e.g., three to five years), depending on the level of court to which the matter is appealed (the highest level being the Supreme Court of Canada).

Section 36 Actions

No action brought pursuant to section 36 of the Act (for conspiracy or bid-rigging) has been fully adjudicated at trial. All actions have settled (typically after certification). It takes several years for a matter to reach certification. It would similarly take several years for a matter to be fully adjudicated at trial.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Civil Provisions

No, they do not.

Section 36 Actions

This will depend on various factors (e.g., rules of procedure in the jurisdiction; stage of proceedings; whether it is a class action, etc.). For example, if a matter is discontinued against a defendant without a settlement (e.g., in a case where the defendant has satisfied the plaintiff that it did not engage in the alleged conduct), permission of the court may or may not be required, depending on the jurisdiction in which the settlement is reached (e.g., in some provinces the court must approve a discontinuance) and depending on what stage the proceeding is at (e.g., prior to the close of pleadings, etc.).

Once an action has been certified as a class action, it can only be discontinued or abandoned with the approval of the court, on such terms as the court considers appropriate. Similarly, class action settlements must be approved by the court, which will consider whether the agreement is fair, reasonable and in the best interests of the settlement class.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Civil Provisions

This is not applicable.

Section 36 Actions

Yes. See the response above to question 7.1.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Civil Provisions

Yes. The Tribunal has the authority to award costs and may determine by whom and to whom they are to be paid.

Section 36 Actions

It depends on the province in which the case is commenced. Some provinces have “no cost” regimes, whereas in others, the winner is able to recover legal costs from the unsuccessful party.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, they are.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition law claims may be permitted. Plaintiffs’ have sought to use third party funding in Canadian class actions, including competition class actions.

9 Appeal

9.1 Can decisions of the court be appealed?

Civil Provisions

The Tribunal's decisions can be appealed to the Federal Court of Appeal as of right, with respect to questions of law, and with leave, with respect to questions of fact. Decisions of the Federal Court of Appeal can be appealed to the Supreme Court of Canada, with leave.

Section 36 Actions

Decisions of provincial courts or the Federal Court of Canada can be appealed to the provincial court of appeal or the Federal Court of Appeal, respectively. In some cases, a party may be required to seek leave to appeal a decision. Further appeals may be made to the Supreme Court of Canada, with leave.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The Bureau has both an immunity programme (for those first in to report an offence) and a leniency programme (for all subsequent applicants). (These programmes apply to the criminal provisions of the Act, not the civil provisions.)

However, participants in either programme (whether successful or not in obtaining immunity or leniency) are not immune from being named as defendants in a civil action for damages.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Rules of discovery differ by province, but defendants (whether successful or unsuccessful immunity or leniency applicants) are generally required to provide plaintiffs with all non-privileged documents that are relevant to the litigation. This would include documents that are incriminating (and that may have been shared with regulators in seeking immunity or leniency).

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

We are not aware of any at this time.

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Litsa is listed in *Who's Who Legal: Competition – Future Leaders 2018*, which profiles the foremost practitioners in the competition community aged 45 and under.



Blake, Cassels & Graydon LLP (Blakes) is a leading Canadian business law firm. For more than 150 years, Blakes has proudly served many of Canada's and the world's leading businesses and organisations.

The Blakes Competition, Antitrust & Foreign Investment Group is widely acknowledged as the leading practice in Canada. Named "Competition Law Firm of the Year 2018" by *Benchmark Canada*, Blakes houses a formidable team of practitioners with recognised expertise in every aspect of competition law and foreign investment review. The Competition Group advises major domestic and international companies and law firms, providing strategic counsel and representation in merger reviews, cartel investigations, abuse of dominance cases, distribution practices, advertising matters and other competition issues. Blakes lawyers have been involved in the largest and most complex mergers in Canadian history, and have led the Canadian aspects of some of the largest global transactions, including internationally recognised innovative matters. Blakes is also a leading firm with respect to securing merger approvals for non-Canadian purchasers under Canada's foreign investment laws.

China

Zhong Lun Law Firm

Peng Wu



Yi Xue (Josh)



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The *Anti-monopoly Law of the People's Republic of China* (“**AML**”), which became effective on 1 August 2008, is the fundamental law governing disputes in connection with competition/anti-monopoly matters in China. While, before the AML, the *Anti-unfair competition Law of the People's Republic of China* effective on 1 December 1993 (“**AUCL**”), the *Price Law of the People's Republic of China* effective on 1 May 1998 (“**Price Law**”) and the *Bid Invitation and Bidding Law of the People's Republic of China* effective on 1 January 2000 (“**Bidding Law**”) may also govern competition issues under certain circumstances, for example, the AUCL prohibits predatory pricing, tying and abuse of administrative power, the Price Law prohibits collusion to manipulate market price, predatory pricing, and price discrimination, and the Bidding Law prohibits misconducts of bid inviters and bidders during competitive bidding. These laws may have different emphasis from the AML, and to some extent they are supplement to the AML.

There are three types of illegal activities prohibited by the AML, namely conclusion of monopoly agreements, abuse of a dominant market position and abuse of administrative power to eliminate or restrain market competition. Therefore, an individual or entity may either bring a civil lawsuit against other individuals or entities concluding a monopoly agreement or abusing a dominant market position, or bring an administrative lawsuit against the relevant administrative organs abusing administrative power to eliminate or restrain market competition.

Under the civil procedure system of China, a civil lawsuit may be initiated based either on contractual relationship or tort. As a party to a contract or a member of a trade association, the plaintiff may request the court to annul the contract or the article of association containing clauses that violate the AML, and to order the party at fault to pay damages to compensate the party at loss under the *Contract Law of the People's Republic of China* (“**Contract Law**”). As the infringed of a tort, the plaintiff may request the court to order the defendant to stop infringement and to compensate losses to the plaintiff that were caused by the defendant's monopolistic conduct.

If an individual or entity considers that a particular administrative act of an administrative organ has constituted abuse of administrative power to eliminate or restrain market competition, and his/her or its lawful rights and interests have been infringed upon by such administrative act, such individual or entity may bring an

administrative lawsuit against the administrative organ. In addition, the individuals or entities, who have been investigated and then punished by relevant competition authorities for violating the AML, or whose transactions have been prohibited or imposed on with restrictive conditions under the procedure of anti-monopoly review on concentration of undertakings under the AML, may also bring an administrative lawsuit against the relevant authority. However, as there have been no specific judicial interpretations on administrative litigation under the AML, the general rules of administrative litigation provided by the *Administrative Procedure Law of the People's Republic of China* shall apply in administrative litigation under the AML. In practice there have been few administrative cases initiated under the AML. It should also be mentioned that breach of AML constitutes no crime under the AML, the *Criminal Law of the People's Republic of China* or other PRC laws, so there is no criminal prosecution against violation of the AML in China. Therefore, the introduction hereunder will only focus on civil litigation under the competition law in China.

1.2 What is the legal basis for bringing an action for breach of competition law?

For civil liabilities under the AML, Article 50 establishes the legal basis and principle by providing that where the monopolistic conduct of an undertaking has caused losses to other parties, such undertaking shall bear the civil liabilities according to the relevant laws. On such basis Article 14 of the *Provisions of the Supreme People's Court on the Application of Laws in Civil Disputes Trials Arising from Monopolistic Practices* (“**AML Judicial Interpretation**”), the only judicial interpretation (judicial interpretations are the interpretations made by the Supreme People's Court to certain laws, and could either be substantive or procedural, which play a very important role in case trials in China) currently specifying the civil lawsuit of AML, provides that where the defendant to a case has caused damage to the plaintiff by committing a monopolistic act, the court may, according to the plaintiff's claims and the ascertained facts, order the defendant to stop infringement, and assume civil liability for compensating for the damage caused, etc., and Article 15 of the AML Judicial Interpretation provides that where the clauses of the contracts or the articles of association of trade associations involved in lawsuits are in violation of the mandatory provisions of the AML or other laws and administrative regulations, the courts shall rule such clauses as invalid.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

As aforementioned, the AML is the fundamental law for competition

matters in China, and hence it is also the national law that the legal basis for competition law claims in China is derived from.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialist courts established for the purpose of competition issues in China, while there have been three Intellectual Property Courts established in Beijing, Shanghai and Guangzhou following the relevant decision of the Standing Committee of the National People's Congress in 2014. In practice, such Intellectual Property Courts and the intellectual property divisions of other relevant courts mainly take charge of hearing cases of civil monopoly disputes.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

In general, according to Article 48 of the *Civil Procedure Law of the People's Republic of China* ("Civil Procedure Law"), any natural person, legal person and other organisation (according to the *Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, other organisations shall refer to duly-established organisations that have a certain organisational structure and some assets, but are not qualified as legal persons, including: (1) duly-registered sole proprietorship enterprises for which business licences have been collected pursuant to the law; (2) duly-registered partnership enterprises for which business licences have been collected pursuant to the law; (3) duly-registered Sino-foreign contractual joint venture enterprises and foreign-invested enterprises for which Chinese business licences have been collected pursuant to the law; (4) branches and representative offices of duly-established social organisations; (5) branches of duly-established legal persons for which business licences have been collected pursuant to the law; (6) branches of duly-established commercial banks, policy banks and non-banking financial institutions for which business licences have been collected pursuant to the law; (7) duly-registered village/township enterprises and neighbourhood community enterprises for which business licences have been collected pursuant to the law; and (8) other organisations that satisfy the conditions prescribed in this Article) may bring a civil lawsuit. The AML Judicial Interpretation specially provides that natural persons, legal persons or other organisations that suffer losses due to monopolistic acts, or that are involved in disputes over the violation of the AML by contracts, articles of association of trade associations may bring a civil lawsuit under the AML.

There is no concept in the civil procedure of China exactly equivalent to "class action" or "collective action" of other jurisdictions. However, according to Article 52 of the Civil Procedure Law, where one party or both parties consist of two or more persons, and their subject matters of the actions are the same or of the same category, the actions can be jointly tried with the court's approval and the parties' consents, and such action is named "joint action". Article 55 of the Civil Procedure Law provides that only against such acts as environmental pollution, harm of the consumer's legitimate interests and rights and other acts that undermine the social and public interest, the relevant institutions and

organisations prescribed by the law may bring a lawsuit. However, except that Article 47 of the *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* provides that the China Consumers' Association and the provincial consumers' Association may bring lawsuits against activities detrimental to the legitimate rights and interests of a large number of consumers, no other laws have provided other institutions or organisations that may bring lawsuits under Article 55 of the Civil Procedure Law.

Joint actions in China basically are on an "opt-in" basis. Article 52 of the Civil Procedure Law further provides that if a party of two or more persons to a joint action have common rights and obligations with respect to the subject matter of action and the act of any one of them is recognised by the others of the party, such an act shall be valid for all the rest of the party; if a party of two or more persons have no common rights and obligations with respect to the subject matter of action, the act of any one of them shall not be valid for the rest. Article 53 of the law provides where there are numerous plaintiffs in a joint action, representatives may be selected by and from the group of plaintiffs. Actions undertaken by such representatives will be effective in relation to all joint plaintiffs, except for the change or waiver of the claims, recognition of the claims brought by the opposing party, or involvement in mediation which shall be subject to the consents of the parties he or she represents. Article 54 provides that if the number of plaintiffs is uncertain upon institution of the action, the court may issue public notices, which state the particulars and claims in respect of a joint application, instructing other potential plaintiffs to register with the court within a certain time period. The plaintiffs who have registered with the court may select a representative to engage in litigation. Judgments or orders rendered by the court are effective for all plaintiffs who registered with the court. The same judgments or orders are binding on plaintiffs who have not participated in the joint actions but instituted legal proceedings within the limitation period.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

In general, there are two factors to determine the court of competent jurisdiction to take on a civil dispute, i.e. the level jurisdiction and territorial jurisdiction under the civil procedure system of China. With the applicability of the general rules provided by the Civil Procedure Law and the *Supreme People's Court on Certain Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China* ("CPL Judicial Interpretation"), the AML Judicial Interpretation specially provides that:

- For level jurisdiction, the following courts shall have the jurisdiction to hear the first instance of civil monopoly disputes:
 - (1) the Intermediate People's Court in the capital cities of provinces and autonomous regions, municipalities directly under the central government and cities specifically designated in the state plan;
 - (2) the Intermediate People's Court designated by the Supreme People's Court; and
 - (3) the Basic People's Court approved by the Supreme People's Court.
1. The Intellectual Property Courts in Beijing, Shanghai and Guangzhou, in practice being deemed as Intermediate People's Courts, also have jurisdiction to hear the first instance of civil monopoly disputes.

According to Article 4 of the AML Judicial Interpretation, the territorial jurisdiction of civil monopoly disputes shall be determined in accordance with the specific details of the case and pursuant to the provisions of the Civil

Procedure Law and the relevant judicial interpretations on the jurisdiction for tort disputes, contractual disputes, etc.

2. According to the Civil Procedure Law and the CPL Judicial Interpretation, if the competition law claims are brought based on tort behaviour, the case should be heard by the People's Courts at the place of domicile of the defendant or at the place where the tort occurs. The "place where the tort occurs" as prescribed in the Civil Procedure Law includes the place where the tort is committed and the place where the damage occurs. If the competition law claims are brought based on a contractual dispute, the case should be heard by the People's Court at the place of domicile of the defendant or at the place where the contract is performed. The parties may also, in writing, choose the People's Court at the place where the contract is signed, at the place of domicile of the plaintiff or the defendant, at the place where the subject matter is located or at the place where the contract is performed.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Like the competition laws of other jurisdictions, the AML also has the extraterritorial effect according to Article 2 thereof. As the practice of the courts of China in the area of anti-monopoly matters is rather immature due to the limited amount of monopoly related cases brought to them, China currently is not quite an attractive jurisdiction for both claimants and defendants outside China; while in practice, Chinese companies are inclined to file monopoly lawsuits before Chinese courts against foreign companies for suspected monopoly behaviours for the language and judicial culture merits, especially in case that other jurisdictions may also apply to the cases.

1.8 Is the judicial process adversarial or inquisitorial?

The legal system of China basically belongs to the civil law system, where judges usually play a rather important role in the judicial process. However, the judicial process in Chinese courts is of both adversarial and inquisitorial features, where the judge has the right to question the parties and collect evidence on his/her own and also leaves room for the parties to debate with each other. During the process, the judge mainly acts as an adjudicator and lets the parties debate freely. While the judge finds certain facts unclear, he/she has the authority to resume the court investigation process.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The Civil Procedure Law provides interim remedies, which are generally applicable to competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

Articles 100 to 105 of the Civil Procedure Law set forth the preservation rule for civil cases, which applies to competition law civil cases:

- A party may apply for interim remedies, which include preservation of the property of the other party, or orders that

request the other party to commit or not to commit certain actions, namely interim remedies. It is the applicant's duty to prove that judgment on the case may become impossible to enforce or that it may cause other damages to the party due to the conduct of the other party in the case or for any other reason. When the court decides to grant interim remedies, it may order the applicant to provide security accordingly. In that case, if the applicant fails to provide security, the court shall issue a ruling to dismiss the application. When the circumstance is emergent, the court must make a decision within 48 hours upon its receipt of the application filed by the party. In addition to a party's application, interim remedies may also be ordered on the court's own initiative when necessary.

- An interested party whose legitimate rights and interests would, due to urgent circumstances, suffer irreparable damage without immediate application for property preservation, may, before filing a lawsuit, apply to the relevant courts for the adoption of property preservation measures. While, the applicant must provide security under such circumstances; otherwise, the court will reject the application. The court must make a decision within 48 hours upon its receipt of the application filed by the party.
- Property preservation shall be limited to the scope of the claims or to the property relevant to the case.
- Seal-up, seizure, freezing or other methods as prescribed by the law can be adopted for property preservation, and the court shall promptly notify the party whose property has been preserved after preservation is taken.
- In the cases involving property disputes if the party against whom the application for property preservation is filed provides security, the court shall cancel the property preservation.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

For completion law cases of contractual claims, the court may, according to Article 15 of the AML Judicial Interpretation, annul the contract or articles of association whose content violates the mandatory provisions of the AML or any other laws and administrative regulations. Further, the court can order the party at fault to pay damages to compensate the party at loss.

For competition law cases of tort claims, the court may, based on the litigation requests of the plaintiff and on the facts investigated, order the defendant to bear civil liability such as cessation of infringement, compensation of losses, etc. under Article 14 of the AML Judicial Interpretation.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Damages are an available remedy under the civil law system of China. On one hand, the *Civil Code of the People's Republic of China* (the law became effective on 1 October 2017, stipulating the general principles and rules governing civil activities), the

General Principle of Civil Law of the People's Republic of China, the *Contract Law of the People's Republic of China* (“**Contract Law**”) and the *Tort Law of the People's Republic of China* (“**Tort Law**”) provide the principle of calculating damages, being the losses suffered by the plaintiff. According to the Contract Law, the amount of damages shall be equivalent to the loss caused by the breach of contract and shall include the profit obtainable after the contract is performed, but shall not exceed the amount of the loss that may be caused by breach of contract and that has been or ought to be foreseen by the party in breach in concluding the contract. On the other hand, the AML Judicial Interpretation does not specify the damages calculation method in competition law cases, while only provides that the scope of damages may include the reasonable expenses incurred by the plaintiff in the attempt to investigate and stop the monopolistic act. That is to say there are no specific rules on calculating damages in competition law cases, and no exemplary damages can be granted.

In practice, the courts usually determine damages in light of the plaintiff's claims and findings of facts. For example, in the *Rainbow v. Johnson & Johnson* case, the court believed that the damages should not be calculated according to the principle under the Contract Law, which would be the loss of profits should Rainbow comply with the RPM agreement (i.e., a profit margin of 23 per cent). Instead, the court deemed that the loss of profits should be calculated according to the normal profits in the relevant market (i.e., a profit margin of 15 per cent). In the *Huawei v. IDC* case, since both parties were not able to produce neither evidence proving the actual losses suffered by Huawei, nor evidence proving how much profit IDC earned from the infringement, the court, after considering the relevant factors, including the facts of the case, the nature of IDC's infringing conduct, IDC's subjective fault, the time of duration of the infringement, the damaging impact and the reasonable expenses incurred by Huawei in order to investigate and stop the relevant abusive conduct, ordered IDC to pay damages of RMB 20 million to Huawei.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

As mentioned above, the damages ruled by the courts in China are based on the principle of recovering the losses suffered by the plaintiff, while administrative penalties are to punish the undertakings for violation of the AML, so monetary penalties imposed by the competition authorities, which include fines and confiscation of illegal gains according to the AML, is not a statutory factor for the court to determine damages, while the court may make reference to the relevant administrative penalties.

4 Evidence

4.1 What is the standard of proof?

Article 64 of the *Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings* (“**Civil Evidence Provisions**”) provides judges shall assess the evidence on a thorough and objective basis in accordance with applicable legal procedures, shall adhere to the professional ethics of judges, and shall use logical reasoning and their daily life experience to reach independent judgments concerning the probative value of the evidence. That is to say, judges are granted discretion of assessing the evidence. The Civil Evidence Provisions also stipulate that if the parties to a case produce conflicting evidence on

the same fact but neither has sufficient evidence to rebut the evidence submitted by the other party, the court shall assess whether or not the evidence submitted by one party is clearly more persuasive than the evidence submitted by the other party, taking into consideration the circumstances of the case as a whole, and if so, affirm which party's evidence has greater probative value. Where it is unable to judge the probative force of evidence, thus causing the disputed fact difficult to ascertain, the court shall make its ruling according to the rule on the distribution of burden of proof.

Therefore, it is hard to say there is objective standard of proof in the courtrooms of China. However, some opinions may say that the standard of proof in civil disputes in China is “high degree of probability”.

4.2 Who bears the evidential burden of proof?

Article 64 of the Civil Procedure Law and Article 2 of the Civil Evidence Provisions provide the general principle of evidential burden of proof in civil litigation, namely a party is responsible for providing evidence in support of the fact on which the said party relies to assert a claim or rebut a claim of the other party, and if there is no evidence or the evidence provided cannot sufficiently support the claim, the party having the burden of proof shall bear the ensuing adverse consequences. When it comes to competition law civil litigation, the AML Judicial Interpretation provides more specific rules on allocation of burden of proof in several scenarios. Combining the provisions of both the Civil Evidence Provisions and the AML Judicial Interpretation, the burden of proof in a competition law civil lawsuit shall be allocated as follows:

- For suing the defendant concluding a horizontal monopoly agreement prohibited by Article 13 of the AML, the plaintiff shall bear the burden of proving the existence of the agreement, while the defendant shall bear the burden of proving that the agreement does not have the effects of excluding or restricting the competition.
- As for the civil disputes in relation to vertical monopoly agreements, although the AML Judicial Interpretation provides no specific rules on the allocation of the burden of proof and thus the above general principle provided in the Civil Evidence Provisions shall apply, namely the party alleging a vertical monopoly agreement shall be responsible for providing evidence on the existence of the agreement and that the agreement has eliminated or restricted market competition. This position was taken by the judge of *Rainbow v. Johnson & Johnson*.
- According to the AML Judicial Interpretation, the plaintiff shall bear the burden of proving that the defendant has a dominant market position in the relevant market and that it has abused such position by violating Article 17 of the AML, while the defendant shall prove that it has justifiable reasons for conducting such behaviour. As for the anti-competitive effects of a violation of abuse of market dominance, it is commonly understood that the burden lies with the plaintiff to prove that the defendant's behaviour has the effects of excluding or restricting market competition. For example, in the *Qihoo v. Tencent* case, the Supreme People's Court considered that anti-competitive effects shall be an element for tying, and that the plaintiff should bear the burden of proof for such effects.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The AML or other relevant laws and regulations do not provide on this.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

According to Article 63 of the Civil Procedure Law, evidence in civil litigation includes (i) statements of parties, (ii) documentary evidence, (iii) physical evidence, (iv) audio-visual materials, (v) electronic data, (vi) testimony of witness, (vii) appraisal opinions and (viii) written records of inquests. According to Article 70 of the law, the parties shall submit the original copy of documentary evidence and audio-visual materials, and shall submit the original physical evidence, and doubtful audio-visual materials, photocopies or reproductions that cannot be verified against the original documents or original objects and the testimony of a witness that fail to appear in the court without justifiable reasons cannot be used independently as the basis for affirming the facts of a case. In addition, documentary evidence or demonstrative materials in foreign languages shall be submitted along with Chinese translation.

The Civil Evidence Provisions and AML Judicial Interpretation provide that a party may apply to the court for up to two (2) persons with expertise to attend court sessions to explain professional questions that are relevant to the case, and the judge and the parties can question such person with expertise in the court hearing. In addition, with the approval from the court, the person with expertise appearing in the court on behalf of respective parties may be confronted with each other in respect of issues involved in the lawsuit, and the persons with expertise are also allowed to make inquiry of an expert examiner. It should be noted that the opinions stated in court sessions by persons with expertise on professional issues shall be deemed as statements made by the party concerned, but not an independent form of evidence or testimony of witnesses.

In practice, expert economists, legal experts and technical and industry experts have been commonly involved in civil competition law litigation.

Moreover, according to the AML Judicial Interpretation, the parties may apply with the court to entrust professional institutions or professionals with the preparation of market survey or economic analysis reports on specialised issues involved in the case. With the consent of the court, such professional institutions or professionals may be determined by both parties through consultation, and shall be designated by the court if consultation fails.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

In general, a party in a civil action cannot request the opposite party to directly provide any documents, information or admission, or to conduct a deposition of any person from the opposing party. However, the parties may apply to the court to conduct evidence collection where: (i) the evidence is documentary materials kept by the relevant governmental agencies and is only obtainable by the court; (ii) the evidence concerns state secrets, trade secrets or privacy; or (iii) the evidence is impossible for a party or its counsel to obtain due to objective circumstances. Moreover, according to the Civil Evidence Provisions, where there is evidence proving that a party concerned refuses to provide without any justifiable reasons the evidence possessed by such party, and the opposite party alleges that contents of such evidence are disadvantageous to the evidence holder, such allegation can be construed as justifiable.

Based on the above, the court during the proceeding may, upon a party's application, collect certain information and evidence from the competition authorities which have been obtained during their investigations.

According to the Civil Procedure Law, evidence preservation is available both before and during the civil proceedings:

- under the circumstances where evidence may be lost, or it will be difficult to collect the evidence in future, the party concerned may apply with the court for preservation of such evidence during the proceedings, and the court may also take the initiative to take preservative measures; and
 - under the emergencies in which evidence may be lost or it will be difficult to collect the evidence in future, an interested party may, before the case is filed, apply for preservation of such evidence with the relevant cases.
1. Also, the law and relevant judicial interpretations do not specially provide what kind of evidence can be persevered. In addition, for administrative litigation, evidence preservation is only available during the proceeding.
 2. In addition, the Civil Evidence Provisions provide that the court may, upon the application of the parties, organise the evidence exchange by parties prior to the sitting of the court.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

According to Article 71 of the Civil Procedure Law, the entities or individuals who have information on a case are obliged to appear in the court as witnesses. Furthermore, according to the Civil Evidence Provisions, a witness shall give testimony in court and answer questions put to them by the parties, and if the witness fails to appear in court, his or her testimony shall not be used independently as a basis for confirming the facts of the case. The law or the relevant judicial interpretations nevertheless do not grant the court any coercive measures to force a witness to appear in a civil court.

Although the parties are allowed to question witnesses during the civil proceedings, however, since in practice a witness is rarely summoned by the court to attend court hearings, cross-examination of witnesses is hardly a part of civil proceedings in China, and some opinions would say that currently China has not established a complete cross-examination system in civil proceedings.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

In general, the hearing and ruling of the courts in China shall not be bound or affected by any findings and decisions of any national governmental authorities, international organisations, or foreign governmental authorities. However, Article 77 of the Civil Evidence Provisions provides the principles for the court to confirm the probative value of the evidence for the same fact, and one of the principles is that the evidentiary value of the documents made by the national administrative authorities is higher than other forms of evidence. Accordingly, an effective decision made by the AML enforcement authorities and the facts described therein would have probative value to serve as the basis for the plaintiff to pursue follow-on claims. As for the decisions of foreign enforcers, they may only serve as reference to the court.

Although a follow-on action can be brought up where a breach of the AML has already been established in an infringement decision taken

by the AML enforcement authority, in practice, the AML enforcement authorities may redact certain pieces of information in the decision and may not specify the impact of the AML violation on a particular entity or individual. Therefore, the probative value of the decisions by authorities as to liabilities may be limited, and the plaintiff bears the burden to prove that it has suffered losses from the infringement.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a general principle, the Civil Procedure Law provides that confidential information, including state secrets, trade secrets and personal privacy, is protected during and after the proceeding, especially:

- Cases involving trade secrets of a party, upon the application of the party concerned may not be tried publicly.
- Evidence that involves state secrets, trade secrets and personal privacy shall be kept confidential. If it needs to be presented in court, such evidence shall not be presented in an open court session.
- Effective judgments and written orders involving state secrets, trade secrets and personal privacy shall not be accessible to the general public.

Based on the above, the AML Judicial Interpretation further provides that as regards evidence involving state secrets, trade secrets, personal privacy or other contents that shall be kept confidential in accordance with the law, the court may, as per the application by the parties concerned or *ex officio*, take such protective measures as hearing the case in closed sessions, restricting or prohibiting the reproduction of the evidence, presenting the evidence only to the lawyers engaged, or ordering the parties concerned to sign confidentiality undertakings.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

There is no such provision for the AML enforcement authorities to express their views or analysis in relation to the case. In practice, no case where the opinions of the AML enforcement authorities were sought by a court can be publicly found.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

According to Article 15 of the AML, for civil lawsuits against violation of Article 13 and 14 of the AML, i.e. conclusion of monopoly agreements, if the defendant can prove the agreement is concluded for the purpose of:

- (1) advancing technology, or researching and developing new products;
- (2) improving product quality, lowering costs, increasing efficiency, unifying specifications and standards, or implementing specialisations of labour;
- (3) improving the operational efficiency and competitiveness of small and medium-sized operators;
- (4) realising public interests such as energy conservation, environmental protection, and rescue and relief efforts;

- (5) alleviating problems related to a serious drop in sales or obvious overproduction during an economic downturn;
- (6) protecting legitimate interests during foreign trade or foreign economic cooperation; or
- (7) other circumstances specified by laws or the State Council.

To assert the above items (1) to (5), the defendant shall also prove that the agreement does not seriously restrict competition in the relevant markets and enable consumers to share the benefits therefrom. The defences based on the above justifications however have been hardly established in practice.

Article 17 of the AML provides that an undertaking with a dominant market position would only be liable for:

- (1) selling goods at an “unfairly” high price or purchasing goods at an “unfairly” low price; and
- (2) without “justifiable reasons”, engaging in other abusive conduct including selling goods at the price lower than costs, refusal to deal, exclusive dealing, tying and discrimination.

Therefore, it seems the justification defence could be available in cases against abusing a market-dominant position. However, the AML or relevant judicial interpretations do not provide detailed rules on the said “unfairly high price”, “unfairly low price” or “justifiable reasons”. Nevertheless, according to the provisions stipulated by the relevant administrative rules issued by the National Development and Reform Commission (“NDRC”) and the State Administration for Industry and Commerce (“SAIC”) (according to the reform programme on restructuring of departments under the State Council, the relevant anti-monopoly departments of NDRC, SAIC and MOFCOM have been merged into the Anti-monopoly Bureau under the State Administration for Market Regulation, which was established on 10 April 2018), such as the *Provisions on Anti-price Monopoly* issued by NDRC and the *Provisions of the Industry and Commerce Administrative Organs on Prohibition of Abuse of a Dominant Market Position* issued by SAIC, could be adopted by the courts as the basis of reasoning depending on the need of the trial and upon being recognised as lawful and valid after examination, according to Article 6 of the *Provisions of the Supreme People’s Court on the Citation of Laws, Regulations and Other Normative Legal Documents in Adjudicative Documents*; however, such administrative rules shall not be directly cited by the courts as legal ground of judgment.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

There are no specific provisions on whether pass-on defence is available under the AML or the AML Judicial Interpretation, and there have been no cases which involves such defence. While, in general, if the defendant can prove that the plaintiff has not actually suffered any loss due to the passing-on effect, the court would then not support the plaintiff’s claim for a damages award. However, so far we have not found such cases in practice.

Based on Article 1 of the AML Judicial Interpretation, natural persons, legal persons or other organisations that suffer losses due to monopolistic acts, or that are involved in disputes over the violation of the AML by contracts, articles of association of trade associations may bring a civil lawsuit under the AML, and indirect purchasers should be allowed to bring a lawsuit.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

On one hand, neither the AML nor the AML Judicial Interpretation

specify the scope of defendants in cartel related cases. On the other hand, it is an argumentative issue that whether the defendant is entitled to add other parties as co-defendants in civil cases. Under the Civil Procedure Law, where one party or both parties consist of two or more persons, and their subject matters of the actions are the same or of the same category, the actions can be jointly tried with the court's approval and the parties' consents, and such action is named joint action; and the court shall notify the party who must participate in a joint action if such party fails to do so. Furthermore, according to CPL Judicial Interpretation, except the court shall on its own initiative notify the said party to participate in the joint action, the parties in the current case may also apply to the court to add the said party in the case, and the court reviews the application and renders a ruling on it. If the reasons for the application are not established, the court shall rule to dismiss the application; and, if the reasons for the application are substantiated, the court shall notify the said party to participate in the proceedings in writing.

Based on the above, the defendant in a competition civil case including a cartel case may apply with the court to add the other cartel participants as co-defendants, while it is at the court's discretion to determine whether the other participants shall be added. In addition, the factors considered by the court in its ruling would be whether the relevant party must participate in the procedure, i.e. whether the case is an indispensable joint action. The CPL Judicial Interpretation lists certain types of indispensable joint action, while it does not cover the cartel-related cases. It is commonly interpreted that cases of joint infringement should be an indispensable joint action, which also complies with the relevant provision of *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Compensation for Personal Damage* (according to Article 5 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Compensation for Personal Damage*, where a compensation claimant files an action against some of the joint tortfeasors, a people's court shall add other joint tortfeasors as co-defendants). As cartel constitutes joint infringement, the court should actively add the other cartel participants as co-defendants in the case or approve the defendant's application to do so. However, since there have been no competition civil cases brought before the courts in China, such interpretation will still need to be tested by practices in future.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

According to the AML Judicial Interpretation, the limitation period for claims to seek compensation of damages arising from monopolistic conducts is two (2) years from the date when the plaintiff knew or should have known about the monopolistic conduct that gives rise to the action; furthermore, where the plaintiff reports monopolistic conduct to the authorities, the limitation period of bringing a legal action shall be suspended from the date of the report onwards; where the authorities decide not to proceed with case filing or decide to revoke the case or to terminate investigation, the limitation of action shall re-commence from the date on which the plaintiff is aware or should be aware of the decision of not proceeding with the case filing, the revocation of the case or the termination of investigation; and where the authorities rule that the conduct constitutes a monopoly following investigation, the limitation of action shall re-commence from the date on which the

plaintiff is aware or should be aware that a handling decision by an anti-monopoly enforcement authority on ascertaining constitution of a monopoly has come into legal effect.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

In general, the Civil Procedure Law provides that:

- For a first instance case where the ordinary procedure is adopted, the court trying shall conclude the case within six (6) months from the date when the case is officially accepted. Under special circumstances where an extension is necessary, the period can be extended by six (6) months upon the approval of the president of the court, and upon the approval of the higher level of court, the period if necessary can be further extended. As to a case where the summary procedure is adopted, the court shall conclude within three (3) months from the date of official acceptance.
- For a case on appeal against a judgment, the court shall conclude within three (3) months from the date of official acceptance, and under special circumstances where an extension is necessary the period can be extended upon the approval of the president of the court. For a case on appeal against a written order, the court shall conclude within thirty (30) days from the date of official acceptance. The judgment and the written order of a court of second instance shall be final.

According to the CPL Judicial Interpretation, the above trial periods refers the period from the day following the official acceptance of a case to the day of pronouncing a judgment or of service of a mediation statement, but it should be noted that the period of public notice, evaluation, trial of an objection to jurisdiction, or handling of a dispute over jurisdiction between courts shall not be included.

For foreign-related cases which involve a foreign factor, such as a foreign party, a foreign subject matter or foreign conditions occurring outside of China, they are not subject to the above trial time limits.

In practice, beside the time limits provided by law, there are also a lot of factors that may affect litigation proceedings in China, and there is no clear way to expedite proceedings. In particular under the current circumstances, in that there is a mismatch between the human resources and the amount of cases of a court. For typical monopoly related civil litigation, the time taken by one case can range from a few months to several years. For example, the time to get the final judgment after two (2) trials in the *Huawei v. InterDigital* case was one year and 10 months, two years and 11 months in the *Qihoo v. Tencent* case, three years and four months in the *Ruibang v. Johnson & Johnson* case, and two years and six months in the *Yunding v. Sinopec* case.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

According to Article 45 of the Civil Procedure Law, it is subject to the approval of the court whether the plaintiff may withdraw the claims before the court pronounces the judgment. That is to say, in case the parties have reached a settlement, the plaintiff still needs to apply for the court's approval. It should be noted the settlement *per se* is not enforceable under the civil litigation system of China, while

after reaching a settlement agreement during the hearing of a case, the court may upon the request of the parties confirm the settlement agreement and accordingly make a reconciliation statement. The reconciliation statement shall be signed by the judges and the court clerk with the signatures of the parties, and become legally effective and enforceable once signed for receipt by the parties.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As mentioned in the reply to question 1.5, there is no concept in the civil procedure of China exactly equivalent to “class action” or “collective action” of other jurisdictions, while the Civil Procedure Law provides the joint action mechanism where actions can be jointly tried with the court’s approval and the parties’ consents, provided one party or both parties consist of two or more persons, and the subject matters of their actions are the same or of the same category; in addition, where there are numerous plaintiffs in a joint action, representatives may be selected by and from the group of plaintiffs, and actions undertaken by such representatives will be effective in relation to all joint plaintiffs, except for the change or waiver of the claims, recognition of the claims brought by the opposing party, or involvement in mediation which shall be subject to the consents of the joint parties he or she represents.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Broadly speaking, the “legal costs” in an civil action could consist of the litigation fee charged by the court, the attorneys’ fee and other reasonable expenses arising from the action, such as notarisation fees, travel expenses, etc.

According to the *Measures for the Payment of Litigation Costs* (promulgated on 19 December 2006), the scope of the litigation fee that the parties shall pay to the court covers acceptance fees for cases of first instance, second instance and certain retrial cases, application fees for preservation and other matters, the travelling expenses, lodging expenses, meal expenses and compensation for absence from work, which arise from the appearance of relevant witnesses, appraisers, translators and adjusters before courts; furthermore, the litigation fee shall be undertaken by the losing party, unless the prevailing party voluntarily undertakes it, and the litigation fee prepaid by the prevailing party can be recovered from the losing party; and if the claimant partially wins the claims, the parties should undertake the litigation cost jointly, and the court should determine the amount undertaken by each party based on each specific situation.

The AML Judicial Interpretation provides that the court upon the request of the plaintiff may include in the scope of damage compensation the reasonable expenses incurred by the plaintiff in the attempt to investigate and stop the monopolistic act. In practice, attorneys’ fees could be covered by such reasonable expenses.

8.2 Are lawyers permitted to act on a contingency fee basis?

Under the *Measures for the Administration of Lawyers’ Service*

Charges, attorneys are allowed to act on a contingency fee basis in civil cases related to monopoly issues, but it is prohibited to act on a contingency fee basis in group actions and administrative actions such as those against abuse of administrative power.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of civil claims is rather rare in China, while the law has not provided any provisions on it. In practice, there is no well-known competition law case where third party funding is adopted.

9 Appeal

9.1 Can decisions of the court be appealed?

China adopts a two-tier trial system in litigations. According to the Civil Procedure Law, if a party refuses to accept a judgment or written order of the court of first instance, the party shall have the right to file an appeal with the court of the next higher level. However, the judgments or written orders of the Supreme People’s Court in first instances as well as certain judgments or written orders that may not be appealed against according to the law or that have not been appealed within the prescribed time limit shall not be appealed; furthermore, upon pronouncement of a judgment, the parties concerned must be informed of their right to file an appeal, the time limit for appeal and the court to which they may appeal.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

According to Article 46 of the AML, leniency is only available in the administrative punishments imposed by the AML enforcement authorities in China. While, in general, the leniency shall not apply in civil actions, since the principle for calculating damages as mentioned in the replies to questions 3.2 and 3.3 is to recover the actual losses suffered by the plaintiff.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

During a civil action in China, according to the Civil Procedure Law and Civil Evidence Provisions, the court upon the request of the parties may collect evidence that is kept by relevant administrative authorities, and the administrative authorities shall not refuse to provide information and evidence. It should be noted that the draft *Guidelines for the Application of Leniency Program to Cases Involving Horizontal Monopoly Agreements* (the “**Draft Leniency Guidelines**”), which was released by the NDRC on 2 February 2016 to seek public opinion, provides that all reports submitted and documents generated under the Draft Leniency Guidelines will be kept in special archives by the AML enforcement agencies and must not be disclosed to any third party without the consent of the

undertaking concerned; and no other agencies, organisations or individuals can get access to this information, and the documents shall not be used as evidence in relevant civil proceedings, unless otherwise stipulated by the laws. The court may still require the party with leniency to provide such materials, and may presume that the opposite party's claim is valid, if the opposite party has evidence to demonstrate that the party with leniency is withholding evidence that is unfavourable to him without any justifiable reasons.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable in China.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable in China.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable in China.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

In the years 2016 and 2017, the Anti-monopoly Committee of the State Council and NDRC published a series of draft regulations and rules to seek for public opinion, including the draft *Anti-monopoly*

Guidelines of the Anti-monopoly Committee of the State Council on Abuse of Intellectual Property Rights, the draft *Anti-monopoly Guidelines of the Anti-monopoly Committee of the State Council on Automobile Industry*, the draft *Guidelines for the Application of Leniency Program to Cases Involving Horizontal Monopoly Agreements*, the draft *Guidelines of the Anti-monopoly Committee of the State Council on the General Conditions and Procedure for Exemption of Monopoly Agreements*, the draft *Guidelines of the Anti-monopoly Committee of the State Council on Identifying Illegal Gains from Undertakings' Monopolistic Acts and Determining Fines* and the draft *Guidelines on Commitments of Undertakings in Anti-monopoly Cases*. These regulations and rules are expected to be enacted in future, and may make an analytical reference and specific resource for to the courts' reasoning and ruling in competition lawsuits. In addition, there are certain provisions under the draft regarding competition lawsuits:

- It is provided in the *Draft Leniency Guidelines* that all reports submitted and documents generated under the *Draft Leniency Guidelines* will be kept in special archives by the AML enforcement agencies and must not be disclosed to any third party without the consent of the business operator concerned. No other agencies, organisations or individuals can get access to this information and the documents shall not be used as evidence in relevant civil proceedings, unless otherwise stipulated by the laws.
- The draft *Guidelines on Commitments of Undertakings in Anti-monopoly Cases* provides that the AML enforcement authorities' decision on suspension or termination of the investigation shall not affect other business operators' or consumers' institution of a civil action with the People's Court against the suspected monopoly conducts, while such decision on suspension or termination of the investigation must not be taken as relevant evidence for affirming that relevant conduct concerned constitutes monopoly conduct.

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Zhong Lun is one of the first law firms in China to represent foreign clients in antitrust/competition law matters. Zhong Lun competition/antitrust practice team, with eight partners supported by more than 30 associates, is one of the largest and most experienced in China. Since 2008, Zhong Lun has represented clients (including both strategic and financial investors) in merger-control reviews in connection with offshore and inbound M&A transactions and advised a number of high-profile clients on matters which involve abuse of dominance and monopoly agreements related issues.

Zhong Lun has also advised clients in a number of anti-monopoly law related litigations and investigations. Given our extensive experiences, our advice on anti-trust law is often sought by multinationals before they enter into certain commercial arrangements.

Our antitrust/competition team is equipped with local expertise as well as international experience gained from our lawyers' previous practice of competition law with prestigious international law firms. A number of the team members are not only well-versed in antitrust/competition laws, but also experts in particular industries.

As one of the most influential PRC law firms, with deep roots in the political, legal and commercial circles of China, Zhong Lun maintains effective working relationships and communication channels with government and semi-governmental entities at all levels, as well as major industry players. Our lawyers have frequently been invited to advise and comment on draft legislation and their implementation, which enabled us to establish a close working relationship with PRC anti-monopoly law enforcement agencies.

Cyprus

Marios Eliades



Alexandra Kokkinou



Tassos Papadopoulos & Associates LLC

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Any natural or legal person may file a complaint before the Cyprus Commission for the Protection of Competition (hereinafter “CPC”) for violation of Sections 3 and/or 6 of the Protection of Competition Law, [13(I)/2008], (the “Competition Law”) and/or Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”), and the CPC may impose administrative sanctions/fines.

Furthermore, private court actions are available where a natural or legal person has suffered any loss as a result of a breach of Articles 3 and 6 of the Competition Law and/or Articles 101 and 102 of the TFEU, by virtue of the Law establishing rules for actions for damages as a result of breach of Articles 3 and 6 of the Competition Law and/or Articles 101 and 102 of the TFEU (law 113(I)/2017). Such claims can be raised within the context of a civil action before the competent District Court.

1.2 What is the legal basis for bringing an action for breach of competition law?

The legal basis can be premised both on national and European Union law.

National

The Competition Law and the Control of Concentrations between Undertakings Law, [22(I)/1999], and the Law establishing rules for actions for damages as a result of breach of Articles 3 and 6 of the Competition Law and/or Articles 101 and 102 of the TFEU (law 113(I)/2017) are the main laws applicable at national level for the protection of competition. The latter is the main legislative instrument regulating the filing and conduct of actions for damages.

Section 3 of the Competition Law provides, *inter alia*, that all agreements between undertakings or associations of undertakings and any concerted practices having as their object or effect the elimination, restriction or distortion of competition within the Republic of Cyprus are prohibited. Section 6 provides that any abuse of a dominant position within the internal market is also prohibited.

The following behaviours are listed in both Section 3 and Section 6 as the most notable examples of anti-competitive practices:

- (a) the direct or indirect fixing of prices or other trading conditions;

- (b) the restriction or control of production, distribution, technological development or investment;
- (c) geographical or other market sharing;
- (d) the application of different conditions to equivalent transactions; and
- (e) the imposition of obligations, which by their nature or according to commercial practice, are totally irrelevant to the subject matter of a contract, as a prerequisite to its execution.

European Union

Articles 101 and 102 of the TFEU are applied if an agreement or concerted practice or an undertaking’s abuse of a dominant position within the internal market may affect trade between Member States. Relevant EU regulations and block exemptions also apply.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

As mentioned above (see question 1.2), the legal basis for competition law claims derives from national law and European Union legislation. According to Section 50 of the Competition Law, if an issue and/or a practice are not specifically regulated by national legislation, then the CPC and the courts will apply EU competition law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are currently no specialist courts for competition law cases in Cyprus. As mentioned above, such claims can be raised within the context of a civil action before the competent District Court. Furthermore, decisions of the CPC are subject to recourse for annulment before the Cyprus Supreme Court.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Legal standing depends on the penalties or on the remedies being sought. Administrative fines are imposed by the CPC. Civil proceedings can be instituted by any person who suffered loss or damage from any breach of the Competition Law and from any anti-competitive practices and any direct or indirect purchaser.

Collective claims, class actions and actions by representative bodies are not prohibited *per se*. The Rules of Civil Procedure provide that where several persons have the same interest in one cause or matter, one or more of those may be authorised by the court to pursue or defend an action on behalf or for the benefit of all interested persons.

Criminal proceedings are initiated by the Attorney General of the Republic in cooperation with the CPC and/or the Police.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The law applies to anti-competitive practices that eliminate, restrict or distort competition within the Republic of Cyprus.

At first instance, the District Courts have jurisdiction to hear claims for damages. The competent court is the court where the defendant has its residence (for natural persons) or where a legal entity has its registered office. Alternatively, the action may be brought before the District Court of the territory where the alleged breach of the Competition Law or loss has occurred.

The Supreme Court of Cyprus can hear appeals from District Court judgments in its appellate jurisdiction. No leave is required to file an appeal.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Neither. Partly because the size of the market is small and partly because the judicial process is slow.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available and can be ordered by either the CPC or by the court (see question 2.2).

2.2 What interim remedies are available and under what conditions will a court grant them?

The CPC can order interim measures and impose any conditions it considers necessary under the circumstances. The CPC can issue an order for interim measures *ex proprio motu* (on its own motion) or upon an application of an interested party. Such application must be filed at the same time or subsequently to a complaint for a breach of the provisions of Sections 3 and/or 6 of the Competition Law or Articles 101 and/or 102 of the TFEU.

For an interlocutory order to be issued, the following conditions must be satisfied cumulatively: i) the claimant has a legitimate interest; ii) there is a reasonably strong *prima facie* case; iii) there is a serious risk of irreparable damage to the interests of the complainant or to the public interest; and iv) the imposition of such conditions or interim relief is a matter of urgency.

Interim remedies are also available in civil proceedings by virtue of Section 40 of the Competition Law, which provides that any person who has suffered any damage or financial injury from any act or omission that contravenes Sections 3 and/or 6 of the Competition Law or Articles 101 and/or 102 of the TFEU has a right to apply to the competent District Court for an injunction in order to prevent the infringement. As provided by Section 37 of the Courts of Justice Law [L.14/1960] and the relevant case-law, in order to grant any interim relief, the court must be satisfied that a) the plaintiff's claim raises a serious issue to be tried, b) there is a good probability for the plaintiff to succeed and recover damages, and c) it will be impossible for justice to be awarded at a later stage, unless an injunction is granted.

The court will also consider whether or not the balance of convenience favours the preservation of the *status quo* and will apply the proportionality and fairness test.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The main final remedies are the following:

- the CPC can order the termination of the illegal actions immediately or within a fixed period;
- the CPC can impose any conditions they deem necessary to bring the infringement to an end;
- the CPC can impose any conditions they deem necessary for the restoration of the *status quo* as it was before the Competition Law had been breached;
- the court can make an award against the undertaking for any damages or loss suffered by any person as a result of anti-competitive practices that constitute a breach of the Competition Law;
- the CPC can impose an administrative fine not exceeding 10% of the combined annual turnover of the undertaking concerned or not exceeding 10% of the sum of the turnover of every undertaking which is a member of the infringing association of undertakings; and
- where there is a continuing breach, the CPC may impose a fine up to €85,000 for every day that the infringement continues.

According to the relevant provisions of the Competition Law, any person who denies or omits to comply with or acts contrary to a decision finding an infringement of the Competition Law (including interim measures) commits a criminal offence and can be sentenced to up to one year of imprisonment or to a pecuniary penalty, or both.

Criminal sanctions can be imposed not only against the concerned undertaking but also against its managing director and/or against the members of its board of directors.

Each case will be decided on its own facts. The CPC and the District Courts use the standard tests of proportionality and fairness to decide on a particular remedy.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

According to the general principles of the laws of Cyprus and the

common law, the claimant can recover any loss or damage suffered as a direct result of a breach of the Competition Law. The measure of damage is determined by the actual loss or damage suffered by the plaintiff. It may also include loss of profit, but this must be reasonably foreseeable. According to the specific law, i.e. the Law establishing rules for actions for damages as a result of breach of Articles 3 and 6 of the Competition Law and/or Articles 101 and 102 of the TFEU (law 113(I)/2017), the measure of damages is to reinstate the plaintiff to the position he/she was in if the breach had not occurred.

Exemplary damages are available under Cypriot law, but they are rarely awarded. For a claim for such damages to have a chance to succeed, the behaviour of the defendant must be shown to have been repeated and/or particularly repulsive.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Out-of-court settlement amounts paid to the injured party are taken into account.

4 Evidence

4.1 What is the standard of proof?

The standard of proof, as in all civil cases, is the balance of probabilities.

4.2 Who bears the evidential burden of proof?

The burden of proof is borne by the plaintiff. More specifically, the plaintiff must prove one or more infringements of the Competition Law and that such breach caused loss or damage to him/her.

The decision of the CPC finding an infringement of Sections 3 and/or 6 of the Competition Law constitutes irrebuttable evidence in that regard. If the decision is from the competition authority of another EU Member State, the decision constitutes rebuttable evidence.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Other than the fact that a final decision by the CPC constitutes irrebuttable evidence, there is as yet no jurisprudence on this matter.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

All forms of evidence are normally admissible in civil procedures, unless they are deemed inadmissible by the court, in accordance with the Law of Evidence. Evidence in court may be oral and/or written. Due to an amendment of the Law of Evidence, hearsay is also allowed subject to certain conditions and it is up to the judge to decide the weight of the hearsay evidence.

Expert evidence may be adduced in court, by summoning experts to testify and/or by filing any reports they have prepared. Experts are subject to cross-examination as with any other witness.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

There are no disclosure proceedings before the initiation of court proceedings.

After the commencement of the judicial proceedings, disclosure and inspection of documentary evidence relating to any matter in question is available to both parties upon application to the court. An application for inspection may be opposed by the other party if it concerns privileged documents. In such a case, the court can inspect the document and decide whether the claim of privilege is valid.

There is no procedure to enforce discovery from third parties before the trial, but such parties may be summoned during the trial either as witnesses (*subpoena ad testificandum*) or just to produce documents at their possession (*subpoena duces decum*). In this sense, employees and/or members of the CPC may also be summoned to testify on oath and/or produce documents.

Additionally, by virtue of the Law establishing rules for actions for damages as a result of breach of Articles 3 and 6 of the Competition Law and/or Articles 101 and 102 of the TFEU (law 113(I)/2017) the court may order the production of documents from third parties and/or from the records of the CPC, provided that the process before the CPC has been concluded.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Any of the parties are free to summon any witness they wish, even from other jurisdictions, although in the latter case there is no enforcement procedure to compel a foreign witness's presence in a Cypriot court. For witnesses residing in Cyprus, the litigants can file a summons and serve it on them, requiring their attendance in court to give evidence and/or produce documents. Once the summons is duly served, the attendance of the witnesses is compulsory and the court may issue an arrest warrant to compel their appearance.

Cross-examination of witnesses is allowed.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

As mentioned above, decisions of competition authorities or other governmental authorities have significant evidential value and corroborate the claimant's case. Infringement decisions from the CPC constitute irrebuttable evidence and decisions from the competition authorities of other EU Member States constitute rebuttable evidence.

In any case, even if in the end the infringement is proven in court, the breach itself does not entitle a person to damages *ipso facto*. The plaintiff must strictly and particularly prove his/her loss along with a causal link between the loss suffered and the anti-competitive conduct.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

The courts have powers to issue such orders as appropriate to

ensure confidentiality, such as such information being kept in sealed envelopes and stored in specially protected rooms in order to restrict access solely to the court and the parties to the action. The courts can also appoint experts to produce reports in a form which protects confidentiality.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Yes, the Law establishing rules for actions for damages as a result of breach of Articles 3 and 6 of the Competition Law and/or Articles 101 and 102 of the TFEU (law 113(I)/2017) provides that the CPC can express its views and analysis before the courts.

Section 23 of the Competition Law provides that the CPC is responsible, *inter alia*, for the publication of announcements informing any interested party regarding issues within its competence and that the CPC can submit reasoned opinions to public entities regarding issues that fall within its competence.

Any decisions of the CPC must, in any event, provide a full reasoning, since they are subject to recourse before the Supreme Court, and lack of sufficient reasoning may be a ground for annulment.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There are no general defences of justification or public interest. However, there are important exceptions.

According to Section 7 of the Competition Law, the prohibition shall not apply:

- a) to agreements relating to wages and employment working conditions; and
- b) to undertakings which are responsible for the administration of services of general economic interest or undertakings having the character of a state monopoly, if the application of the provisions of the Competition Law obstructs the performance of the particular tasks assigned to those undertakings by the state.

Furthermore, pursuant to Section 4, any agreement, decision or concerted practice falling within the scope of Section 3 shall be permissible and valid, if the following conditions are met cumulatively:

- a) it contributes to improving the production or distribution of goods or to promoting technical or economic progress and confers to consumers a fair share of the resulting benefit;
- b) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- c) it does not afford the undertakings concerned the possibility of eliminating competition.

Block exemptions can also be granted by the Cyprus Council of Ministers after a reasoned opinion of the CPC, by virtue of Section 5. Such exemptions include, *inter alia*, the following:

- a) agreements relating to the insurance sector;
- b) agreements relating to the motor vehicle sector;
- c) agreements relating to technology transfer;

- d) agreements relating to technical cooperation in the field of air transport;
- e) agreements relating to the production or trade of agricultural products;
- f) agreements relating to the field of road transport; and
- g) agreements relating to the field of liners and conferences in the field of maritime transport.

According to the Control of Concentrations between Undertakings Law [22(I)/1999], the Minister of Commerce, Industry and Tourism is vested with the discretionary power to declare a concentration as being of major importance, through a reasoned order. In such cases, the relevant decision is referred by the Minister to the Council of Ministers for examination in accordance with Section 38, and the Council of Ministers shall decide, without delay, whether it will finally approve the concentration and under what terms (Section 29). Finally, block exemptions which are provided by the relevant regulations of the European Union are also applicable.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Yes, this defence would be available. Indirect purchasers have *locus standi*.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Any party may join proceedings either by applying to intervene or by existing parties seeking to add them. The courts will generally decide if the joinder of a party will serve the cause of justice and contribute in deciding the issues in a more fair manner.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Limitation periods regarding cases before the CPC

In theory, there are no limitation periods for bringing a claim for anti-competitive practices before the CPC. However, there is a limitation period for the imposition of administrative fines by the CPC. According to Section 41 of the Competition Law, the CPC cannot impose administrative fines for infringements of the provisions of the law or the European Community Competition Laws, unless it exercises its powers a) within three years, regarding infringements of provisions concerning requests for information or the conduct of inspections, or b) within five years in all other situations.

Time shall begin to run on the day the infringement is committed. In the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases to exist.

Limitation periods in civil proceedings

The limitation period is six years. The courts have the power to stay the limitation period by up to two years if the parties are involved in a process of extra-judicial settlement.

Where interim remedies are concerned, one must apply to the CPC or the court without delay in order for the urgency condition to be fulfilled (see section 2).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

In general terms, there are no restrictions or timetable set by the relevant legislation or the civil procedure rules. Due to the heavy workload of the District Courts and the plethora of interim applications that are available to the parties, a claim for damages may last anywhere between one and four years.

In theory, however, a claimant can apply for a summary judgment at any time after the filing of his/her statement of claim. However, in order for this to be successful, it would be necessary to prove complete absence of a defence to the claim. Practically, the court procedures would only be expedited if there is a relevant decision of the national competition authority or other expert reports concerning infringements of the Competition Law by the defendants.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Private claims for anti-competitive practices before the District Courts can be resolved with a settlement agreement. According to the Cyprus Civil Procedure Rules and the relevant case-law, the plaintiff may, at any time before or after the receipt of the defendant's statement of defence and before taking any other step in the proceedings, discontinue wholly or partly its claim against all or any of the defendants, without leave. If the above conditions are not met, the discontinuance of the claim is subject to judicial authorisation, which is almost invariably granted.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

No class actions are allowed under the rules of procedure.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

According to Order 59 of the Civil Procedure Rules, the costs of civil proceedings shall be at the court's discretion. However, the general principle is that costs follow the result of the action, which means that the unsuccessful party will be ordered to pay the legal costs of the other party.

It must be stressed that nothing prevents lawyers from charging a higher amount than that the unsuccessful party is ordered to pay by the court.

8.2 Are lawyers permitted to act on a contingency fee basis?

Contingency fees are not permissible in Cyprus. However, the litigation costs can be agreed between the lawyer and the client before

the commencement of proceedings. The agreement may be for a fixed amount or the costs calculated on the basis of a fixed cost in accordance with the relevant subsidiary legislation. In the latter case, the legal fees would depend on the amount of the claim.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Strictly speaking, funding of competition law claims by a non-litigant is not expressly prohibited. However, the general practice is that funding of litigation is borne by the parties to the proceedings and there have not been any circumstances where litigation proceedings were funded by a third party.

9 Appeal

9.1 Can decisions of the court be appealed?

Court decisions in civil proceedings premised on the infringement of the Competition Law and Articles 101 and 102 of the TFEU can be appealed before the Supreme Court of Cyprus without leave.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

An immunity and leniency programme took the form of subsidiary legislation pursuant to the provisions of the Competition Law. According to the Cartel Immunity and Reduction of Fine Programme (hereinafter, the "CIRF"), the CPC may grant immunity to an undertaking if the following requirements apply:

- the applicant is the first who comes forward and submits evidence;
- the evidence is such that it enables the CPC to initiate proceedings or to prove an infringement relating to anti-competitive practices;
- the applicant must provide the evidence before the CPC reaches a *prima facie* finding on an infringement of the Competition Law;
- the applicant must take all the necessary and effective steps to terminate its participation in the illegal activities;
- the applicant must not have coerced any other undertaking to participate in the illegal activities or played the leading role in those activities;
- the applicant shall not alert its former associates that it has applied for immunity under the abovementioned programme;
- the applicant shall not destroy or conceal any information and/or documents and/or any form of evidence regarding the illegal activities and its former associates;
- the applicant must cooperate fully, timely and on a continuing basis with the CPC during the investigation and the hearing procedures; and
- the applicant shall facilitate interviews between its current and/or former employees or members of its staff and the CPC.

If the conditions for immunity are not met, an undertaking may be eligible to apply for a fine reduction if it provides information that

contributes significantly to the finding of anti-competitive practices and/or infringement of the Competition Law.

It is specifically provided in Section 28 of the Competition Law that immunity and leniency procedures concern administrative fines and therefore applicants cannot be awarded immunity from private civil claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

There is no specific provision in the Competition Law allowing either successful or unsuccessful applicants to withhold evidence submitted in the application process in subsequent court proceedings (see also question 4.7). It must be also stressed that disclosure of evidence takes place after the applicant has been reminded of his/her privilege against self-incrimination.

However, the unsuccessful immunity applicant is, to an extent, protected by Sections 27 and 13 of the CIRF. Section 27 provides that the CPC must not use evidence or information obtained through the immunity/leniency procedures unless the applicant has consented or the above evidence/information was made known to the CPC through other means. In addition, any evidence submitted to support an application may be withdrawn by the applicant by virtue of Section 13 of the CIRF. In any case, the above protection is circumvented by the fact that the CPC can always use the broad investigation powers conferred to it by Sections 30–32 of the Competition Law to obtain such evidence and use it in any subsequent court proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Directive will make it easier to file claims for damages and also to prove the underlying cause of action since a final decision of the CPC will constitute irrebuttable evidence of a breach of the Competition Law.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Directive has been transposed into national legislation by virtue of the Law establishing rules for actions for damages as a result of breach of Articles 3 and 6 of the Competition Law and/or Articles 101 and 102 of the TFEU (law 113(I)/2017).

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The law applies from the date of its publication in July 2017. There is no retrospective effect, so it will apply to infringement decisions post-dating its publication.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

There have been no proposed reforms as yet, but the law introduced in 2017 provides that procedural regulations may be issued by the Council of Ministers.

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Czech Republic

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Tomáš Fiala



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

National competition rules are contained in Act No. 143/2001 Coll., on Protection of Economic Competition, as amended (the “Competition Act” or the “Act”). The Act is based on the principles of Articles 101 and 102 of the Treaty on Functioning of the European Union (“TFEU”) as well as EU merger control rules. The competition rules are enforced at the administrative level by the Office for Protection of Economic Competition (the “Competition Office”).

The scope of claims that may be brought before the competent Czech courts for breach of the Competition Act and Articles 101 and/or 102 TFEU includes: (i) cease and desist orders; (ii) declaration of invalidity of contractual arrangements; (iii) damages; (iv) the surrender of unjust enrichment; and (v) interim measures.

1.2 What is the legal basis for bringing an action for breach of competition law?

The substantive basis for bringing an action for breach of competition law form the Competition Act and Articles 101 and/or 102 TFEU that have direct effect in the Czech Republic. As regards the damages claims for breaches of competition law, these are governed by Act No. 262/2017 Coll., on Damages in the Area of Economic Competition (the “Competition Damages Act”) that as from 1 September 2017 implemented in the Czech Republic EU Directive 2014/104/EU on antitrust damages actions (the “Directive”).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

It follows from the answer to question 1.2 above that the legal basis for competition law claims derive both from EU and national competition law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

No; there are no specialist competition law courts in the Czech Republic. Therefore, the jurisdiction of a court to hear a case involving competition law will be determined by the general rules of jurisdiction laid down in Act No. 99/1963 Coll., the Civil Procedure

Code, as amended (the “Civil Procedure Code”). Section 9 par. 3 letter h) of the Civil Procedure Code provides that regional courts act as courts of first instance in matters concerning the protection of competition. Similarly, Section 25 of the Competition Damages Act provides that regional courts act as courts of first instance in disputes regarding compensation for damage caused by an anticompetitive behaviour. Accordingly, regional courts hear competition law cases in the Czech Republic. The high courts will rule on appeals against the decisions of the regional courts.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

In general, any natural or legal person that has the capacity to assume legal rights and obligations may bring an action for damages before the competent Czech courts. Czech law does not recognise class actions or representation of a plaintiff by an association or any other bodies in competition law matters. However, under Section 91 par. 1 of the Civil Procedure Code, it is possible for several plaintiffs to bring an action jointly. Further, Section 93 of the Civil Procedure Code enables a person that has a legal interest in the outcome of the dispute to join the plaintiff as a “supporting participant”. In addition, for reasons of procedural economy, the court has, under Section 112 par. 1 of the Civil Procedure Code, the right to join cases for the purpose of joint proceedings if the facts of the cases concerned are linked or if they involve the same parties.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

There are no special rules under Czech law governing jurisdictional matters for competition law claims, but a number of general jurisdictional bases can be used to establish jurisdiction. In particular, the Czech courts will have jurisdiction if the defendant is domiciled in the Czech Republic or if the action would refer to competition law infringements taking place or producing effects in the territory of the Czech Republic.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

No; the Czech Republic does not have a reputation of attracting

claimants from other jurisdictions; however, the new Competition Damages Act could remove main elements that have hindered the development of private enforcement of competition law in the Czech Republic so far.

1.8 Is the judicial process adversarial or inquisitorial?

Czech judicial proceedings are principally adversarial and the judge's role is primarily to observe fairness and equality of the process. On the other hand, the judge may, under certain circumstances, examine evidence other than that proposed by the parties and can also examine witnesses.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes; the competent court may take an interim injunction if it is necessary to provisionally regulate the relationships of the parties, or if there is a danger that the enforcement of the court decision could be jeopardised.

2.2 What interim remedies are available and under what conditions will a court grant them?

The court acts at the request of a party who alleges damage to individual interests. The burden of proof rests on the plaintiff, who must prove that the conditions for applying the interim injunctions are met. The party may seek the court to order the other party to, in particular: not dispose of certain things or rights; and do something, omit something or suffer something.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

As already stated in the response to question 1.1 above, final remedies granted by the competent courts involve (i) annulment of the Competition Office's decision in whole or in part (including cancelling or reducing fines), (ii) declarations confirming that a certain anticompetitive contractual arrangement is invalid and thus unenforceable, (iii) the surrender of unjust enrichment, or (iv) damages for harm suffered from an infringement of the competition rules.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under Czech law, the damages that can be sought by private plaintiffs are compensatory and cover both direct damage and lost profit. Additionally, the court will award compulsory statutory interest. On the other hand, Czech law does not recognise the concept of punitive or exemplary damages. Assessing damages can become

rather difficult in competition cases. The Competition Damages Act does not provide specific guidance on the quantification of harm and only stipulates that if it is impossible to quantify the amount of damages precisely, it will be determined by the court. As there is no case law in the field of competition-based claims for damages, it is very difficult to assess the manner in which Czech courts might calculate the damages. However, it could be assumed that in price-fixing cartels, the calculation of damage would be based on the difference between cartel and market prices.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

In view of the fact that the purpose of damages is to compensate the injured parties, the courts should not take into account penalties imposed by the Competition Office on the defendant undertakings.

4 Evidence

4.1 What is the standard of proof?

The fundamental principle is that the court evaluates the evidence at its own discretion, taking into account all facts stated in the course of the proceedings. The principle of free evaluation of evidence by the court means that it depends on the decision of the court, which evidence it admits and how it will evaluate the evidence. There is no standard of proof such as, for instance, beyond reasonable doubt under Czech law.

4.2 Who bears the evidential burden of proof?

As a general rule, each party carries the burden of submitting and proving those facts upon which its claim or defence is based. The evidence is always examined by the court. The court does not conduct its own investigation but relies on facts and evidence placed before it by the parties. The plaintiff must thus present his or her case and submit all facts supporting the action. In response, the defendant must make the objections and pleas to his or her defence.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Yes; the Competition Damages Act includes several legal presumptions that should make it easier to prove damages claims. In particular, this Act has established a rebuttable presumption that the cartels cause harm. This presumption is a clear divergence from the rules on general liability for damage where the burden rests with the claimant to prove that damage was suffered. The burden of proof that the cartel does not cause harm has been thus shifted to the infringers (defendants).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

No; under Czech law, any means by which the facts can be ascertained may serve as evidence. The Civil Procedure Code expressly lists the following: examination of witnesses; expert witnesses; reports and statements of authorities; individuals or legal entities; notarial or executorial records and other documents; inspection by the court; and examination of the parties.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Under the Competition Damages Act, the parties have easier access to evidence necessary in actions for damages. In particular, if a party needs specific documents that are in the hands of other parties or third parties to prove a claim, it may obtain a court order for the disclosure of such documents. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected. Non-compliance with a disclosure order is subject to the imposition of a procedural fine by the court. However, amnesty/leniency and settlements statements are excluded from the disclosure.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Under the Civil Procedure Code, each person, who is not a party to the proceedings, is obliged to appear as a witness when summoned by the court. This duty may be refused only if such person would expose himself or herself or related person to the risk of criminal proceedings. A person that fails to appear before the court without an excuse may be brought to the court by the Police, if that person had been previously warned of such consequence. The judge can put the questions to the witness. The parties can also question the witness, if allowed by the court.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The Competition Damages Act explicitly states that the decisions of other courts, the European Commission and the Competition Office finding a competition law infringement are binding on the courts and constitute full proof that the infringement occurred. The decisions of the competition authorities of other EU Member States will constitute *prima facie* evidence of an infringement.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

In order to protect business secrets, the court may impose under the Competition Damages Act a confidential duty on parties to which such secrets are disclosed. In the case of breaching such secret, a penalty of up to CZK 1 million may be imposed on the relevant party. Moreover, a non-financial penalty may be imposed, as a consequence of which it is not allowed to use the evidence to which the breached confidentiality duty relates.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The Competition Act provides for the possibility of the Competition Office to assist domestic courts in proceedings for the application

of Articles 101 and 102 TFEU. To that end, the Competition Office may submit statements to the courts concerning the application of Community competition rules. We are not aware of the case where the Competition Office acted as *amicus curiae* before the competent Czech courts.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

No; there is no specific defence of justification and/or public interest available under Czech law. However, with respect to the undertakings entrusted with the operation of services of general interest (e.g. basic postal service), the Competition Act is applied to those undertakings insofar as such application does not render the performance of these services impossible. Therefore, they may invoke that their agreements or practices do not fall within the scope of application of the competition rules.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

The Competition Damages Act stipulates that the defendants can rely on the passing on defence against the claimant. The infringer can thus reduce compensation to direct customers by the amount they passed on to indirect customers. At the same time, the infringer will bear the burden of proof to demonstrate that the claimant offset the increased price it paid by raising the prices it charged to its own customers.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Yes; Section 93 of the Civil Procedure Code enables a person that has a legal interest in the outcome of the dispute to join the plaintiff as a “supporting participant”. Such person may participate in the proceedings either on the basis of his/her own motion or upon a motion of the plaintiff or the defendant.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Yes; injured parties have five years to bring damages actions, starting from the time the infringement has ceased and the claimant became aware or can reasonably be expected to know (i) the harm and the identity of the infringer, and (ii) the competition law infringement. The Competition Damages Act also specifies instances where the running of the limitation period is suspended, such as, for example, the investigation or the proceedings before the competition authority.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Due to the lack of case law regarding competition law claims, it is difficult to predict the length of judicial proceedings in these cases. However, our opinion is that the first instance proceedings should

normally take from one to two years, while appellate proceedings could take another one to two years. Accordingly, given the complexity of competition law cases, we would assume that the final judgment might be obtained within two to four years.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No; it follows from Section 26 of the Competition Damages Act that if the parties to the proceedings inform the court that they entered into negotiations over out-of-court settlement, the court will automatically suspend the proceedings for a period of up to two years.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As there is no possibility of collective actions for competition law infringements under Czech law, this question cannot be answered for the moment.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes; the court will determine allocation of costs in its final decision. As a rule, a party who had full success in the case shall be reimbursed its costs by the unsuccessful party.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes; attorneys are allowed to agree on a success fee based on a share of the total amount awarded in the case. Such an arrangement must be reasonable and may not be clearly disproportionate to the value and complexity of the matter.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

As a rule, each party shall pay its fees and expenses incurred in the course of the court proceedings. However, a party is not restricted from asking third persons for assistance with financing such expenses, including its lawyer's costs.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes; any party can bring an appeal against the decision of the regional court before the competent high court. The appeal must be filed within 15 days after the delivery of a written form of the contested court decision.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes; the Competition Office operates a programme on immunity from fines and reduction of fines in cartel cases (the "Leniency Programme"). The framework principles of the Leniency Programme are set out in the Competition Act, while the detailed conditions are set forth in the Office's guidance, available on its website.

In order to safeguard the effectiveness of the Leniency Programme, the Competition Damages Act provides an exception from joint and several liability for successful leniency applicants; these immunity recipients will be obliged to compensate only their own purchasers.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The Competition Damages Act has introduced certain restrictions on the disclosure of certain types of documents. In particular, immunity/leniency statements and settlements submissions of the parties are protected and permanently excluded from the disclosure. Other documents prepared by the defendants specifically for the purpose of the administrative proceedings before the Competition Office (e.g. responses to the information requests) are only temporarily excluded from the disclosure, which can be ordered after the Competition Office closed the proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Czech implementation of the Directive will probably remove the main elements that have hindered the development of private enforcement of competition law in the Czech Republic so far. As a consequence, the infringers will be more exposed to claims for antitrust damages.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

As already stated above, the Directive has been implemented in the Czech Republic by the Competition Damages Act.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

It follows from the interim provisions (Section 36 of the Act) that

the procedural provisions contained in the Competition Damages Act (e.g. the rules referring to disclosure of evidence) will apply to proceedings initiated after 25 December 2014, i.e. after the Directive entered into force. However, substantive provisions (e.g. statute of limitation or scope of damages) will apply to actions brought after the Competition Damages Act took effect, i.e. after 1 September 2017.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

No changes in competition litigation are expected in the near future in the Czech Republic. Nonetheless, it is worthwhile mentioning that the Czech Ministry of Justice has published a legislative proposal aiming to introduce a general class action regime, based on the opt-out principle, into Czech law. This could lead to increased competition litigation. However, it will take at least another two or three years before the class action regime becomes part of the Czech legal order.



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Tomáš Fiala is an attorney at Vejmelka & Wünsch. He specialises in competition, data protection and pharmaceutical law. He has advised a number of Czech and international clients in prominent competition proceedings before the Czech Competition Office. Prior to joining Vejmelka & Wünsch in 2001, Tomáš worked at the Competition Office where he held a position of the Director of the European and International Department. Tomáš is a member of the Czech Bar Association and the Czech Association of Competition Law. He participated as a speaker at several seminars and conferences in the area of competition law and is an author of various legal articles in this field. He speaks Czech and English.



Vejmelka & Wünsch is one of the leading law firms in the Czech Republic. The provision of comprehensive services for clients in respect of all types of commercial projects constitutes the core activity of Vejmelka & Wünsch. Consulting services cover all areas of Czech business law, with particular emphasis on company and commercial law, corporate acquisitions, joint ventures, real estate law and competition law.

Vejmelka & Wünsch's competition law practice encompasses a broad range of matters in antitrust, competition and related areas of law. We have participated in all types of proceedings before the Czech Competition Office. The most important areas have been and likely continue to be cartel proceedings and competition compliance programmes. Our lawyers have successfully guided numerous proposed mergers through the merger clearance requirements. Similarly, we regularly advise multinational companies with respect to their distribution systems, pricing policies and related matters.

Denmark

Jesper Fabricius



ACCURA Advokatpartnerselskab

Laurits Schmidt Christensen



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The following types of civil claims are possible:

1. an action for reversal or remittal of a decision by the Danish Competition Appeals Tribunal (*Konkurrenceankenævnet*);
2. an action for declaration (this may, for instance, be brought by either party in a refusal-to-supply conflict);
3. an action for injunction before the ordinary courts or the enforcement court (this may, for instance, be brought by customers and/or competitors in cases concerning discriminatory pricing or by competitors in cases concerning predatory pricing); and
4. a claim for damages suffered as a consequence of breach of competition law (this may, for instance, be brought by the customers of cartel participants).

Claims may be brought before the courts in the form of appeals against decisions made by the Danish Competition Appeals Tribunal (an administrative body handling appeals against decisions by the Danish Competition and Consumer Authority (*Konkurrence- og Forbrugerstyrelsen*) and the Danish Competition Council (*Konkurrencerådet*)); see claim type 1 above.

However, claim types 2–4 above may also be brought before the courts even if neither the Danish Competition and Consumer Authority nor the Danish Competition Council has made a decision.

In addition to the civil claims stated above, the Public Prosecutor for Serious Economic and International Crime (*Statsadvokaten for Særlig Økonomisk og International Kriminalitet*) may bring criminal actions for breach of competition law.

1.2 What is the legal basis for bringing an action for breach of competition law?

Pursuant to section 20(3) of the Danish Competition Act (*Konkurrenceloven*), it is possible to bring a decision by the Danish Competition Appeals Tribunal before the courts within eight weeks after receiving the decision of the Tribunal.

With respect to claim types 2–3 stated under question 1.1 above, the Danish Competition Act does not provide any explicit legal basis for bringing an action for breach of competition law. The legal basis

for bringing such claims must be derived from general principles of Danish law.

Claim type 4 is regulated by the Act on Actions for Damages for Infringements of Competition Law (*Lov om behandling af erstatningsager vedrørende overtrædelser af konkurrenceretten*) which implements the Damages Directive (2014/104/EU).

Under Danish law, private persons or companies are not generally entitled to invoke legislation passed in the general interest of the public (*actio popularis*). However, in relation to a breach of competition law, it is generally accepted that any person/company with a specific legal interest in the breach may bring an action.

A claim for damages, pursuant to the Act on Actions for Damages for Infringements of Competition Law, can be made by any person/company who has suffered damage due to a breach of competition law.

In November 2016, the Maritime and Commercial High Court established that a claim for damages for breach of competition law does not preclude a parallel claim for damages for breach of the Danish Marketing Practices Act, even when the claims relate to the same legal matter.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is, apart from claims for damages pursuant to the Act on Actions for Damages for Infringements of Competition Law, derived from national law principles. It is possible to bring a claim before the courts based on national competition law and/or EU competition law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

As a general rule, all actions must be brought before the relevant city court. However, in cases where the provisions of the Competition Act are of material importance, the case may be brought before the Maritime and Commercial High Court in Copenhagen instead of the relevant city court. Furthermore, if an action is brought before a city court and the provisions of the Danish Competition Act are of material importance for deciding the case, the city court must refer the action to the Maritime and Commercial High Court if requested by a party.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

In Denmark, the basic principle is that only parties with a legal interest in a case have standing to bring an action for breach of competition law. In practice, a competitor or a customer who is individually affected by the breach in question may bring an action.

As mentioned, a claim for damages pursuant to the Act on Actions for Damages for Infringements of Competition Law can be made by any person/company who has suffered a loss due to a breach of competition law.

Under the Danish Administration of Justice Act (*retsplejeloven*), collective claims (similar claims from different parties raised against the same party or similar claims raised by one or more parties against several parties) are allowed if the following conditions are satisfied:

- a. the Danish courts have jurisdiction to hear all claims;
- b. the relevant court has jurisdiction to hear at least one of the claims;
- c. all claims are subject to the same rules of procedure; and
- d. neither party objects, or if as a result of the connection between the claims they should be treated as one case irrespective of any objections.

It is also possible to make class actions. A class action may be initiated provided that:

- a. the claims are similar;
- b. the Danish courts have jurisdiction to hear all the claims;
- c. the relevant court has jurisdiction to hear at least one of the claims;
- d. a class action is considered the best way to handle the claims;
- e. the members of the group in question can be identified and informed about the case in a practical manner; and
- f. it is possible to appoint a group representative.

A class action is conducted by a group representative on behalf of the group. Furthermore, the Danish Consumer Ombudsman may act as a group representative. This option is restated in the Act on Actions for Damages for Infringements of Competition Law. The class action comprises all claimants registered as members of the relevant group, unless the court decides that the class action comprises all claimants who have not opted out.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

An appeal against a decision by the Danish Competition Appeals Tribunal may be brought before the city court at the place where the party bringing the action lives or has its registered office. However, the majority of such cases will probably be brought before or referred to the Maritime and Commercial High Court in Copenhagen instead of the relevant city court; see question 1.4 above.

For other types of actions, a court will be entitled to take on a competition law claim if:

- a. the defendant lives or has its registered office within the jurisdiction;
- b. the claim relates to business conducted by the defendant within the jurisdiction;

- c. the claim relates to real estate and such real estate is situated in the jurisdiction;
- d. the claim relates to a contractual obligation which has been or must be performed within the jurisdiction (does not apply to payment obligations);
- e. the claim relates to a breach of competition law committed within the jurisdiction; or
- f. the parties have agreed to submit their dispute to the relevant city court.

Therefore, the fact that the breach of competition law has been committed within the jurisdiction will entitle a court to take on a competition law claim. However, if one of the other situations a–d or f applies, it is not imperative that the breach has been committed within the jurisdiction, or even that it has had effects within the jurisdiction.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Denmark does not have a reputation for attracting claimants. In recent years, there have been a number of defendant applications to seize jurisdiction in Denmark, mainly due to discovery rules being more favourable to defendants in Denmark than in many other countries and due to the fact that Danish courts are generally quite conservative when awarding damages to claimants.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process in Denmark for civil claims is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, the provisions of the Administration of Justice Act on prohibitory injunctions apply to competition law cases just as they do to any other matters.

2.2 What interim remedies are available and under what conditions will a court grant them?

In accordance with the Administration of Justice Act, the enforcement court may grant a prohibitory injunction ordering a person or a legal entity to refrain from certain acts which conflict with the claimant's rights.

In connection with a prohibitory injunction, the defendant may be ordered to undertake specific acts to ensure compliance with the injunction. The enforcement court may also ensure compliance with the prohibitory injunction; for instance, by seizing objects used in connection with a breach of the injunction.

The enforcement court will grant a prohibitory injunction if the court considers it likely that each of the following conditions are satisfied:

- a. the acts in question conflict with the claimant's rights;
- b. the defendant will carry out the acts in question; and
- c. it is not possible to wait for normal court proceedings.

The enforcement court will not grant a prohibitory injunction if it finds that the general rules on damages and criminal liability of

Danish law or any security provided by the defendant offer adequate protection. Furthermore, even if the above conditions a–c are satisfied, the enforcement court may refuse to grant a prohibitory injunction if the damage suffered by the defendant as a consequence of a prohibitory injunction is disproportionate to the claimant's interests.

If the enforcement court grants a prohibitory injunction, it may demand that the claimant provide security for any damage that the defendant may suffer as a consequence of the prohibitory injunction.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

A decision by the Danish Competition Appeals Tribunal may be (1) affirmed, (2) reversed, or (3) remitted by the courts.

The courts may also:

- declare that an agreement should be interpreted in a certain way;
- declare an agreement or any part thereof void;
- declare that certain acts or omissions by a person or a legal entity are in breach of competition law;
- impose an injunction prohibiting a person or legal entity from carrying out certain acts; and/or
- award damages.

No particular tests apply in relation to remedies a–d. A court will award damages only if the following conditions are satisfied:

- the defendant's liability is established;
- loss and amount of loss are proved;
- a cause-and-effect relationship is established; and
- the loss was a reasonably foreseeable consequence of the act or omission resulting in liability.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In principle, damages will only be awarded if the claimant is able to prove a loss.

However, the courts have a margin of appreciation when assessing evidence, and where the claimant has given a plausible explanation of how the breach of competition law has affected the claimant, the courts may award damages based on an estimate, even if it is very difficult to prove a specific loss with certainty.

Exemplary damages are not available. The level of damages is generally quite low in Denmark.

On more occasions, the Danish courts have heard and rendered judgment in competition law-based claim cases.

In a reported case of January 2015, the Maritime and Commercial High Court considered a claim by Danish pesticides producer Cheminova against Akzo Nobel for the latter's involvement in the Monochloroacetic Acid cartel. The Commission's 2005 cartel decision formed the basis of the claim. The onus of the case was the calculation and the documentation of the loss incurred by

Cheminova. Cheminova had claimed an amount of DKK 47m/EUR 6m but was awarded an amount of DKK 10m/EUR 1.5m.

In a recent case of January 2017, the Maritime and Commercial High Court considered a claim by Breeders of Denmark (export company offering DanAvl Breeding Pigs and consultancy to pig producers) against the Danish Agriculture & Food Council/Pig Research Centre due to the latter's anticompetitive behaviour and abuse of its dominant position. A court order from the Maritime and Commercial High Court of December 2011 formed the basis of the claim. Also in this case, the onus of the case was on the calculation and documentation of the loss incurred by Breeders of Denmark. Breeders of Denmark had claimed an amount of DKK 5.3m/EUR 0.70m but was awarded an amount of DKK 3.4m/EUR 0.46m.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Fines are not taken into account by the court when calculating the award. The issue as to whether a redress scheme will be taken into account has not been decided. It is assumed that in so far that a claimant has been compensated through a redress scheme, this must be taken into account by the court when calculating the award, as a claimant could otherwise obtain an undue economical advantage.

4 Evidence

4.1 What is the standard of proof?

The courts have a margin of appreciation when assessing evidence, and there are no specific rules on the standard of proof. Please refer to question 4.2 below.

4.2 Who bears the evidential burden of proof?

The claimant generally bears the evidential burden of proof of an alleged breach of competition law and, in the case of an action for damages, the existence and amount of the loss. However, the Act on Actions for Damages for Infringements of Competition Law sets out a presumption that cartel infringements cause harm. The infringer has the right to rebut this presumption.

If a breach of competition law has been established by an administrative decision which has not been appealed, or by a final ruling of a court of law, this will serve as proof of the breach.

Pursuant to the Act on Actions for Damages for Infringements of Competition Law, a final Danish competition law decision establishing an infringement of competition law is deemed to constitute irrefutably evidence of the infringement in question when bringing an action for damages. In other words, the finding of an infringement cannot be challenged in substance during the follow-on damages claim law suit. Further, a final decision in another Member State establishing an infringement of competition law creates a presumption that an infringement of competition law has indeed taken place.

As a general rule, the defendant bears the evidential burden of proof of the existence of justifications/defences for the conduct in question. For instance, the defendant will have to prove that the conduct is subject to a block exemption if the defendant claims that this is the case. If the defendant claims to have acted due to an emergency (*ius necessitatis*) – which in any event hardly ever constitutes a relevant defence in a competition law case – the defendant will have to prove

that there was an emergency situation and that such an emergency forced the defendant to conduct its business in breach of the normal requirements of competition law.

A defendant can claim that the claimant has passed on the loss to its customers (“*passing on defence*”). Pursuant to the Act on Actions for Damages for Infringements of Competition Law, the defendant bears the burden of proof in relation to passing on. As regards an indirect purchaser claiming compensation from an infringer, the indirect purchaser has an alleviated burden of proof in relation to showing that an overcharge has in fact been passed on by the direct purchaser to the indirect purchaser claiming a loss. In this regard, the court will take into consideration whether it is common commercial practice to pass on price increases to indirect purchasers.

Generally, the courts exercise some discretion when deciding who bears the burden of proof and what it takes to discharge the burden of proof.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

As mentioned in question 4.1 above, the Danish courts have a margin of appreciation which also applies in competition law cases. There is, however, an evidential presumption of loss in cartel cases in the Act on Actions for Damages for Infringements of Competition Law. Please also refer to question 4.2 above.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Any evidence of importance to the case may be produced by the parties.

The general rule with respect to expert evidence is that it must be obtained in a process controlled by the court. In this process, each party may affect the choice of the expert and the questions to be answered by the expert. Expert evidence obtained unilaterally by one party is not *per se* excluded as evidence, but the courts may not give such evidence the same weight as would have been the case if the evidence had been obtained in a process controlled by the court.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The general rule is that each party must produce the evidence deemed necessary by such party, and that the court only considers the evidence produced by the parties.

In competition law matters it is not possible to obtain disclosure of documents from the other party or third parties before proceedings begin.

It is, however, possible to seek access to the files of public authorities. In relation to the files of the Danish Competition and Consumer Authority, only a person considered a party to the case in question is entitled to access to the file. At the outset, only the natural or legal person who has obtained the evidence from the competition authorities through an access to file request may produce it in a subsequent action for damages.

During proceedings, each party may request that the court orders the other party or any third party to produce any evidence in its

possession subject to this evidence being identified and the request being proportional.

However, leniency statements or settlement submissions are at the outset not disclosable. Moreover, leniency statements or settlement submissions obtained solely through an access to file request to a competition authority will be rejected by the court in the event the files in question are produced as evidence.

As regards other documents, the court may only order the disclosure of the following categories of evidence once the competition authority has closed 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.

If the competition authority has not closed its proceedings, documents obtained through an access to file request which fall within the above-mentioned categories will be rejected as evidence by the court.

In a recent judgment from June 2017, the Maritime and Commercial High Court found that the requirement to identify documents for which disclosure of evidence are requested in the Act on Actions for Damages for Infringements of Competition Law must be interpreted more broadly in competition law damages cases than what is otherwise the interpretative position under the Danish Administration of Justice Act.

Refusal by either party to comply with a court order in this respect will be taken into account when the court considers the evidence. If the refusal is made by a third party, the court may impose a fine or take the third party into custody, etc. to secure compliance with the order.

Neither a party to the case nor a third party may be ordered to produce evidence disclosing information about issues that the party/third party in question would not be obliged to give oral testimony about (confidential information, information that could expose the party or his family to criminal sanctions or serious loss, etc.).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, everyone who is not explicitly excluded (ministers of religion, medical doctors and lawyers) is obliged to give evidence as a witness and may, if necessary, be forced to appear.

Cross-examination of witnesses is possible.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Danish courts are obliged not to make any decisions contrary to a decision taken or to be taken by the European Commission.

As mentioned in question 4.2 above, pursuant to the Act on Actions for Damages for Infringements of Competition Law, a final Danish decision establishing an infringement of competition law is deemed to be an irrefutable piece of evidence of the infringement in question when bringing an action for damages before a Danish court.

Danish courts are not bound by decisions by other national competition authorities, but as mentioned in question 4.2 above, a decision authority of another Member State creates a presumption

that an infringement of competition law has occurred when bringing an action for damages before a Danish court.

A decision by the Danish Competition and Consumer Authority which has not been appealed is considered to be binding, at least on the unsuccessful party.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a consequence of the adversarial principle, all parties must have access to all documents. But a party may produce documents as evidence in a non-confidential version where confidential information without importance to the case has been deleted.

The public is entitled to attend court hearings, but upon the request of one of the parties, the court may decide to deny access to the public (closing of doors) if it is necessary to protect confidential information. Conditions are relatively strict.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The Act on Actions for Damages for Infringements of Competition Law provides an explicit legal basis for:

- the court to give a competition authority the opportunity to comment on disclosure requests for the submission of evidence. Further, a competition authority may, on its own initiative, submit observations to the court about the proportionality of the disclosure requests for the submission of evidence;
- allowing a competition authority upon request from a court to provide its observations when the court must assess whether a piece of evidence is obtained solely through access to the file and must be rejected by the court for the reasons mentioned in question 4.5 above; and
- allowing the Danish Competition and Consumer Authority upon the request of the court to assist the court with respect to the determination of the quantum of damages.

It remains to be seen how often these provisions will be used as the Act has only been in force since 27 December 2016.

If the Danish Competition and Consumer Authority or the European Commission, unrelated to a specific lawsuit, has published a decision or an analysis which is of relevance to the lawsuit, such decision or analysis may be invoked by a party.

In principle, the Danish Competition and Consumer Authority or the European Commission might possibly intervene in support of a party in a lawsuit and may thereby indirectly express its views and analysis; however, this option has not been used.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

The Danish Competition Act does not apply to restrictions on competition which are a direct or necessary consequence of public regulation.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Yes, the “passing on defence” is available. Please refer to question 4.2 above.

As regards law suits by indirect purchasers, pursuant to the Act on Actions for Damages for Infringements of Competition Law, any natural or legal person who has suffered a loss caused by an infringement of competition law is able to claim and to obtain full compensation for that loss. Accordingly, both direct and indirect purchasers may claim damages and have a legal standing to sue.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

A cartel participant could intervene in an ongoing lawsuit in support of a participant to the same cartel. Such intervention would be subject to applicable standards of legal interest and standing and require acceptance by the court. A cartel participant could also launch a declaratory claim against the claimant (in relation to a matter against another participant to the same cartel) and subsequently ask for the cases to be joined. A cartel participant who has been sued for damages by a claimant may also raise a contribution claim against another cartel participant and request that this claim is joined with the damages proceedings.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The general rules on inactivity and time-barring as modified by the Danish Competition Act and the Act on Actions for Damages for Infringements of Competition Law apply.

In relation to actions for damages for infringements of competition law a five-year limitation period applies. The limitation period is counted from the date the infringement ceases and the claimant has or could have reasonably been expected to have known that:

- 1) the infringer’s behaviour and the fact that it constitutes an infringement of competition law;
- 2) the infringement of the competition rules has caused harm to the claimant; and
- 3) the identity of the infringer.

The *absolute limitation* period is 10 years from the time the infringement ceased. The absolute limitation period may, however, be suspended or interrupted in certain circumstances, e.g. if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates or while a consensual dispute resolution process is pending.

A decision by the Danish Competition and Consumer Authority or the Danish Competition Council will stand if it has not been appealed to the Competition Appeals Tribunal within four weeks. (In special circumstances, the Competition Appeals Tribunal may admit appeals received later than four weeks after the decision of the Danish Competition and Consumer Authority or the Danish Competition Council.) Decisions by the Competition Appeals Tribunal will stand if the decision has not been brought before the courts within eight weeks.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Given the typical complexity of a competition law case, it is likely to take at least 18 to 36 months from the date when an action is filed with a court of first instance (the city court or the Maritime and Commercial High Court in Copenhagen) until a judgment is rendered.

If the decision is appealed, it may take another 12 to 36 months before a final judgment is delivered.

Criminal proceedings tend to be somewhat faster than civil proceedings when they have first been initiated, but preparation time is generally quite long and may be several years.

Generally, civil proceedings may be expedited by making the writ of summons as complete as possible so that the need for further pleadings will be limited as much as possible. Proceedings commenced on the basis of a final decision by the competition authorities establishing the breach of competition law are, in principle, easier to expedite as the breach has already been established. However, it remains to be seen if such proceedings will actually pass through the court system more quickly than proceedings commenced without any prior decision from the competition authorities. The Maritime and Commercial High Court in Copenhagen offers a fast-track procedure in which the date for the final hearing and deadlines for submitting pleadings are fixed at an early stage in order to expedite proceedings. The fast-track procedure presupposes that each party only needs to submit two pleadings and that the final hearing of the case may be held in only one day.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No, the parties do not need permission from the court to discontinue proceedings.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

A collective settlement by the representative body is permitted, but must be accepted by the court to be valid. The court must accept the settlement unless it discriminates between the claimants represented by the representative body or is *prima facie* unreasonable.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Unless special circumstances apply, the court will award an amount to cover legal costs to the successful party.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are generally obliged to take into consideration the outcome

reached as one of several factors when calculating their fees. “No cure – no pay” agreements are legal, but it is illegal for attorneys to agree their fees as a certain share of the damages awarded.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition law claims is permitted. There is no obligation for the funded party or the entity providing the funding to disclose any such funding arrangements to the court, and consequently it is not transparent to what extent this option is used.

It is well known that industry organisations and interest groups occasionally provide funding to their members in lawsuits which are of general interest to their members.

9 Appeal

9.1 Can decisions of the court be appealed?

A judgment by a city court or by the Maritime and Commercial High Court in Copenhagen may be appealed to the High Court within four weeks of the judgment. A judgment by the Maritime and Commercial High Court may, in certain cases, be appealed directly to the Supreme Court as the court of the second instance.

First instance judgments by the High Court may be appealed to the Supreme Court within four weeks of the judgment. The High Court’s judgment in an appeals case may be appealed to the Supreme Court as the third instance only if permission is granted to that effect by the Danish Appeals Permission Board (“*Procesbevillingsnævnet*”).

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, a leniency programme applies to cartel activities. There is no immunity from civil claims irrespective of whether leniency has been successfully applied for or not. However, pursuant to the Act on Actions for Damages for Infringements of Competition Law, a successful leniency applicant is, to some extent, advantaged in terms of not being jointly liable in full with other cartel participants.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An applicant for leniency – whether successful in obtaining leniency or not – may be ordered by the court to submit documents in its possession as evidence, unless the applicant in question would be exempt from the duty to give evidence as a witness with respect to the facts contained in the documents (for instance, because of a duty of confidentiality, or because the disclosure of the documents would expose the applicant or parties closely related to the applicant to criminal sanctions or loss). Sanctions may be imposed if the documents are not submitted.

However, if the applicant in question is a party to the proceedings, the court cannot force the leniency applicant to disclose the relevant

documents or impose sanctions on the leniency applicant for not disclosing the documents, but if the leniency applicant refuses to comply with a court order to disclose certain documents, the court may decide to take this refusal into account when considering the evidence and may hold it against the leniency applicant.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The new Act on Actions for Damages for Infringements of Competition Law results in several material changes. Some of the most central changes are:

- that any natural or legal person – including both direct and indirect purchasers that have suffered a loss due to an infringement of competition law – is entitled to full compensation for the loss suffered;
- the presumption that cartel infringements cause losses; and
- the burden of proof is eased for indirect purchasers.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The EU Directive on Antitrust Damages Actions has been implemented into Danish law.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The Act on Actions for Damages for Infringements of Competition Law entered into force on 27 December 2016.

The act applies to claims for damages brought before the courts after 27 December 2016.

The substantial provisions of the act, including rules on period of limitation, do not apply to claims for damages as a result of infringements of competition law committed prior to 27 December 2016. The previously applicable rules will apply to such infringements.

Infringements commenced prior to 27 December 2016 and which continue after this date will constitute a continued violation, and will in its entirety be processed according to the new rules.

The procedural provisions of the act also apply to actions for damages brought before a court after 25 December 2014, corresponding to the date the Directive was adopted.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

No, there are not.



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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The principal statute which governs the scope of claims for a breach of competition law in England and Wales is the Competition Act 1998 (“1998 Act”).

Competition Act 1998

The 1998 Act contains two prohibitions on anti-competitive activity, known as the Chapter I Prohibition (section 2 of the 1998 Act) and the Chapter II Prohibition (section 18 of the 1998 Act) (together the “Prohibitions”). These Prohibitions closely reflect the well-known prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), save that those Articles are concerned with anti-competitive activity which has an effect on trade between Member States of the European Union (“EU”) rather than on domestic trade.

Chapter I Prohibition

The Chapter I Prohibition prohibits agreements between undertakings, decisions by associations of undertakings and/or concerted practices which:

- (a) may affect trade in the UK (or a substantial part of it); or
- (b) have as their object or effect the prevention, restriction or distortion of competition within the UK.

Examples of the types of agreements which will infringe the Chapter I Prohibition include those which:

- (a) directly or indirectly fix purchase or sale prices, or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

Consistent with the approach adopted by the TFEU, and Article 101(3) in particular, section 3 of the 1998 Act specifies a number of exclusions from the Chapter I Prohibition. Under section 9 of the 1998 Act, exemptions from the Chapter I Prohibition may be obtained if certain criteria are met. We consider this further in relation to question 5.1 below.

Chapter II Prohibition

The Chapter II Prohibition provides that conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in a market is prohibited, if it may affect trade within the UK (or a substantial part of it). In particular, conduct may constitute such an abuse if it consists of:

- (a) directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties; or
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

Articles 101 and 102 of the TFEU

Since the modernisation of the enforcement of EU competition law throughout the EU pursuant to Regulation 1/2003 (the “Modernisation Regulation”), national courts and competition authorities have jurisdiction to apply Articles 101 and 102 of the TFEU directly. Accordingly, allegations of anti-competitive conduct said to have an actual or potential effect on trade between Member States (rather than just domestic trade) may be heard in the English courts, which are required to apply Articles 101 and 102 in determining the question before them.

It is notable that the territorial scope of EU competition law extends beyond the borders of the EU; if anti-competitive conduct outside the EU has an actual or potential effect on trade between Member States, such conduct may be caught by EU competition rules. As a result, infringements of competition law involving conduct outside the EU may similarly be relied upon in damages actions before the English courts. However, there does need to be a sufficient territorial connection with the EU. In 2016, the High Court considered a claim for damages by *iiyama* (a Japanese electronics company) against a number of defendants arising from the European Commission’s cathode ray tube (“CRT”) and CRT glass cartel decisions. The relevant supply chain involved CRT glass made outside the EEA which was supplied to CRT manufacturers outside the EEA. The CRTs were then sold to monitor manufacturers or dealers outside the EEA, who then sold the finished product to *iiyama*. It was only when *iiyama* sold the monitors intra-group to one of the other claimants for re-sale in the EEA that the cartelised products entered the EEA. The High Court struck out *iiyama*’s claim on the basis that there was an insufficient territorial connection with the EU for Article 101 of the TFEU to be applicable (see *iiyama Benelux BV & Ors-v-Schott AG & Ors* [2016] EWHC 1207 (Ch)). However, *iiyama* has since successfully appealed to the Court of Appeal, and its claim has been allowed to proceed to trial (see

iiyama (UK) Ltd-v-Samsung Electronics Co Ltd [2018] EWCA Civ 220). The Court of Appeal drew a parallel with the ‘qualified effects’ test laid out by the European Court of Justice (the “ECJ”) in the recent **Intel** case (i.e. that the territorial reach of EU competition law is capable of extending to conduct which had a foreseeable, immediate and substantial effect within the EU – see **Case C-413/14P, Intel Corporation Inc-v-European Commission**), reasoning that a worldwide cartel intended to produce substantial indirect effects across the EU may also satisfy this test. The Court found that applying this test would require a full examination of the operation of the cartel, which could only be conducted at trial. Accordingly, the Court held that the matter was not suitable for summary determination, and therefore overturned the High Court’s decision to strike the claim out. The Court of Appeal’s ruling is likely to encourage future claims involving indirect sales into the EU.

Notwithstanding the UK’s anticipated withdrawal from the EU on 29 March 2019 (“**Brexit**”), the UK Government has taken steps to ensure legal continuity post-Brexit (at least in the foreseeable future) by including provisions in the European Union (Withdrawal) Act 2018 (the “**Brexit Act**”) addressing the domestic status of EU law post-Brexit. In particular, under sections 2 and 3 of the Brexit Act, all EU-derived domestic legislation and ‘direct EU legislation’ (which is defined to include EU Regulations) that was operative immediately before Brexit will form part of English domestic law after Brexit. This means that, for example, the Modernisation Regulation will be considered to form part of English law (and therefore remain in full force) following Brexit. As such, English national courts and competition authorities will retain their jurisdiction to apply Article 101 and 102 of the TFEU directly post-Brexit. The Brexit Act also ensures (at section 4) that rights derived from EU treaties, which are recognised in the English or EU courts in a case decided before Brexit, will continue to apply post-Brexit.

A comprehensive English regime already exists in parallel to the EU regime. As such, there will be no “hole” in the English statute book post-Brexit.

We cannot predict whether the English courts will apply EU competition law as it evolves post-Brexit. We can say that section 6 of the Brexit Act provides that English courts, when faced with a case relating to EU law as applied immediately before Brexit (including EU competition law), should decide that case in accordance with the UK and/or EU case law on those issues as applied pre-Brexit. It is therefore clear that EU competition law will continue to play a part in the enforcement of English competition law post-Brexit, particularly in the near-term. English courts will retain a right to have regard to EU law developments when considering cases to which such developments are relevant, but will not necessarily be bound by ECJ precedent established on or after the day of Brexit, nor will they be able to refer a matter to the ECJ. We suggest it is likely that UK judges will continue to pay close regard to ECJ precedent for some time to come.

Enforcing infringements of competition law

As a matter of English law, a breach of either the Prohibitions or Articles 101 or 102 of the TFEU gives rise to a generic cause of action known as a “breach of statutory duty”. This cause of action will remain unchanged for as long as the UK remains a member of the EU. Because those provisions (as they apply immediately before Brexit) will be considered to form part of English law following Brexit, this cause of action is unlikely to change. However, should Articles 101 and/or 102 be amended in the future post-Brexit, a breach of those amended provisions may not be capable of giving rise to actionable claims in breach of statutory duty under English law.

The English courts have the power to grant a range of remedies (see further question 3.1 below). The principal remedies are: (i) damages

(where the relevant breach has caused the claimant to suffer loss or damage); (ii) a judicial declaration that a contract, or certain behaviour, breaches the Prohibitions and/or Articles 101/102; and/or (iii) injunctive relief.

Under certain circumstances, the Prohibitions and/or Articles 101/102 may be available to defendants as a “shield” to claims. This is on the basis that the claimant is pursuing a claim which, in whole or part, is founded upon an illegal basis. For example, where a claimant brings an action to enforce a contract, a defendant may seek to argue that the claim fails because the contract is unenforceable as it infringes one of the Prohibitions and/or Articles 101/102 (see for example **Agents’ Mutual Ltd-v-Gascoigne Halman Ltd [2017] CAT 15**, on appeal).

The 1998 Act introduced rights of action which are specific to competition law infringements. Section 47A and section 47B in particular create alternative mechanisms for seeking “follow-on” damages where the competition authorities have determined that a breach has taken place and issued an infringement decision (i.e. the claimant relies on the prior infringement decision to establish liability – see further question 1.5 below). Both of these mechanisms were significantly expanded on 1 October 2015, when Schedule 8 of the Consumer Rights Act 2015 (the “**2015 Act**”) came into force.

The reforms introduced by the 2015 Act are intended to make it easier for claimants to bring damages actions in England and Wales in respect of infringements of either English or (at least pre-Brexit) EU competition law, in particular by expanding the jurisdiction of the Competition Appeal Tribunal (“**CAT**”) to hear “stand-alone” claims (i.e. where there has been no prior infringement decision from a competition regulator and the claimant must prove the existence of the competition law infringement as well as its loss), as well as “follow-on” claims, and also introducing a new “opt-out” collective actions regime. These reforms are discussed further in response to questions 1.4 and 1.5.

1.2 What is the legal basis for bringing an action for breach of competition law?

With respect to English competition law, the legal basis for bringing an action is section 47A and section 47B of the 1998 Act (see further the response to question 1.5).

As to EU competition law, section 2(1) of the European Communities Act 1972 (“**ECA 1972**”) provides the statutory basis for the rights and obligations provided under Articles 101 and 102 of the TFEU to be directly enforceable and effective in the English legal system. Following the Modernisation Regulation, jurisdiction to apply Articles 101 and 102 of the TFEU was also granted to national courts and competition authorities of Member States (in addition to the European Commission). In practice, this has led to claimants pleading the 1998 Act and the TFEU in the alternative.

As a matter of English law, the UK’s formal withdrawal from the EU will be achieved by repealing the ECA 1972. The Brexit Act provides (at section 1) that on the day of Brexit, the ECA 1972 will be repealed and, as noted above, both ‘EU-derived domestic legislation’ and ‘direct EU legislation’ will be incorporated into English law. As also noted above, Articles 101 and 102 of the TFEU and the Modernisation Regulation will continue to apply post-Brexit as they apply immediately before the day of Brexit, meaning that national courts and authorities should retain jurisdiction to enforce these provisions in that form.

A breach of competition law may also give rise to one or more additional causes of action under English law – section 47A(1) of the 1998 Act is broadly framed and expressly covers not only “any claim for damages” but also “any claim for a sum of money”. In

W.H. Newson Holding Ltd and others-v-IMI Plc and others [2013] EWHC Civ 1377 (relating to the copper tubes cartel) the Court of Appeal confirmed that in addition to the claimants' action for breach of statutory duty under Article 101 of the TFEU and/or section 2(1) of the ECA 1972, section 47A of the 1998 Act also permits a claimant to bring a claim for the tort of conspiracy, provided that all the ingredients of the cause of action can be established by infringement findings in the European Commission's decision. By way of further example, in **Emerald Supplies Ltd and Others-v-British Airways Plc [2014] EWHC 3513 (Ch)** and **[2014] EWHC 3514 (Ch)** (the air cargo cartel case), the claimants brought claims on the following three grounds: (i) breach of statutory duty under Article 101 of the TFEU and Article 53 of the EEA Agreement; (ii) interference with the claimants' businesses by unlawful means; and (iii) involvement in a conspiracy to injure the claimants by unlawful means. However, the Court of Appeal struck out the latter two claims on the basis of a lack of intention, accepting the defendants' argument that there could be no intention to interfere/injure in circumstances where, due to multiple layers of a supply chain, *"the defendant is not even sure that the claimant will suffer loss at all"* (see **[2015] EWCA Civ 1024**).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims in England and Wales is derived from: (i) statute; (ii) a developing common law; and (iii) EU law (subject to the domestic status of EU law post-Brexit).

The 1998 Act imports many elements of EU competition law, both in terms of substantive rules and procedure. Indeed, section 60 of the 1998 Act expressly requires that questions arising in relation to competition law are dealt with by national competition authorities and the courts in a manner which is consistent with the treatment of corresponding questions arising under EU competition law. This has had the notable effect of importing EU jurisprudence in respect of competition law matters, including Articles 101 and 102 of the TFEU, directly into the English courts.

As discussed above in response to question 1.1, the Brexit Act provides that national courts dealing with issues of EU law as applicable immediately before Brexit should decide them in accordance with English and/or EU case law on those issues as applied pre-Brexit. The Act also provides that whilst national courts will remain entitled to have regard to EU law developments post-Brexit where relevant to the case before them, they will not be bound by ECJ precedent. It is therefore likely that section 60 of the 1998 Act will be amended to reflect this position. In practice, it is generally expected that English competition law will continue to mirror EU competition law for some time to come, although it is also expected that at least a degree of divergence between the two regimes will develop over time. For example, differences may develop in relation to issues such as parallel trade restrictions, where single market considerations will no longer be of relevance to English competition law post-Brexit (assuming that the UK leaves the single market).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

In March 2000, pursuant to the 1998 Act, a specialist competition tribunal now known as the CAT was set up. The CAT operates as a judicial body and consists of a President, members forming a panel of Chairmen, and members forming a panel of ordinary members. For the purpose of hearing and determining applications and appeals

before it, the CAT consists of a Chairman and two other members. The President and Chairmen are qualified lawyers whereas the ordinary members are drawn from a diverse range of professions, including accountants, economists, public servants and business people as well as lawyers.

Since June 2003, the CAT has had the jurisdiction to determine:

- (a) "follow-on" claims, i.e. claims for damages where the issue of liability has been determined by virtue of an infringement decision issued by a competent competition authority and there is no appeal pending;
- (b) appeals against competition law infringement decisions issued by the Competition and Markets Authority ("CMA") (or, prior to 1 April 2014, its predecessor, the Office of Fair Trading ("OFT")), or the sector regulators such as Ofcom; and
- (c) the judicial review of other decisions taken by the CMA, such as decisions relating to merger control or market investigations.

In light of the CAT's specialist expertise, it was argued that it was not appropriate (or efficient) to limit the scope of its jurisdiction to the above types of case, and that its role should be expanded so as to make it the main venue for all competition cases in England and Wales. This was duly recognised by the UK Government in the 2015 Act. As noted above, the scope of the CAT's jurisdiction was significantly expanded with effect from 1 October 2015, so as to allow it to hear "stand-alone" as well as "follow-on" competition cases.

In addition, the UK Government has decided that regulations should be made under the powers provided for in section 16 of the Enterprise Act 2002 to enable the transfer of competition claims from the High Court to the CAT. This is covered by Part 30 of the English Civil Procedure Rules ("CPR"), which enables the High Court (on its own initiative or following an application by any of the parties) to transfer any part of proceedings before it to the CAT, if, for instance, the CAT has previously made a decision on a similar claim, or if there is a similar claim under section 47A of the 1998 Act based on the same infringement currently before the CAT (Part 30 of the CPR, paragraphs 8.3 and 8.4). The High Court exercised this power on its own initiative in **Sainsbury's Supermarkets Ltd-v-Mastercard Incorporated and Ors [2016] CAT 11**, which was transferred to the CAT in early 2016 and determined in July 2016, resulting in the award of GBP 68.5 million in damages. Mastercard appealed to the Court of Appeal (**[2018] EWCA 1536**), largely unsuccessfully (see further section 5.2). Of particular note for the purposes of this section, the Court of Appeal commented that claims relating solely to competition law issues should be transferred to the CAT. Whilst the precise intention behind this comment is unclear, it is expected to give rise to an increase in transfers to the CAT in the near-term. For example, at the time of writing (July 2018), six on-going follow-on damages claims arising from the European Commission's decisions in the Trucks Cartel have been transferred to the CAT. It is likely that further follow-on claims arising from the same cartel will also be transferred in due course.

Under the previous regime, which applied until 1 October 2015, any claims relating to an alleged infringement of Articles 101 or 102 of the TFEU, or the Prohibitions, that were not "follow-on" claims, had to be commenced in the High Court. These claims were assigned, in the ordinary course, to the Chancery Division of the High Court, although cases could also be brought in the Commercial Court. The Judges in the Chancery Division have undertaken specialist training in dealing with competition law claims and the Chancery Division has developed a specialist understanding of competition law cases. More than two-thirds of Chancery Division Judges are also Chairmen of the CAT. In October 2017, the civil divisions of the High Court were re-structured

under an umbrella jurisdiction known as the Business and Property Courts of England and Wales. Within that structure, various specialist ‘lists’ were created, including a new ‘Competition List’ designed to deal with claims under Articles 101/102 and/or the Prohibitions.

As of 1 October 2015, the CAT became the specialist forum for both “follow-on” and “stand-alone” damages actions relating to infringements of English or EU competition law, as well as continuing to hear appeals against CMA infringement decisions and applications for judicial review of CMA decisions in relation to mergers and market investigations. This has resulted in an increase in workload for the CAT, which may require a corresponding increase in resources. Indeed, the CAT has just over 45 new cases registered between October 2015 and the time of writing, compared with around 35 in the same period prior to October 2015 (i.e. roughly a 25 per cent increase). It remains open to claimants to bring a competition damages claim in the High Court, but it is expected that judges will transfer ‘pure competition’ claims to the CAT more actively (particularly given the Court of Appeal’s comments in the *Sainsbury’s* case mentioned above), such that the CAT will eventually become the natural and obvious destination for competition damages actions. Whilst many of the reforms discussed further below (and in particular those relating to limitation periods, discussed in the response to question 6.1) are subject to complex transitional provisions, High Court judges have been exploring suitable mechanisms to transfer claims to the CAT without causing prejudice to parties. This is usually accomplished by making an order that a claim transferred to the CAT will not be regarded as having been commenced in the CAT, and that any rights which would otherwise be available to the parties in the High Court will continue to be available notwithstanding the transfer.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Any legal person with capacity who has suffered or is likely to suffer loss or damage as a result of a breach of English or EU competition law is entitled to bring a claim for damages or an injunction, either in the High Court or before the CAT (CPR EU Competition Law Practice Direction). Accordingly, the usual list of potential claimants applies as in any action: individuals; companies; partnerships; limited partnerships; and so on.

High Court

As noted above, proceedings in the High Court can be initiated either as a “stand-alone” action (where there has been no prior infringement decision by a competition authority), or as a “follow-on” action (where there has been such a decision).

With regard to claims by multiple claimants, under the CPR, in theory any number of claimants (or defendants) can be joined as parties to a single claim (Parts 19.1–19.5 of the CPR). The requirement is that the claims can conveniently be disposed of in the same proceedings. Where this is the case, the claimants must work together and present in relation to the common elements of their claims a joint case throughout the course of the proceedings (unless the court orders otherwise).

A claim involving a large group of claimants who have all incurred similar damage as a result of a single infringement (for example, by virtue of their having purchased cartelised products at an overcharge) is perhaps most likely to lend itself to a joint claim.

However, the claimants will still need to demonstrate that their claims can conveniently be disposed of in a single damages action. Moreover, the group must clearly comprise only claimants who are actually capable of having suffered damage: in the *Air Cargo* litigation the High Court struck out a claim brought on behalf of 65,000 Chinese claimants in circumstances where only a small proportion of those claimants had in fact shipped freight by air and could have therefore suffered the loss being alleged (see **Bao Xiang International Garment Centre and Ors-v-British Airways plc and Ors [2015] EWHC 3071 (Ch)**).

As is commonly the case, such proceedings would be brought against one or more of the addressees of the relevant infringement decision (there is no need to sue all addressees as liability is joint and several). If additional purchasers of cartelised products are identified at a later stage in the proceedings, Part 19.2 of the CPR provides that they may be added to the proceedings (with the court’s permission). Alternatively, additional claimants can issue fresh proceedings and, if appropriate, these proceedings can formally be consolidated with the existing proceedings (see, for example, **W.H. Newson Holding Limited & Ors-v-IMI plc & Ors (HC12B02085 consolidated with HC12F03701)**).

Although the multi-party claims procedure under Parts 19.1–19.5 of the CPR was not set up specifically to deal with collective actions (unlike Group Litigation Orders and representative actions, see below), it has been used to good effect as a mechanism for collective redress in competition cases in the context of larger business-claimants or those that have suffered a greater level of damage.

Representative actions

It is possible to bring a representative action on behalf of parties who have “the same interest” in a claim under Part 19.6(1) of the CPR. However, this procedure has not been used successfully to date in a competition law context.

In April 2009, the English High Court struck out an attempt by a direct purchaser claiming damages in a “stand-alone” action to bring a representative action on behalf of all other direct or indirect purchasers of the cartelised (freight) services (**Emerald Supplies Ltd-v-British Airways Plc [2009] EWHC 741(Ch)**). On 18 November 2010, the Court of Appeal upheld the High Court decision, refusing permission for a representative action for damages to be brought by the claimants on behalf of direct and indirect purchasers of air cargo services from British Airways.

The difficulty faced by the claimant in the case was that a fundamental requirement of a representative action under Part 19.6 of the CPR is that those who are represented must have the “same interest” in the action, and it must be possible to say of any person that they qualify for membership of the represented class by virtue of having the “same interest” at all stages in proceedings. It is not enough that the class will become identifiable when judgment is given.

The claimants in the *Emerald Supplies* case were not able to identify whether a person would qualify for damages (and would therefore have the “same interest” in the claim at all stages in the proceedings as the other members of the class) until a decision was made on the issue of whether competition law had been infringed. Until the question of liability was tried and judgment given, the claim could not be brought as a representative action under Part 19.6 of the CPR. It is generally considered that, following this decision, the possibility of using the representative action procedure to facilitate class actions for breaches of EU and English competition law has been closed off.

Group Litigation Orders

A potential alternative under the CPR is to bring a claim involving multiple claimants under a Group Litigation Order (“GLO”), where a number of claims have “common or related issues of fact or law”

(Parts 19.10 and 19.11 of the CPR). Indeed, a GLO was suggested at first instance by the Chancellor in **Emerald Supplies Ltd & Anr-v-British Airways Plc [2009] EWHC 741 (Ch)**, paragraph 38 – “[f]urther, the avoidance of multiple actions based on the same or similar facts can equally well be achieved by a Group Litigation Order made under CPR Rule 19.11. The existing 178 additional claimants and any others who seek to join in after the publication of the European Commission’s investigation are more conveniently accommodated under that procedure.” All claimants wishing to join the group litigation must apply to be entered onto the group register (i.e. they must “opt in”) by a date specified by the court. Judgment on one or more of the GLO issues then binds all of the claimants on the group register. A GLO will not be permitted if the court considers it more appropriate that the claims are consolidated or brought by way of a representative action. Whilst 105 GLOs have been granted since they were introduced in May 2000, only one has ever been issued in a competition case (**Prentice-v-Daimler Chrysler**, a case which ultimately settled).

CAT

Under section 47A of the 1998 Act, any person who has suffered loss or damage as a result of an infringement of competition law may bring a claim for damages before the CAT in respect of that loss or damage. Under the previous regime, in place until 1 October 2015, the CAT could only consider “follow-on” actions, whereas the High Court could consider both “stand-alone” and “follow-on” cases. Under that regime, the ability of the CAT to go beyond the findings of the initial infringement decision relied upon was extremely limited (**English Welsh & Scottish Railway-v-Enron Coal Services Limited [2009] EWCA Civ 647**). This had therefore limited the scope of claims which could be heard by the CAT under section 47A of the 1998 Act – i.e. it was not sufficient to rely on findings of fact which could arguably amount to an infringement. However, on 1 October 2015 the jurisdiction of the CAT was expanded by the 2015 Act, to enable it to hear claims for damages in both “follow-on” and “stand-alone” actions, which may be brought by either individuals or businesses. Since then, at least six such “stand-alone” cases have been brought in the CAT (see **Socrates Training Limited-v-The Law Society of England and Wales; Shahid Latif & Mohammed Abdul Waheed v Tesco Stores Limited; NCRQ Ltd-v-Institution of Occupational Safety and Health; Westpoint Group Trading Limited & Ors-v-XL Farmcare UK Limited & Ors; Labinvesta Limited-v-Dako Denmark and Unlocked Limited and Ors-v-Google Ireland Ltd and Others**).

Collective “follow-on” damages actions for breach of competition law may be brought in the CAT under section 47B of the 1998 Act. Until 1 October 2015, such collective actions could only be brought on behalf of multiple named consumer claimants (so-called “consumer claims”) by a body authorised by the UK Government for this purpose. The Consumers’ Association (also known as Which?) was the only body granted such authorisation under the pre-1 October 2015 regime, and it only brought one case, against JJB Sports, claiming damages in connection with price-fixing of replica football shirts. That claim was ultimately settled in January 2008, and Which? stated that it would be very reluctant to bring another claim unless the rules were amended to address some of the difficulties it has encountered. In particular, under the pre-1 October 2015 regime, follow-on collective actions could only be brought on behalf of consumers on an “opt in” basis (i.e. on behalf of named consumers who had taken active steps to opt into the action). It was not possible to bring an action on behalf of a defined class of consumers, or on behalf of “consumers at large”, on an “opt out” basis (whereby members of the class are automatically included if they fall within the definition of the relevant class, unless they actively choose to “opt out” of the action).

That changed on 1 October 2015. The scope of the collective actions regime was significantly expanded, such that collective actions under section 47B of the 1998 Act are now available to businesses as well as consumers, in “stand-alone” as well as “follow-on” cases, and, most significantly, on an “opt out” basis as well as an “opt-in” basis. Certain conditions need to be met to satisfy the “opt out” criteria but the key point is that it is now possible to bring a claim on the basis of an estimation of the total number of potential claimants, with individual claimants only needing to come forward after the quantification of damages stage to collect their share of the total amount of damages awarded. These reforms are intended to lead to an increase in private enforcement of competition law in England and Wales, although, as discussed further below, as at the time of writing only four applications have been made to the CAT for certification of an opt-out collective damages claim, two of which have failed and the third of which has only recently been issued.

Concerns were raised in response to the consultation issued by the Department for Business, Innovation and Skills, the (“**BIS Proposals**”) on the options for reform that permitting claims to be brought on an opt-out basis could lead to an increase in vexatious or unmeritorious claims, but the UK Government concluded that that the safeguards included in the 2015 Act are sufficient to address these concerns. These safeguards include: (i) a certification process pursuant to which the CAT is required to certify a collective action before it is permitted to proceed; (ii) a prohibition on exemplary damages; (iii) the application of the “loser-pays” principle in respect of costs (i.e. those who bring unsuccessful cases will be liable for costs); and (iv) a prohibition on the use of contingency fees in “opt out” collective actions (see questions 3.2 and 8.2 below).

The first “opt-out” collective action to be attempted was **Dorothy Gibson-v-Pride Mobility Products Limited [2017] CAT 9**. Following a certification hearing, the CAT ruled that the collective action as pleaded was not capable of certification because the alleged losses suffered by the members of the proposed claimant class were so diverse (and in some cases, outside the scope of the infringement decision from which the claim arose) that there was insufficient commonality of the issues arising from each individual claim. The CAT did, however, consider that this was the sort of claim which would be well-suited to being brought as an opt-out collective action if the issues it identified were dealt with, and the applicant was given an opportunity to file a draft amended claim form. However, the applicant decided not to proceed with the claim (perhaps because amending the claim to address the issues identified by the CAT may have resulted in a much reduced claim value).

The second application for certification concerned a GBP 14 billion follow-on opt-out collective damages claim against Mastercard, arising from the European Commission’s Decision in 2014 relating to interchange fees (**Walter Hugh Merricks CBE-v-Mastercard Incorporated & Ors [2017] CAT 16**). The claim was brought in September 2016 on behalf of the 46 million consumers who purchased goods and/or services from businesses selling in the UK that accepted Mastercard cards (irrespective of whether the consumers actually used a Mastercard for the purchase), between May 1992 and June 2008. This was the largest damages claim ever initiated in the UK, but the CAT rejected the application for certification. The application failed on two main grounds: (i) the lack of a sufficiently reliable methodology to calculate aggregate loss; and (ii) even if the aggregate loss could be adequately estimated, the lack of a sufficiently reliable methodology to calculate individual losses, so as to enable distribution of the damages “pot”. The applicant in this case had taken a very broad-brush, “top-down” approach to quantification of damages, largely to get round the difficulties arising from the limited common issues between the claims. In particular, pass-on was not a common issue in any meaningful

sense as there was likely to be significant variation in pass-on of the alleged overcharge between different kinds of goods and services and also different kinds of retailer. The CAT accepted that damages could, in principle, be calculated on a high-level aggregate basis, using a weighted average pass-on percentage. However, in the circumstances of this case, the proposed methodology for doing so was inadequate. There was insufficient evidence as to the availability of data required to apply the methodology on a sufficiently sound basis, and the applicant's proposal to simply share out the aggregate damages on an annual basis equally between all claimants would not reflect the governing principle of damages for breach of competition law being compensatory in nature.

Two further applications for certification were made in May and July 2018 in respect of follow-on damages claims arising from the European Commission's decision of 19 July 2016 (the Trucks Cartel). The first application was brought by UK Trucks Claim Limited ("UKTC"), a special purpose vehicle created specifically for bringing the application. The second application was brought by the Road Haulage Association ("RHA"), a trade association representing the interests of the road haulage industry in the UK. Those applications have yet to be determined.

The first successful application for certification of a collective damages action under the new regime is therefore still awaited at the time of writing. However, it is anticipated that further claims will be brought and, as the body of guidance on key certification issues grows and potential class representatives (and their advisors) are able to predict more accurately whether a collective claim will be certified to proceed on an opt-out basis, that this new type of litigation will become more prevalent.

The CAT's procedural rules were revised to coincide with the entry into force of the 2015 Act on 1 October 2015 (the "CAT Rules 2015"). These new rules grant the CAT a considerable degree of discretion in determining whether a person should be authorised to act as a representative in a particular case. Rule 78(1) provides that the CAT may authorise a person to act as a class representative only where it considers that it is "just and reasonable" to do so. Rule 78(2) sets out a list of factors which the CAT will take into account when making this decision, including any potential conflict of interest, the proposed representative's ability to pay the defendant's recoverable costs if ordered to do so, and the proposed representative's plans in relation to governance and consultation.

The reforms to the collective actions regime set out in the 2015 Act can be viewed against the background of the wider ongoing debate at both UK and EU level on the question of collective redress. On 11 June 2013, the European Commission published its long-awaited (non-binding) recommendation on collective redress mechanisms in EU Member States (the "EU Recommendation"). This was recently followed by a call for evidence on 22 May 2017 (in the form of an online questionnaire), seeking information on how the EU Recommendation has been implemented in practice, with a view to considering whether further measures to consolidate and strengthen the approach reflected in the Recommendation should be proposed. In January 2018, the European Commission published a report on the implementation of the EU Recommendation by Member States. The Report noted that implementation of collective redress mechanisms across the EU is still not consistent. The European Commission indicated that it would seek to address these inconsistencies as part of its forthcoming "New Deal for Consumers", a consumer protection legislative package which was announced a few months later, in April 2018. As part of the package, the European Commission intends to update a number of EU consumer protection laws (including Directive 93/13/EEC on unfair contract terms, Directive 98/6/EC on consumer prices, Directive 2005/29/EC on unfair B2C commercial practices and Directive 2011/83/EU on

consumer rights). In addition, the European Commission proposes to replace Directive 2009/22/EC on injunctions with a framework that will include a pan-EU regime for collective proceedings, with rigorous controls to prevent abuse.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The English law on the proper jurisdiction of a claim is governed by Regulation (EU) No 1215/2012 ("Brussels Regulation") of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast) (which replaced the previous version, Regulation (EU) No 44/2001 with effect from 10 January 2015) and case law. This question is always a matter for careful consideration on a case-by-case basis. However, in summary, a defendant may be sued in the English courts if it is domiciled there. Alternatively, a defendant may be sued in the English courts if the anti-competitive behaviour, which is the subject of the complaint is alleged to have occurred there. A defendant may also be sued in the English courts if the relevant damage itself occurred, or will occur, there. If these criteria are met then it is likely, on the face of it, that the English courts will have jurisdiction.

Although Article 4 of the Brussels Regulation stipulates that a claimant should normally sue a defendant in the Member State in which the defendant is domiciled, there is an exception under Article 8 which provides that a claimant can sue elsewhere if the defendant is one of a number of defendants and it is desirable to determine all claims together to avoid irreconcilable judgments. For example, in the case of a pan-EU cartel where one of the cartelists is domiciled in the UK and the rest are domiciled in various other jurisdictions throughout Europe, a claimant could rely on Article 8 to bring its claim in England and Wales.

In recent years, the question has arisen as to whether a claimant can bring a claim in England and Wales on the basis that a UK subsidiary of one of the named addressees of the infringement decision was itself implicated in the cartel and thus liable for a breach of competition law, even though the subsidiary was not a named addressee of the infringement decision itself. In other words, can a damages claim be "anchored" in the UK via a UK subsidiary, even if none of the addressees of the infringement decision are domiciled in the UK?

Different answers to this question have been given by the CAT and the High Court. In **Emerson Electric Co & Ors-v-Mersen UK Portslade Ltd [2012] EWCA Civ 1559** the Court of Appeal upheld the CAT's ruling that there must be a UK-based addressee of the infringement decision to give the CAT jurisdiction to hear a "follow-on" claim under section 47A of the 1998 Act. By contrast, in the High Court, it is currently possible to anchor a claim via a UK-based subsidiary of an addressee of a European Commission infringement decision.

In **Provimi-v-Aventis [2003] EWHC 961**, the High Court permitted a claim to be brought against UK subsidiaries who were not addressees of the infringement decision, even though they did not know about the cartel to which their parent companies were party, on the basis that the subsidiaries had "implemented" the cartel agreed by the parent companies (by selling the cartelised products). Subsequently in **Cooper Tire and Rubber Company Europe Ltd & Ors-v-Dow Deutschland Inc & Ors [2010] EWCA Civ 864** and **Toshiba Carrier UK & Ors-v-KME Yorkshire & Ors [2012] EWCA Civ 1190**, the Court of Appeal cast doubt on the **Provimi** decision, suggesting that at least knowledge of the cartel by the anchor subsidiary should be shown, although in both of those cases the point did not actually fall to be determined.

In **Toshiba Carrier**, as well as pleading a standard “follow-on” claim, the claimants’ particulars of claim lodged before the High Court also included an alleged “stand-alone” claim against the relevant UK-based subsidiary which was being used as the “anchor defendant”. The Court of Appeal concluded that, due to the inclusion of such “stand-alone” claim, the proceedings should not be struck out on jurisdictional grounds (even though the particulars of claim were said to be very badly drafted, and there was some confusion about the “stand-alone” element of the claim). The Supreme Court refused permission to appeal in March 2013, meaning that the claim survived a strike-out application and could proceed.

It is interesting to note in this regard that the ECJ has held that claimants are permitted to rely on an anchor defendant to assert jurisdiction, and maintain that jurisdiction claim even if the claimants subsequently settle the claim against the anchor defendant but wish to proceed against the other defendants, unless there is “firm evidence” (to be determined by the national court) to support the conclusion that the claimants deliberately tried to circumvent the usual rules relating to bringing the claim where a defendant is domiciled (see **Case C-352/13 Cartel Damage Claims Hydrogen Peroxide SA-v-Akzo Nobel and others**).

The question of jurisdiction in respect of anchor defendants was considered recently by the High Court in **Vattenfall-v-Prysmian and NKT [2018] EWHC 1694 (Ch)**. This was a jurisdiction challenge raised by defendants to follow-on damages actions arising from the European Commission’s decision in the Power Cables cartel. The Court considered whether it had jurisdiction to hear the claims on the basis that the defendants included an anchor defendant that knowingly implemented the cartel. The Court dismissed the jurisdiction challenge and held that an arguable case that the anchor defendant knowingly implemented the cartel was sufficient to ground jurisdiction in England and Wales. As to what is capable of constituting knowing implementation, the Court referred to the **Provimi**, **Cooper Tire** and **Toshiba Carrier** cases, and made two conclusions. First, that selling the cartelised product is capable of constituting knowing implementation of the cartel. Second, that indirect involvement in the business surrounding the supply of the cartelised product was also capable of constituting knowing implementation. In particular, on the facts, this was found to include supplying products to other group companies and employing some of the individuals working on projects within the scope of the cartel. Whilst it is important to bear in mind that this decision does not crystallise the English law on implementation, it does serve to alleviate concerns as to whether it will be possible to ground jurisdiction in England and Wales by issuing proceedings against, for example, an anchor defendant that supplied the cartelised product.

If the defendant is domiciled outside the EU, different rules apply. These rules derive from the English common law. They provide that a defendant can be sued in England if it is served with the claim form in England. This is possible in circumstances where the defendant has a place of business in England, or if it is present in the jurisdiction for another purpose (even briefly) and is served with a claim form during that time. With regard to the latter example, it should be noted that there is a good chance that jurisdiction will successfully be challenged, if it is found that there is no real connection between the claim and England. A defendant may also be sued in England if the damage occurred, or resulted from an act committed, within the jurisdiction. However, even if these factors are satisfied, the English courts have discretion as to whether to accept jurisdiction or not. The courts must be satisfied that the claimant has a serious case to be tried, and that the English courts are the most appropriate forum for the dispute.

As noted in section 1.2, under the Brexit Act, ‘direct EU legislation’ that applies immediately before Brexit will continue to apply as English domestic law following Brexit. As the Brussels Regulation is an EU Regulation, it falls within the definition of ‘direct EU legislation’ and will therefore apply following Brexit as it applies immediately before Brexit. However, whilst this would preserve the current domestic position, there would be no guarantee that these rules would be applied reciprocally in Member States in respect of the UK (which would no longer be a Member State within the meaning of the Brussels Regulation). This would have considerable practical implications in jurisdictional disputes in competition claims. For example, the courts of Member States may no longer be obliged to enforce the “court first-seised” rule (which remains applicable in many competition claims) in favour of English courts, making it more difficult to protect UK jurisdiction from ‘torpedo’ actions.

The UK may seek to reach an alternative similar agreement, for example through the Lugano Convention or the Hague Convention on Choice of Court Agreements. If no such agreement is reached, then the question of jurisdiction and enforcement of judgments of EU Member State courts would be governed by common law principles. Whilst the English courts would be highly likely to apply any exclusive jurisdiction clause in contracts involving EU-based parties, questions of jurisdiction and enforcement of judgments would inevitably be more complex.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

England and Wales has become a popular jurisdiction for bringing private antitrust actions and, within Europe, it is widely recognised as a favourable jurisdiction for potential claimants. Primarily, the reasons for this are that the English courts have a reputation for dealing with complex cases efficiently and effectively, and the English legal system is considered to facilitate the way in which a claim can be brought. In particular, the English courts have a flexible and, in some respects, generous approach to establishing jurisdiction (see question 1.6 above) and the relevant procedural rules provide for an extensive disclosure regime (see question 4.5 below), both of which make it easier, compared to many other European jurisdictions, for claimants to obtain documentary evidence which assists in the pursuit of their claims. In addition, as noted above, the development of UK class actions is likely to lead to an increase in high-value private enforcement of competition law in the medium to long term, as claimants become more confident about the way in which this new regime is applied in practice.

Moreover, whilst the costs of litigating in England and Wales can be high, the “costs-shifting” rules (whereby the loser pays a significant proportion of the winner’s costs) make England and Wales a preferred jurisdiction for claimants from a costs perspective. The rules on the funding of litigation (see section 8 below) may add to the appeal of the jurisdiction for claimants.

1.8 Is the judicial process adversarial or inquisitorial?

The procedure in both the High Court and the CAT is adversarial. That said, both the courts and the CAT have significant case management powers and may make procedural orders (such as for the disclosure or provision of special documents or information) or raise issues for parties to deal with on their own initiative if they consider it will assist in the resolution of the case.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

There are a number of different options available for seeking interim remedies in competition law cases.

The availability of interim remedies from the English courts, and the circumstances in which they will be granted, are dealt with in response to question 2.2 below. The CAT also has powers to grant interim relief, in two different contexts, namely:

- (a) requests for interim relief pending determination by the CAT of an appeal against a regulator's decision (for example, suspension of the effect of a CMA infringement decision); and
- (b) requests for interim relief in damages claims and claims for an injunction under section 47A of the 1998 Act.

A detailed discussion of the rules relating to interim relief in the context of appeals before the CAT is beyond the scope of this chapter. However, it is worth noting that the CAT Rules 2015 introduced a lower threshold for the CAT to be able to give such directions as it considers appropriate where necessary as a matter of urgency for preventing harm to a particular person or category of persons: under the previous rules, it was necessary to show "serious and irreparable harm", whereas Rule 24 of the CAT Rules 2015 now refers to the lower threshold of "significant damage". It was recently confirmed by the CAT in **Flynn Pharma-v-CMA [2017] CAT 1** that this amendment has modified the test previously set out in **Genzyme-v-OFT [2003] CAT 8**: see further paragraphs 29–33 of the CAT's judgment.

More directly relevant for the purposes of this chapter are the CAT's powers to grant interim relief in the context of damages actions and claims for an injunction under section 47A of the 1998 Act. These are set out in Rules 66–70 of the CAT Rules 2015.

Firstly, pursuant to Rule 66 of the CAT Rules 2015, the CAT may order a defendant to make an interim payment on account of any damages or other sum of money (excluding costs) which the CAT may hold the defendant liable to pay. Any such payment must be limited to a reasonable proportion of the likely amount of the final judgment, and may only be made where: (i) the defendant against whom the order is sought has admitted liability; (ii) the claimant has obtained judgment against the defendant for damage to be assessed or for a sum of money (other than costs) to be assessed; or (iii) the CAT is satisfied that, if the claim were to be heard, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant. At the time of writing, only one application to the CAT for an interim award of damages has been successful: in **Healthcare at Home-v-Genzyme Limited [2006] CAT 29** the CAT awarded Healthcare at Home interim damages of GBP 2 million, in the context of a follow-on damages claim based on an infringement decision which found that Genzyme Limited had engaged in anti-competitive margin squeeze behaviour.

Secondly, as part of the reforms introduced by the 2015 Act, the CAT now has the power to grant interim injunctions (as well as final injunctions), in all cases in which it appears to the CAT to be "just and convenient" to do so (Rule 67(2) of the CAT Rules 2015). Where the matter is urgent, or it is otherwise necessary to do so in the interests of justice, the CAT may grant an interim injunction before proceedings have even been started, and it is not necessary for an injunction to have been claimed as a final remedy in order for the CAT to grant an application for an interim injunction. In proceedings subject to the fast-track procedure (see question 6.2) an

interim injunction may be granted by the CAT without requiring an undertaking as to damages (as would normally be required in other cases). As a general rule, an application for an interim injunction in a competition case should be made with notice being given to the respondent at the same time as the application is filed with the CAT. The CAT's Guide to Proceedings 2015 states that "*without notice applications in competition cases will be wholly exceptional*" (paragraph 5.136). If the CAT is persuaded to make an interim order without notice, the order will only cover the period pending a full hearing of all the parties.

When deciding whether to grant an injunction, the CAT is required to apply the same principles as would be applied by the High Court (section 47D(2) of the 1998 Act). The CAT's Guide to Proceedings states that although there are no fixed rules governing the grant of an interim injunction, any application should address the guidelines developed by the courts in **American Cyanamid-v-Ethicon Ltd [1975] AC 396** (see question 2.2 below).

At the time of writing, at least four applications have been made to the CAT for interim injunctions pursuant to its new powers (including one application originally made to the High Court but transferred to the CAT), but as far as the authors are aware no interim injunctions have actually been awarded by the CAT. In two cases, the claims ultimately settled before the applications for interim injunctions were heard (**NRCQ-v-The Institution of Occupational Safety and Health and Westpoint Group Trading Limited and others-v-XL Farmcare UK Ltd and others**). In another case, one of the applicants went into voluntary administration causing the original trial listing to be vacated – it remains to be seen if and how the application will be pursued (see **Unlockd Limited and Ors-v-Google Ireland Ltd and Others**). In one further case, involving an application for an interim injunction to restrain an alleged abuse of dominance in respect of accreditation of a Network Rail training scheme, the application was initially heard in June 2016 but the parties consented to the issue of whether the defendant is an "undertaking" for the purposes of competition law being determined as a preliminary issue. Following a hearing in October 2016, judgment on that preliminary issue was handed down on 5 July 2017 (**UKRS Training Ltd-v-NSAR Ltd [2017] CAT 14**). The CAT ruled that NSAR Ltd was an undertaking and therefore subject to competition law, such that the application for an interim injunction (and the underlying claim) should be permitted to proceed. In the meantime, Network Rail had suspended UKRS as an accredited training provider in February 2017. Pending appeal of Network Rail's suspension decision, the parties consented to stay proceedings. The CAT made an order in those terms on 27 October 2017.

In the interests of completeness, it should be noted that in addition to interim relief granted by the English courts or the CAT, a request for interim measures may also be made in the context of a competition investigation by the CMA (under section 35 of the 1998 Act) or the European Commission (pursuant to Article 8 of the Modernisation Regulation), or in the context of an arbitration relating to competition law issues. These options are however beyond the scope of this chapter.

2.2 What interim remedies are available and under what conditions will a court grant them?

The English courts may order many types of interim remedy – see Part 25 of the CPR. The most relevant for the purposes of this chapter is likely to be interim injunctions. An interim injunction may be "prohibitory", i.e. to prevent the defendant from commencing or continuing behaviour which infringes competition law, or "mandatory" – i.e. to require the defendant to take certain steps (for example, a dominant undertaking that has unlawfully

refused to supply the claimant may be required to recommence supply, pending final determination of the dispute). As a general rule, judges are perceived to be more reluctant to grant mandatory orders than prohibitory orders, whilst attempts to circumvent this by casting mandatory orders in prohibitory terms tend to be rejected: the court will look at substance rather than form.

As mentioned briefly above in response to question 2.1, when deciding whether to grant an application for an interim injunction, the courts will generally follow the guidelines set out in **American Cyanamid-v-Ethicon Ltd [1975] AC 396**, focussing on two key questions:

- (a) Is there a serious issue to be tried?
- (b) If so, what is the balance of convenience?

As regards the first question, this is often also expressed as requiring a “good arguable case”. In practice, it is a relatively low threshold, which will typically be satisfied by establishing that the case would survive the test for summary judgment in Rule 24 of the CPR (i.e. no real prospect of success and no other compelling reason why the case or issue should be disposed of at a trial).

The second “balance of convenience” test is usually more complex. First the court will ask whether damages would be an adequate remedy for the applicant if they succeed at trial (if so, interim relief will not usually be granted). In the competition law context, this may not be the case where, for example, there is an alleged abuse of dominance and the applicant is a small company which is likely to go out of business before the case can be heard if an interim injunction is not awarded. If damages would not be an adequate remedy, the court will consider whether a cross-undertaking in damages from the applicant (a pre-requisite in almost all cases) would provide adequate protection for the respondent if the court were to grant interim relief which subsequently proves to have been wrongly granted (i.e. if the applicant is ultimately unsuccessful at trial). Finally, the court will consider the “balance of convenience” more generally, i.e. would more harm be done by granting the interim injunction than by refusing it, taking into account the particular factual circumstances in which the injunction is sought?

If all the various factors remain finely balanced, the court will generally preserve the “*status quo*” (which usually means the state of affairs immediately prior to the commencement of the alleged competition law infringement, rather than the date of the hearing of the application for the interim injunction).

As with interim injunction applications to the CAT, any application should normally be made with notice being given to the respondent at the same time as filing the application with the court. However, the court may in exceptional cases accept an application for an interim injunction which is made without notice. In such cases, full and frank disclosure must be given by the applicant of anything which it thinks may be relevant for the court to know.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

- (a) Damages

A remedy in damages is available to a party which can establish that on the balance of probabilities: (i) it has suffered loss as a result of a breach of competition law by the defendant; (ii) the defendant’s conduct caused the losses claimed; and (iii) the damage was not too remote. Damages awards can be granted by both the CAT and the High Court. In practice, damages

have rarely been awarded in competition cases to date, as there has been a tendency for claims to be settled. A notable recent exception was the award of GBP 68.5 million to Sainsbury’s in July 2016 in a claim before the CAT against Mastercard (discussed further below in response to question 5.2).

An interesting question which has recently arisen is whether a claim for damages should be permitted in circumstances where the claimant has arguably also participated (through a related group company) in the alleged infringement (i.e. the application of the *ex turpi causa maxim*). In **Sainsbury’s Supermarkets Ltd-v-Mastercard Incorporated and Ors [2016] CAT 11** Mastercard advanced the same argument before the CAT as it had done before the High Court in an earlier (unsuccessful) strike-out application in **Tesco Stores Ltd and others-v-Mastercard Incorporated and others [2015] EWHC 1145 (Ch)**, namely that Sainsbury’s was a party to the alleged infringement because it was part of the same undertaking as Sainsbury’s Bank, which had participated in the Mastercard scheme, and therefore should not be permitted to profit from its own wrongdoing. However, the CAT rejected this argument on the facts, on the basis that Sainsbury’s Bank’s infringement was “innocent” because it was a mere licensee of the Mastercard scheme, as were a number of other banks and financial institutions.

It would therefore appear that, whilst the *ex turpi causa* defence is, at least in theory, available in private damages actions arising from cartel infringements, a defendant would have to show that the claimant had an active role in the cartel such that its infringement was more than an “innocent” one. However, the CAT did find that Sainsbury’s Bank’s role in the Mastercard scheme and the potential for it to have benefited from it should be taken into account when assessing the correct measure of damages to be available to Sainsbury’s itself. As noted in response to question 1.4 above, Mastercard unsuccessfully appealed to the Court of Appeal (see further section 5.2).

- (b) Injunctions

Final injunctions may be granted by either the High Court, or (following the reforms introduced by the 2015 Act) the CAT in a similar manner to interim injunctions (discussed above in response to questions 2.1 and 2.2).

Injunctions are always discretionary and may not be granted in circumstances where, for example, the claimant’s conduct can be criticised, the claimant has delayed in bringing proceedings, and/or the observance of the injunction would require constant supervision. For example, in a case where the parties had been hoping to obtain interim measures from the OFT (the predecessor to the CMA) to prevent an alleged anti-competitive agreement from being put into effect, the High Court refused to grant an injunction in circumstances where the parties had made their application to the High Court very late and only once it was clear that the OFT was not going to take action (**AAH-v-Pfizer [2007] EWHC 565**).

At the time of writing, the CAT has not yet exercised its new powers to grant final injunctions by way of remedy in a claim made under section 47A of the 1998 Act. An application for an injunction by way of final remedy (alongside damages) was made in a claim brought against Tesco in February 2016 relating to allegedly anti-competitive land use restrictions, but the case settled before the claim was heard (**Shahid Latif and Mohammed Abdul Waheed-v-Tesco Stores Limited**). An application for an injunction by way of final remedy was also made in a claim brought against the Law Society by Socrates Training Limited (again, alongside damages). Although the Law Society was found to have infringed competition law, the proceedings were stayed for two months to give the parties an opportunity to seek agreement on the quantum of damages (**Socrates Training Limited-v-The Law Society of England and Wales [2017] CAT 10**). The parties reached agreement and the claim was settled in September 2017.

(c) Alternative remedies

As English tort law currently stands, the only remedy generally available for breach of statutory duty is compensatory damages. Other alternative equitable remedies such as restoration, account of profits and exemplary damages are not normally available (see for example **Devenish Nutrition Ltd & Ors-v-Sanofi-Aventis SA (France) & Ors [2007] EWHC 2394 (Ch)**, [2008] EWCA Civ 1086).

As discussed below in response to question 3.2, the case of **2 Travel Group PLC (in liquidation)-v-Cardiff City Transport Services Limited [2012] CAT 19** demonstrated that the CAT may be willing to award exemplary damages in exceptional circumstances. However, this possibility no longer exists for proceedings brought on or after 9 March 2017, which relate to an infringement or harm which occurred on or after that date, due to the prohibition on exemplary damages contained in the Damages Directive, implemented into English law by virtue of paragraph 36 of Schedule 8A of the 1998 Act (inserted by the Damages Directive Implementing Regulations).

(d) Declaratory relief

A claimant may seek a declaration that a particular agreement, or certain conduct on the part of the defendant, is or would constitute a breach of competition law. Declaratory relief is often sought in conjunction with other remedies.

Declaratory relief may be granted by the High Court and can be sought at any stage of proceedings. With regard to actions commenced before the CAT, there is some uncertainty as to whether declaratory relief is also available from the CAT: section 47A(3) of the 1998 Act, which sets out the types of claims which may be brought before the CAT under section 47A, refers only to a claim for damages, any other claim for a sum of money, and a claim for an injunction. No mention is made of declaratory relief. During the consultation on the reform proposals ultimately implemented by the 2015 Act, a number of respondents argued that the CAT should be granted the express power to grant declaratory relief but this point was not addressed in the Government's response to the consultation or the 2015 Act as subsequently enacted. Nonetheless, declaratory relief has been requested from the CAT in a number of recent cases: see for example **Shahid Latif & Mohammed Abdul Waheed-v-Tesco Stores Limited, Socrates Training Limited-v-The Law Society of England and Wales, and Sainsbury's Supermarkets Ltd-v-Mastercard Inc. & Ors**. At the time of writing, the CAT has not given a clear ruling on this issue, although in the **Sainsbury's** case the CAT stated in its judgment that declaratory relief would be a matter for the High Court, whilst noting that arguments had not been heard on this point (**Sainsbury's Supermarkets Ltd-v-Mastercard Inc. & Ors [2016] CAT 11**, paragraph 2). The **Sainsbury's** case was appealed alongside two other related cases (**Asda & Ors-v-Mastercard** and **Sainsbury's-v-Visa & Ors**) before the Court of Appeal. Perhaps in line with the CAT's comments as to declaratory relief, the Court of Appeal made a declaration that interchange fee agreements were restrictive of competition in breach of Article 101(1) of the TFEU.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

As discussed above, a claimant who suffers loss as a result of an infringement of EU or English competition law can bring a claim for damages. Both the High Court and the CAT can hear such claims,

and the general principles applied to determine the amount of the award and the types of damages available are similar in both forums.

Compensatory damages

Damages are generally awarded on a compensatory basis, i.e. to enable a claimant to recover, insofar as money can, the losses suffered as a result of the defendant's breach of competition law. This is in line with the requirements of the Damages Directive (and as such, no amendments to English law in this regard have been required).

The determination of the quantum of damage in competition claims is often a challenging issue, and will almost always involve the submission of expert economic evidence. Particular difficulties arise in unfair/excessive price cases where, in order to secure a remedy, the court/CAT is, in effect, being asked to set a particular price (i.e. a "fair" one). When considering the level of its damages award, the court/CAT will also consider whether the damages (or part of them) could be seen as too remote from the breach.

Exemplary damages

Prior to the implementation of the Damages Directive, the possibility of awarding exemplary damages was in principle open to both the English courts and the CAT, although in practice such damages were only available in exceptional circumstances.

In the case of **Devenish Nutrition Ltd & Ors-v-Sanofi-Aventis SA (France) & Ors [2007] EWHC 2394 (Ch)**, the High Court held that exemplary damages could not be recovered if the defendant has already been fined by a competition authority. The High Court reasoned that, since a financial penalty had already been imposed on the defendant through the public enforcement process, it would be unjust to "punish" it again through the imposition of exemplary damages (this decision was upheld by the Court of Appeal (**[2008] EWCA Civ 1086**)).

However, in the subsequent case of **2 Travel Group PLC (in liquidation)-v-Cardiff City Transport Services Limited [2012] CAT 19**, the CAT held that where the defendant had not already been fined by a regulator (or benefitted from immunity under a leniency programme) then exemplary damages could be awarded in exceptional circumstances, *viz.*, where the defendant has behaved "outrageously" with "cynical disregard" for the claimant's rights, and was aware that its conduct was probably or clearly unlawful. In this particular case no fine had been imposed on Cardiff Bus owing to the application of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000. The CAT considered that the further conditions relating to "exceptional circumstances" were met, and awarded exemplary damages of GBP 33,818.79 plus interest to 2 Travel Group. However, as illustrated by **Albion Water Limited-v-Dŵr Cymru Cyfyngedig [2013] CAT 6**, the threshold set out by the CAT in the **2 Travel Group** case was a high threshold which was likely to be difficult to meet in most other cases (and indeed all other cases in which exemplary damages have been sought from the CAT to date have settled prior to hearing). In the **Albion Water** case, the CAT found that a failure by Welsh Water to engage in any meaningful way at a senior level with important pricing decisions was not sufficient to meet the "cynical disregard" test.

These cases were all decided prior to the Damages Directive which, in line with its general approach that overcompensation should be avoided, expressly prohibits the award of exemplary damages in competition damages actions. This is now reflected in English law in paragraph 36 of new Schedule 8A of the 1998 Act (inserted by the Damages Directive Implementing Regulations). However, this provision only applies to proceedings commenced on or after 9 March 2017, where the relevant infringement or harm to which the claim relates also occurred on or after that date. In practice, this will mean that it will probably not apply to many claims for some

years to come. In cases to which the new rule does not technically apply due to these temporal provisions, it should remain open to the High Court and/or the CAT to continue to apply the **2 Travel Group** approach, and award exemplary damages in exceptional cases. That said, it remains to be seen whether they will do so in practice.

Finally, it should be noted that the 2015 Act provides that the CAT may not award exemplary damages in collective actions in any event (reflected in section 47C(1) of the 1998 Act). To the extent that the award of exemplary damages may remain an open in certain cases, these will therefore be limited to individual claims under section 47A of the 1998 Act.

Pass-on

Where the claimant may have “passed-on” some or all of the overcharge/loss to its own purchasers, a defendant may assert this by way of a “defence” to the alleged claim, and argue that, to the extent that the loss has been passed-on, the claimant has not suffered a loss for which it should be compensated (or at the very least that the level of damages claimed ought to be significantly reduced to take account of such pass-on).

The concept of “passing on” has been recognised by both the High Court and the CAT. The relevant case law, and the approach adopted, is discussed in more detail in response to question 5.2 below.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

As discussed above in response to question 3.2, fines imposed by competition authorities have been taken into account by both the High Court and the CAT in the context of deciding whether to award exemplary damages. However, the availability of such damages in the future will be limited, following implementation of the Damages Directive into English law.

With regard to the impact of any redress scheme already offered to those harmed by the infringement, the 2015 Act introduced new discretionary powers for the CMA to approve voluntary redress schemes offered by infringing businesses (i.e. a scheme under which a business voluntarily offers compensation to those who have suffered loss as a consequence of a competition law infringement), either during the course of a CMA or European Commission investigation or following an infringement decision against the business in question. For businesses, there are a number of incentives for offering such a scheme and seeking approval of it from the CMA, including a potential reduction of up to 10 per cent in any fine imposed by the CMA in respect of the infringement. However, this relates to a reduction in the regulatory fine, not a reduction in the calculation of any subsequent damages award by the courts or the CAT.

On that latter point neither the courts nor the CAT have yet had the opportunity to consider the question. However, for cases brought on or after 9 March 2017 which relate to an infringement or harm which occurred on or after that date, the Damages Directive Implementing Regulations provide where a consensual settlement is reached, the amount of the settling complainant’s claim is reduced by the settling infringer’s share of the loss or damage, calculated by reference to their relative responsibility for the harm caused, rather than by reference to the amount paid under the settlement agreement (paragraph 39 of Schedule 8A of the 1998 Act, reflecting Article 19(1) of the Damages Directive). It seems likely that this approach would also be deemed to apply where a redress scheme has been offered by an infringing company and a claimant has availed themselves of the scheme, even if the redress scheme was

devised by the infringing company without directly consulting the claimant in question (or indeed any potential claimants) – paragraph 6 of new Schedule 8A of the 1998 Act defines a “consensual dispute resolution process” very broadly, to include “*any other process enabling parties to a dispute to resolve it out of court*”.

4 Evidence

4.1 What is the standard of proof?

The applicable standard under English law is the civil standard of proof, i.e. the “balance of probabilities”.

It is worth noting, however, that in the context of an appeal against an infringement decision taken by the OFT (predecessor to the CMA), the CAT has held that the applicable standard of proof has to reflect the fact that competition prohibitions are quasi-criminal. In **Napp Pharmaceutical Holdings Ltd and Subsidiaries-v-Director General of Fair Trading [2002] CAT 1**, it was held that the competition authority was required to satisfy the CAT that the infringement was proven on the basis of “*strong and compelling evidence*”.

4.2 Who bears the evidential burden of proof?

In “stand-alone” cases involving an alleged breach of the Chapter I Prohibition or Article 101, where there is no prior infringement decision by a competition authority, the burden of proof as to the existence of the infringement is split. It is for the claimant to show that the agreement in question *prima facie* infringes the Chapter I Prohibition/Article 101(1), but it falls to the defendant to show that the agreement is not prohibited because it meets the conditions for exemption under section 9 of the 1998 Act/Article 101(3). If the existence of the infringement is established, the burden of proof is on the claimant to prove that it suffered loss as a result (i.e. causation and quantum).

In “follow-on” cases, the existence of the infringement is already established by the prior infringement decision of the competition authority. Prior to implementation of the Damages Directive in the UK, claimants bore the burden of proving the loss suffered as a result of the infringement. However, in line with Article 17(2) of the Damages Directive, the Damages Directive Implementing Regulations have amended the 1998 Act to include a rebuttable presumption that cartel infringements cause harm, thereby shifting the burden to the defendant to demonstrate that the claimant did not in fact suffer harm (see question 4.3 below). However, as a substantive provision, this new rule will only apply in proceedings which were commenced on or after 9 March 2017, where the relevant infringement and harm also occurred on or after that date.

The practical burden which the claimant faces in a “stand-alone” case (i.e. proving a *prima facie* infringement of competition law) is a heavy one, particularly because in practice it is commonly the party that is alleged to have breached the law (the defendant) which will, at least prior to disclosure (see question 4.5 below), possess the relevant documentary evidence relating to the alleged breach. As a result, it is likely to be easier in principle for a claimant to obtain an award of damages in “follow-on” actions than in “stand-alone” actions (although “follow-on” actions are by no means straightforward).

Where the passing on defence is invoked (see question 3.2 above and question 5.2 below), the burden of proof becomes a complex issue, which, prior to the implementation of the Damages Directive into English law, was not addressed in UK statute and had not

been clearly established by case law. This has now been rectified by the Damages Directive Implementing Regulations by inserting express provisions dealing with the burden of proof in this context into the 1998 Act, contained in paragraphs 9–11 of new Schedule 8A (reflecting the requirements of Articles 13–15 of the Damages Directive):

- (a) in a claim made by a direct purchaser, where the defendant argues that the loss has been passed-on by way of a defence to the claim, the 1998 Act (as amended by the Damages Directive Implementing Regulations) provides that the burden of proving pass-on lies with the defendant; and
- (b) in a claim made by an indirect purchaser, alleging that the overcharge (or part of it) was passed on to them, the burden of proof technically lies with the claimant, but they will benefit from a rebuttable presumption that the overcharge was passed on provided that they can show that: (i) the defendant infringed competition law; (ii) that infringement led to an overcharge for the direct purchaser; and (iii) the claimant purchased the goods or services which were the subject of the infringement (or goods or services derived from them). In other words, it is assumed that the overcharge was passed on to the indirect purchaser. In order to rebut this presumption, the defendant must demonstrate credibly to the satisfaction of the court that the overcharge was not passed-on to the indirect purchaser.

As with other substantive provisions of the Damages Directive Implementing Regulations, these provisions will technically only apply to proceedings brought on or after 9 March 2017 where the relevant infringement and harm also occurred on or after this date. As such, they are unlikely to formally apply to many cases for several years (see section 11 below). It remains to be seen whether the courts will take a similar approach in cases involving passing on which do not meet the temporal criteria for application of the approach set out in the Damages Directive Implementing Regulations. However, it is worth noting in this regard that the CAT's approach to the burden of proof in the context of pass-on in the *Sainsbury's-v-Mastercard* case was largely in line with the Damages Directive requirements and was endorsed by the Court of Appeal (see further the discussion in response to question 5.2 below).

As this new regime begins to be applied by national courts over the coming years, it will also remain to be seen how judges will grapple with these rather complex rules where “mixed” claims are brought involving both direct and indirect purchasers. Article 15 of the Damages Directive states that national courts should be capable of taking “due account” of claims at different levels of the supply chain in assessing whether the burden of proof is satisfied, but the Damages Directive Implementing Regulations do not deal any further with this issue, which is likely to give rise to difficult questions in practice. As suggested by Sir Peter Roth (President of the CAT and an English High Court judge), it seems likely that these complex rules will introduce a strategic element to “mixed” claims involving both direct and indirect purchasers, with defendants potentially seeking to ensure that claims by indirect purchasers are heard first, so as to establish pass-on for the purposes of a particular set of proceedings.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The traditional position under English law is that there is no presumption of loss and the quantum of damages needs to be proven using the ordinary principles of causation and loss. As part of the consultation on the reforms introduced by the 2015 Act, stakeholders

were asked whether a rebuttable presumption of loss should be introduced into cartel cases, but the UK Government's response, dated January 2013, concluded that such a presumption should not be introduced. The reasons given included that: it “*would be a departure from the normal English law position that loss must be proven*”; it would be unlikely to save time; it may lead to spurious claims; and “*it was unnecessary as claimants are already able to access the information they [need] by means of the UK's rules on disclosure*”.

The Damages Directive nonetheless introduced a rebuttable presumption that cartel infringements cause harm. Accordingly, the 1998 Act has been amended by the Damages Directive Implementing Regulations to include this presumption, in paragraph 13 of new Schedule 8A. As discussed above, this has the effect of shifting the burden of proof onto the defendant to demonstrate that the claimant did not in fact suffer harm. However, the temporal application of the Damages Directive Implementing Regulations (outlined above and discussed further in section 11) is such that this presumption is unlikely to apply to many private damages actions in England and Wales for some time to come.

Once it has been proven that at least some loss has been suffered, whether in reliance on the new rebuttable presumption of harm or otherwise, the position under English law with respect to quantification will remain the same as prior to implementation of the Damages Directive: a claimant will be required to support its position as to the amount of damages sought by reference to common law principles (and, in most cases, expert economic evidence).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The evidence relied upon by the parties to proceedings under the 1998 Act is adduced by way of documentary evidence, the testimony of witnesses of fact recorded in written statements, and expert witnesses if required. Both the factual and expert witnesses are then subject to cross-examination at trial. Hearsay may also be advanced as evidence, although less weight will be given to such evidence by the court.

In the English courts, documentary evidence commonly forms the backbone of the evidence adduced by the parties. The rules governing the disclosure of documentary evidence are in Part 31 of the CPR. The term “document” is construed widely and includes all notes, records, tapes, other electronic media or anything on which evidence or information is recorded in an intelligible manner. Expert evidence is generally admissible if it is provided by a suitably qualified and independent expert on a matter which lies within the scope of his expertise.

The court will control the scope of evidence by inviting the parties to identify the issues which divide them and on which evidence is required. Where both parties appoint experts (rather than appointing a joint expert, which is rare in competition cases), the court will generally require experts to prepare reports and, following exchange, to meet and establish the areas of agreement and disagreement between them (following which they usually produce a “joint expert statement”). The extent of the economic analysis typically required in competition cases means that the presence of economists as expert witnesses is commonplace.

The approach of the CAT is similar to that of the High Court and has become even more so in the wake of the reforms brought into force by the 2015 Act. In particular, the new CAT Rules 2015 present a more sophisticated evidence regime comprising two distinct but broadly similar sets of rules for appeal proceedings (Rule 21) and damages actions (Rule 55).

In appeal proceedings, the CAT may give directions as to the provision by the parties of statements of agreed matters, the issues on which it requires evidence, the nature of evidence required to decide those issues, whether the parties are permitted to provide expert evidence, any limit on the number of witnesses whose evidence may be put forward, and the way in which evidence is to be placed before it. The CAT retains its power to decide whether to admit or exclude evidence. However, it must now have regard to whether it would be just and proportionate to admit or exclude that evidence, by reference to a number of factors including: (i) the statutory framework under which an appeal is being brought (if applicable); (ii) whether the substance of the evidence was available to the respondent before the disputed decision was taken, and if it was not, the reason why the party seeking to adduce the evidence had not made it available at the time; (iii) the prejudice that may be suffered by one or more parties if evidence is admitted or excluded; and (iv) whether the evidence is necessary for the CAT to determine the case. The CAT has similar powers in the context of damages claims, but may also give directions as to the submission in advance of witness statements or expert reports and the examination or cross-examination of witnesses.

In line with the adoption of a more sophisticated evidence regime for proceedings before the CAT, the passage previously found in paragraph 12.1 of the CAT Guide to Proceedings (2005) stating that “*strict rules of evidence do not apply before the Tribunal. The Tribunal will be guided by overall considerations of fairness, rather than technical rules of evidence*” has been removed from the Guide to Proceedings 2015. The Guide to Proceedings 2015 simply states that the CAT may control the evidence in particular cases by giving directions as to the points noted above.

Prior to these changes, it had been observed that proceedings before the CAT appeared to be more informal than the High Court. In light of the above, this observation is far less applicable in the post-2015 regime, whilst the practical reality was and still is that CAT proceedings are conducted in a broadly similar manner to the High Court.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

(a) Overview of disclosure in proceedings before the High Court

Disclosure in competition law proceedings before the High Court is governed by the same rules of the CPR which apply in other types of case. By way of general overview, a party to proceedings is usually obliged to disclose to the other party the existence of all documents which are or have been in his control and which support his case, are adverse to his case, or support the other side’s case. This relatively generous approach (particularly compared with many other EU Member States, at least prior to implementation of the Damages Directive) is one of the key reasons that England and Wales has traditionally been seen as a claimant-friendly jurisdiction for competition damages claims (where asymmetry of information is often a key difficulty faced by claimants).

Disclosure is given by the exchange of lists of documents. This takes place after the parties have formally stated their case but before the exchange of witness and expert evidence. Parties are then entitled to inspect and take copies of the documents disclosed, except documents over which privilege is claimed (Part 31 of the CPR). Recent reforms to the CPR, which came into effect on 1 April 2013, have sought to make the disclosure process more focused and efficient. However, the CPR still assist claimants in requiring both parties to produce and serve

a Disclosure Report describing documents that exist or may exist that are or may be relevant to the matters in issue in the case. If the extent of disclosure cannot be agreed, the court will order disclosure, having regard to the costs estimates and the Disclosure Reports filed by the parties. This may require that disclosure be given on a number of bases. Included in the range of options is a more limited approach, requiring each party only to disclose those documents on which it relies, together with a request for specific documents or disclosure on an issue-by-issue basis. At the other end of the spectrum, the court may order “standard disclosure” (i.e. all documents relevant to the issues at hand whether or not they assist or are adverse to a party’s case) or a “broader train of inquiry” disclosure (requiring disclosure of documents which may help advance or damage a party’s case).

Parties, including third parties (such as contribution defendants and/or those cartelists which have not been sued), may also be compelled to disclose documents by way of a court order (see further section (e) below).

Business secrets or confidential documents are not protected from production to the other side *per se*. However, particularly in Chapter I Prohibition cases, or disputes involving significant players in a market, it is well understood that the imposition of “standard disclosure” could, without further safeguards, lead to the exchange of information between competitors which might itself constitute a breach of competition law.

As a result, the use of disclosed documents is restricted to the purpose of the proceedings alone, and for no other purpose. Disclosed documents are in any event confidential to those proceedings (unless and until they are referred to in court, whereupon they can become the subject of public records). In addition, “confidentiality ring” arrangements may be made. This may mean that parties themselves are not privy to their adversary’s documents and it is only their lawyers and expert witnesses who can review the full extent of the other side’s disclosure. Whilst these types of arrangements can be helpful in enabling the disclosure of highly relevant but sensitive documents, concerns over preservation of confidentiality can also often lead to an inflation of paperwork, with confidential and non-confidential versions of documents proliferating, adding to overall cost.

The High Court’s Practice Direction 31C on disclosure and use of evidence in competition claims, which entered into force at the same time as the Damages Directive Implementing Regulations, reinforces these safeguards by restricting the scope of disclosable evidence to that which is proportionate. Whilst this concept already existed under English law and was taken into account by the courts in practice when assessing the proper scope of disclosure to be ordered, the new rules expressly state that the factors listed in the relevant articles of the Damages Directive must be taken into account, including relevance and the need to preserve confidentiality. In particular, claimants in follow-on damages claims seeking disclosure of the administrative file of the European Commission or the CMA are now required to make a formal application to the High Court. That application must identify categories of evidence within the administrative file of which disclosure is sought and contain a statement of reasonably available facts and evidence sufficient to support the claim for damages. The first formal applications under Practice Direction 31C were considered by the High Court on 16 July 2018 in four separate follow-on claims arising from the European Commission’s decisions in the Trucks Cartel, and were successful (albeit, at the time of writing, the relevant Defendants in those cases are seeking permission to appeal).

Further limited amendments to the rules on disclosure in proceedings before the High Court resulting from the requirements of the Damages Directive will also further restrict the disclosure of certain categories of document. In

proceedings commenced on or after 9 March 2017 (irrespective of when the relevant infringement and harm occurred), Part 6 of new Schedule 8A of the 1998 Act (reflecting Articles 5–8 of the Damages Directive) provides that:

- (i) the disclosure of settlement submissions and cartel leniency statements is prohibited;
- (ii) the disclosure of a competition authority's investigation materials (i.e. information prepared by a person other than a competition authority for the purpose of a competition authority's investigation, or sent by the competition authority to an undertaking which is the subject of the investigation) may not be disclosed before the relevant investigation is closed; and
- (iii) documents or information in a competition authority's file may not be ordered to be disclosed unless the court is satisfied that no-one else is reasonably able to provide the documents or information.

Where documents are protected by legal professional privilege, they may also be withheld from inspection and are not required to be produced as evidence, unless a party takes the unusual step of waiving privilege in its communications. Note that, unlike under EU law, the English law of privilege can extend to communications with "in-house" lawyers who are employed by the business which they advise.

- (b) Disclosure in competition proceedings before the CAT

The rules on disclosure in proceedings before the CAT are set out in Rules 60-65 of the CAT Rules 2015, as supplemented by the CAT Practice Direction issued alongside the Damages Directive Implementing Regulations, which ensures that a consistent approach is taken in proceedings before the CAT and the High Court in relation to implementation of the disclosure requirements of the Damages Directive.

As a general rule, disclosure in competition proceedings before the CAT is not automatic: an order or direction of the CAT is required. The only exception to this is that a party may request disclosure of any document referred to in the pleadings or in witness statements or affidavits or in an expert report. However, in general, the CAT will take a similar approach to that followed in the High Court, with disclosure reports and (where appropriate) an electronic documents questionnaire taking the same form as required by CPR Practice Direction 31B. Like the High Court, the CAT has powers to order disclosure from third parties (CAT Rules 2015, Rules 19(2)(p) and 53(2)(l)) and will order such disclosure to the extent it considers it necessary for the just, expeditious and economical conduct of the case (see further section (e) below). It will also take a similar approach to the High Court to the issue of disclosure of documents protected by legal professional privilege.

Confidentiality rings are also often used in the CAT in a similar way to the High Court, and the CAT's power to give directions for the creation of a confidentiality ring in appeal proceedings and private damages actions was codified in Rules 19(2)(k) and 53(2)(h) (respectively) of the CAT Rules 2015. It is also common practice to hold hearings in private – in whole or in part – where commercial confidentiality issues arise (unlike in the High Court, where judges tend to discourage the use of private hearings on confidentiality grounds in circumstances where alternative and less restrictive measures are possible).

- (c) Documents that can be obtained before proceedings have begun

An application for disclosure of documents prior to the start of proceedings in the High Court is permitted under certain circumstances – see Part 31.16 of the CPR on pre-action disclosure.

Prior to the introduction of the CAT Rules 2015, the CAT had no specific power to order pre-action disclosure. This has now been addressed under Rule 62 of the 2015 Rules, which gives parties the ability to make an application (supported

by evidence) to the CAT for pre-action disclosure. The CAT may make such an order where (i) both the applicant and the respondent or an associated entity are likely to be parties to subsequent proceedings, (ii) the CAT considers pre-action disclosure to be desirable to dispose of the anticipated proceedings fairly, to assist with dispute resolution without proceedings or to save costs, and (iii) the CAT would, if proceedings had already commenced, have made an order for disclosure under Rule 60 of the CAT Rules 2015 in any event.

In those circumstances, the 2015 Guide to Proceedings notes that the CAT would be likely to order pre-action disclosure only of specific documents or a very limited category of documents, and it will be unsympathetic to purely speculative disclosure requests. More generally, the Guide also notes that it will be incumbent on the applicant to satisfy the CAT that there is some good reason why an order for disclosure should not be given in the usual way after proceedings have been commenced.

- (d) Documents that can be obtained during proceedings from the other party

The High Court may require parties to disclose documents at any stage of the proceedings. Disclosure is a continuing obligation (Part 31.11 of the CPR) on parties to litigation. If a party to the proceedings discovers or creates relevant documents relating to the dispute at any time during the proceedings, it must notify the other parties and give supplemental disclosure. Similarly, the CAT will order disclosure during the course of proceedings if it thinks it is necessary or relevant to the proceedings.

- (e) Documents that can be obtained from other parties (including competition authorities)

As noted above, both the High Court and the CAT have powers to order disclosure by third parties. In the High Court, Part 31.17 of the CPR provides that a party to proceedings in the High Court may apply for disclosure against a non-party, and that such an order may be made where (i) the documents of which disclosure is sought are likely to support the applicant's case or adversely affect the case of one or other of the parties to the proceedings, and (ii) disclosure is necessary to dispose fairly of the claim or to save costs. In the CAT, non-parties may be ordered to give evidence or produce documents pursuant to CAT Rules 2015, Rule 19(2) (d) and 22(1)(b) and Rule 56(1)(b).

Such orders for third party disclosure may also be addressed to competition authorities. However, the rules relating to such disclosure have been amended by the Damages Directive Implementing Regulations to make clear that such disclosure may only be ordered where the information or documents in question cannot reasonably be obtained from another party to the proceedings or another third party. In addition, investigation materials (see the final paragraph of section (a) above) may only be ordered to be disclosed once the competition authority has closed the relevant file, and so-called "black-list" documents, namely, leniency corporate statements and settlement submissions which have not been withdrawn, benefit from an absolute prohibition on disclosure (see further question 10.2 below). These rules apply to all proceedings commenced on or after 9 March 2017, irrespective of when the relevant infringement and harm occurred.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In the English courts, if a witness is reluctant, or unwilling, to attend trial, attendance can be compelled by issuing and serving a witness summons (Parts 34.2–34.7 of the CPR) if the witness is in the UK. Issuing a witness summons is purely administrative, and a fee must be paid. Service must be effected personally and not less

than seven days before the witness is required to attend court. There are two types of witness summons: (i) to attend court to give oral testimony; or (ii) merely to attend court to produce a document(s). There are criminal sanctions for failure to appear; namely, fines and imprisonment.

Factual and expert witnesses can expect to be subject to cross-examination by the other side's advocate.

The CAT also has the power to summon witnesses. In addition, the CAT has the specific power to give directions as to the examination or cross-examination of witnesses (CAT Rules 2015, Rules 19(2)(h) and 55(h)). The CAT also has the power to limit cross-examination of witnesses to any extent or in any manner it deems appropriate (CAT Rules 2015 Rules 21(7) and 55(6)).

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Yes, both infringement decisions of the European Commission and the CMA are treated as binding proof of liability in "follow-on" actions before either the High Court or the CAT.

In relation to European Commission infringement decisions, Article 16(1) of the Modernisation Regulation provides that such decisions are binding on national courts on the issue of liability.

In relation to CMA infringement decisions, sections 58 and 58A of the 1998 Act (as amended by the 2015 Act) specifically provide that both findings of fact made by the CMA in the course of an investigation and CMA findings of infringement are binding in both the High Court and the CAT in relation to civil proceedings for infringement of the Prohibitions or Articles 101 and 102, provided that the relevant period for appeal has expired or any appeal has run its course.

Prior to the insertion of the reference to the CAT in section 58 of the 1998 Act by the 2015 Act, the Court of Appeal decision in **Enron Coal Services Limited-v-English Welsh & Scottish Railway [2011] EWCA Civ 2** had also already confirmed that in "follow-on" claims under section 47A of the 1998 Act, the CAT is normally bound by all findings of fact made by the competition regulator in the course of its investigation leading to the infringement decision being relied upon (and not just the findings of fact that constitute the elements of the demonstrated infringement). This position is reflected in section 58A of the 1998 Act (as amended following the 2015 Act), which provides that, once a CMA or European Commission infringement finding becomes final (i.e. appeals are no longer possible), it becomes binding on both the High Court and the CAT (including collective proceedings).

With regard to decisions of a foreign national competition authority, under the normal practice of the English courts, decisions of a foreign regulator or court are generally treated as admissible evidence, but will not be legally binding on the issue of liability, which remains a matter for the English courts to decide. This was confirmed in **Ferrexpo-v-Gilson Investments [2012] EWHC 721**, where the High Court also held that it was not possible to assess what weight should properly be attached to a decision of another court without going into the facts itself. This approach will continue post-implementation of the Damages Directive: in line with the compromise reached in Article 9 thereof, the Damages Directive Implementing Regulations expressly provide that a final decision of a competition authority or review court of another Member State that there has been an infringement of Article 101 or 102 constitutes "prima facie evidence" (but not binding proof) of the infringement (paragraph 35 of new Schedule 8A of the 1998 Act).

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

See question 4.5 above.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Article 15 of the Modernisation Regulation provides for the possibility that national competition authorities and/or the European Commission may assist national courts as *amicus curiae* ("friend of the court") on issues relating to Articles 101 or 102 of the TFEU.

In relation to the European Commission, Article 15(3) of the Modernisation Regulation states that where the coherent application of Article 101 or Article 102 so requires, the European Commission, acting on its own initiative, may submit written observations to national courts. With the permission of the court in question, it may also make oral observations. The European Commission published its first *amicus curiae* observations in 2006 in a case before the Paris Court of Appeal and since then, according to the Directorate General for Competition (DG Competition) website, it has made further observations in 18 cases across the EU. In relation to cases heard before the English courts, the European Commission made *amicus curiae* observations before the High Court in the National Grid case regarding the disclosure of leniency documents (see question 10.2 below) and before the Supreme Court in **Deutsche Bahn AG and others-v-Morgan Advanced Materials plc [2014] UKSC 24**. More recently, the European Commission made oral submissions before the Court of Appeal in the interchange cases (see **Sainsbury's-v-Mastercard; Asda-v-Mastercard; Sainsbury's-v-Visa [2018] EWCA 1536 (Civ)**). The Commission has not to date made any such observations before the CAT.

Article 6(11) of the Damages Directive entitles the European Commission and/or the CMA to provide (non-binding) observations to a national court setting out its/their views on the proportionality of an application for disclosure of the administrative file (described at section 4.5(a) above). In July 2018, the European Commission submitted written observations to the High Court in respect of the applications for the Trucks Cartel administrative file referred to in section 4.5(a).

In relation to the CMA, paragraph 3 of the EU Competition Law Practice Direction under the CPR provides that the CMA is notified of competition claims before the High Court. It has *amicus curiae* rights in relation to such claims by virtue of Article 15(3) of the Modernisation Regulation. In respect of proceedings before the CAT, Rules 33(7) and 76(6) of the CAT Rules 2015 provide (respectively) that the CMA is to be provided with a copy of the claim form in simple and collective opt-out damages proceedings. The CMA is also to be provided with copies of subsequent pleadings served. More generally, Rule 16 of the CAT Rules 2015 provides that, as a general rule, "any person with sufficient interest in the outcome" may apply to the CAT for permission to intervene. Rule 50 of the CAT Rules 2015 further expressly provides that, in relation to damages claims, the CMA may submit written observations to the CAT on the application of the Prohibitions or Articles 101 and/or 102 and, with the CAT's permission, may also submit oral observations.

5 Justification/Defences

5.1 Is a defence of justification/public interest available?

In Article 101 TFEU cases, there is a defence to the prohibition set out in Article 101(1) under Article 101(3). The burden of proof in relation to Article 101(3) is upon the defendant seeking to rely upon it as a defence. Article 101(3) is not a public interest defence as such, but the exemption it provides is available where the defendant shows that the *prima facie* restriction of competition which infringes Article 101(1) is outweighed by the pro-competitive effects of the agreement in question. Article 101(3) contains four limbs. It must be shown that:

- the agreement contributes towards the production or distribution of goods or towards economic or technical progress;
- the agreement allows consumers a fair share of the resulting benefits (for example, by using cost efficiencies to reduce prices);
- no restrictions are imposed which are not indispensable to the attainment of those objectives; and
- the parties are not able, through the agreement, to eliminate competition in relation to a substantial part of the products in question.

A corresponding exemption is available under the Chapter I Prohibition, pursuant to section 9 of the 1998 Act. In relation to both Article 101(3) and its equivalent under the 1998 Act, it is no longer necessary to notify agreements to the European Commission or the CMA in order to benefit from the exemption. Since 1 May 2004, these legal exceptions apply automatically to any agreement which fulfils the conditions of exemption.

A defence of objective justification is available under Chapter II and Article 102, where it can be shown that the actions taken were not abusive because they were objectively justified. For example, it would be an objective justification to an allegation of abusive discrimination for charging different prices to different customers for similar transactions to show that the higher volumes ordered by customer ‘A’ created bulk order cost efficiencies which allowed for a lower price per unit than for the lower volume ordered by customer ‘B’.

These defences cannot be pleaded in “follow-on” actions where the question of liability is effectively closed (as noted above, infringement decisions of the CMA and the European Commission are binding on the CAT and High Court in relation to a “follow-on” action for damages). Concepts such as *force majeure*, consent and necessity are relevant, but only to breach of contract in English law.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

“Pass-on” is often characterised as a “defence” to an overcharge claim, although, arguably, this is not in fact the case. Rather, it is a reflection of the principle that an infringing supplier can seek to defend itself against claims by a purchaser by arguing that the purchaser/claimant has “passed-on” to its own customers all or part of the loss that it has suffered as a result of the anti-competitive arrangements (for example, through higher prices), such that the claimant has not actually suffered any direct loss.

The “pass-on” defence is a significant feature of private competition actions in determining which cases get brought, the evidence likely to be requested to assemble a case and ultimately the outcome and award of damages. Until recently, however, the “pass-on” defence had not been considered in any detail by the English courts

(although the Court of Appeal implied in **Emerald Supplies-v-British Airways [2010] EWCA Civ 1284** that British Airways could have pleaded the “passing on” defence against some members of the claimant class, the defence was not actually pleaded in that case so the judgment did not consider this point in detail).

The July 2016 judgment of the CAT in **Sainsbury’s Supermarkets Ltd-v-Mastercard Incorporated and Ors [2016] CAT 11** provided the first detailed guidance on the admissibility of the “passing on” defence in competition damages claims brought in England and Wales. By way of summary, the CAT held that:

- (i) “passing on” is in fact not a defence at all, but merely an element of the calculation of the appropriate measure of damages. This reflects the need to ensure that the claimant is sufficiently compensated but not over-compensated;
- (ii) the “defence” may only cover identifiable increases in prices charged to customers and not other responses (e.g. cost savings, reduced expenditure, etc.);
- (iii) there must be a demonstrable causal link between the overcharge and those identifiable price increases; and
- (iv) the defendant must show, on the balance of probabilities, that another class of claimant exists, downstream of the claimant in the proceedings, to whom the overcharge has been passed on. The CAT also expressly stated that the burden of proof was on the defendant.

In the circumstances of this particular case, the CAT concluded that whilst Sainsbury’s was likely to have passed on a substantial amount of the overcharge, Mastercard failed to prove exactly what proportion was passed on in the form of identifiable increases in prices, and failed to trace price increases through to particular product lines. As a result, the damages awarded to Sainsbury’s were not reduced to reflect any element of passing on.

However, this very strict approach has attracted considerable criticism, particularly as the CAT nonetheless felt able to subsequently estimate the amount of pass-on at 50 per cent in the context of determining the interest payable on the damages awarded to Sainsbury’s. Furthermore, in a similar subsequent damages action brought against Mastercard in the High Court by another group of retailers, the High Court took a very different approach when determining the appropriate counterfactual and, as a result, reached the conclusion that the multi-lateral interchange fees charged by Mastercard were not in fact anti-competitive, and therefore no damages were payable (**Asda & Ors-v-Mastercard Inc. & Ors [2017] EWHC 93 (Comm)**). In his judgment (handed down just over six months after the CAT judgment), Mr. Justice Popplewell noted that whilst he accorded the CAT’s judgment “considerable respect”, he was not bound by the CAT’s findings, and in light of the evidence put before him (which differed from the evidence put before the CAT in a number of important respects), he rejected the CAT’s approach to the counterfactual as unrealistic.

Appeals in these two cases were heard jointly (together with the appeal in **Sainsbury’s-v-Visa**) by the Court of Appeal during the summer of 2018 (see **Sainsbury’s-v-Mastercard; Asda-v-Mastercard; Sainsbury’s-v-Visa [2018] EWCA 1536 (Civ)**). On 4 July 2018, the Court of Appeal handed down a judgment endorsing the CAT’s approach to pass-on and confirming that the multi-lateral interchange fee charged by Mastercard was anti-competitive. The Court of Appeal did not accept the contention that the CAT’s rejection of the pass-on “defence” was inconsistent with its decision to reduce the interest awarded to Sainsbury’s by 50 per cent on the basis of pass-on. The Court reasoned that the CAT had made economic assumptions around pass-on when assessing interest, which was distinct from the legal concept of pass-on. In particular, the Court emphasised that the economic notion of pass-on is broader (e.g. it includes cost savings and reduced expenditure to balance

increased spending resulting from an overcharge) whereas the pass-on “defence” (i.e. the legal concept) is limited to identifiable increases in prices charged by the claimants which are demonstrably causally connected to the overcharge.

All three cases have now been remitted to the CAT to produce a consistent judgment. This will include consideration of whether the interchange fee was exempt under Article 101(3) of and the quantum of the claims against Mastercard and Visa. If the CAT does not accept that the interchange fee was exempt, then it is possible that it will increase the damages previously awarded to Sainsbury’s.

Future claims litigated in England and Wales will additionally find guidance in the European Commission’s recently published guidelines to national courts when assessing pass-on. The guidelines note that courts should take into account both price effects and volume effects (i.e. whether a claimant charging higher prices to its customers in order to finance an overcharge applied by its supplier suffers loss of sales volume as a result). The guidelines emphasise that the ability to pass on an overcharge is reduced in markets where there is strong competition between direct purchasers and/or high price sensitivity of indirect/end-purchasers.

With regard to the applicable burden of proof where a pass-on “defence” is argued, please see the response to question 4.2.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

For claims commenced in the English High Court, Parts 19 and 20 of the CPR provide mechanisms for defendants to be able to join in and claim contributions from, or indemnities against, other cartel participants. Part 19.4 of the CPR states that, following the service of a claim form, a defendant may make an application for the court’s permission to add other cartel participants. Note that a cartel participant will not be added unless its consent has been provided and filed with the court. Following the addition of other cartel participants, Part 20.6 of the CPR enables a defendant who has filed an acknowledgment of service or a defence to make a further claim for contribution or indemnity against the other cartelists party to the action.

For claims commenced in the CAT, joining additional parties to a claim is governed by Rule 38 of the CAT Rules. This provides that the CAT may grant permission to add a party to proceedings if: (i) it is desirable to add or substitute the new party so that the CAT can resolve the matters in dispute; or (ii) there is an issue involving the new party and an existing party that is connected to the matters in dispute and it is desirable to add the new party to resolve that issue. Permission to add a party may be sought either by the existing party or the entity that wishes to become a party. Rule 38 also gives the CAT the power to remove or substitute a party.

As a general principle, where other cartel participants are joined to a claim as co-defendants they will be deemed jointly and severally liable for any damages awarded. This has been a long-standing principle of English law, applied in proceedings before both the High Court and the CAT. It should be noted, however, that the implementation of the Damages Directive in England and Wales has introduced protections from this general principle for small and medium enterprises (“SMEs”) and immunity recipients. In proceedings brought on or after 9 March 2017, where the relevant infringement and harm also occurred on or after that date:

- (a) the liability of SMEs (within the meaning of Commission Recommendation 2003/361/EC) will be limited to its direct and indirect purchasers of the relevant product or service, provided that (i) the SME’s share of the relevant market(s) was less than 5 per cent at all times during the relevant

infringement, and (ii) the application of the usual principle of joint and several liability would irretrievably jeopardise its economic viability. However, this protection will not apply where the SME led the infringement, coerced other entities to participate in the infringement or has previously been found to have infringed competition law; and

- (b) the liability of immunity recipients will similarly be limited to their own direct and indirect purchasers, unless the claimant(s) are unable to obtain full compensation for their loss or damage from the other entities involved in the cartel infringement. The term ‘immunity recipient’ is to be interpreted strictly, and therefore will not include subsequent leniency recipients that received a discounted fine, but a fine nonetheless.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

There is generally a six-year time limit for bringing an action in the English High Court. Time starts to run from the date on which the cause of action accrued (section 2 of the Limitation Act 1980) (i.e. from when the wrongful act caused the damage in issue). This time period can, however, be extended where there has been deliberate concealment (section 32(1)(b) of the Limitation Act 1980). This is often at issue in relation to cases involving price-fixing and secret cartels. Where a claimant is successful in demonstrating that there has been deliberate concealment, then the six-year limitation period is deemed to start running from the date on which the claimant knew or could with reasonable diligence have discovered that the cause of action for their claim had arisen.

In October 2014, the question of limitation in the context of a competition damages claim was first tested in the High Court in **Arcadia Group Brands Ltd and others-v-Visa Inc and others [2014] EWHC 3561 (Comm)**. The case was brought by high street retailers seeking damages for breaches of European and English law in relation to Visa’s practice in relation to multilateral interchange fees. Visa applied to strike out parts of the claimants’ claims in so far as they alleged infringement of competition law more than six years prior to when the action was brought (i.e. the limitation period had expired). The claimants, however, contended (relying on section 32(1)(b) of the Limitation Act 1980) that they did not know, or could not with reasonable diligence have discovered, the relevant infringement before the expiry of the limitation period.

This argument was rejected by the High Court, which granted the strike out order on the basis that the facts relevant to the claimants’ claims were discoverable based on information from the European Commission and the OFT. The strike out order was unanimously upheld by the Court of Appeal in August 2015 (**[2015] EWCA Civ 883**). This case highlights the importance of bringing a competition claim as soon as claimants have sufficient information plead a *prima facie* case. It also demonstrates that the doctrine of concealment is likely to be applied restrictively by the courts to extend the limitation period.

The question of whether or not time can, in practice, begin to run prior to the date of an infringement decision was not considered by the Court of Appeal. However, the Court noted in passing that this would require an assessment of the facts available to the claimants prior to the date of the infringement. Further, the Court stated that, in this case, it appeared that the claimants would have been in a position to bring their claim prior to the date of infringement decision. It therefore seems possible, at least in theory, that time

could begin to run prior to the date of an infringement decision in the context of a well-publicised investigation that resulted in sufficient relevant facts being in the public domain prior to the publication of the infringement decision such that potential claimants were able to plead a *prima facie* claim in damages.

Prior to the entry into force of the 2015 Act, damages claims in the CAT under section 47A or 47B of the 1998 Act had to be brought within two years of the date on which the cause of action accrued, or within two years from: (i) the expiry of the period for appealing the relevant decision relied upon; or (ii) the conclusion of any appeal process. This limitation period was challenged in a number of cases. In **BCL Old Co Limited & Ors-v-BASF SE & Ors [2012] UKSC 45**, the Supreme Court held that the deadline for bringing an action was not extended by a pending challenge against the penalty that has been imposed (as opposed to an appeal against the substantive infringement finding). In **Deutsche Bahn AG & Ors-v-Morgan Advanced Materials Plc (formerly Morgan Crucible Company Plc) [2014] UKSC 24**, the Supreme Court was asked to rule on the question of whether the limitation period for claims brought in the CAT was suspended until all appeals on the existence of a particular competition infringement have been concluded, or whether, if one of the addressees of the decision chooses not to appeal against the substantive decision (for example, due to its having been granted immunity under a leniency programme), the limitation period may start to run against that particular undertaking before the other cartelists' appeals have been concluded.

The Supreme Court held (reversing the Court of Appeal's judgment on this point) that the limitation period for bringing a damages action was not suspended or extended by appeals by other addressees of an infringement decision. A damages action against a non-appealing addressee of the infringement decision had to be brought within two years of the expiry of their right to appeal, on the basis that the outcome of any appeals against the substance of the infringement decision lodged by other addressees would not have any effect on the findings of infringement against the non-appealing addressee. In the light of this judgment, leniency applicants may face an increased risk of becoming targets for early damages claims by those who believe they have suffered loss as a result of a cartel, and could potentially be held jointly and severally liable for all losses caused to the claimant(s) as a result of the infringement (despite the limited protection extended to immunity recipients discussed in response to question 5.3).

However, as mentioned above in response to question 1.4, the 2015 Act introduced new rules with regard to limitation periods for damages actions brought before the CAT under section 47A and 47B of the 1998 Act, in order to align the limitation periods with those applicable in the High Court, i.e. six years (five years in the case of proceedings in Scotland, as this is the limitation period which applies to claims before the Court of Session in Scotland). In addition, further specific provisions have been introduced in relation to collective actions, whereby the limitation period in relation to a claim made under section 47A will be suspended from the date on which collective proceedings are commenced. The section 47A limitation period will resume: (i) if the CAT declines to make a collective proceedings order; (ii) if the claim is not eligible for inclusion in the collective claim; (iii) if the CAT rejects the collective claim; or (iv) if it is withdrawn or otherwise disposed of without an adjudication on the merits. The purpose of these specific rules for collective actions is to preserve the ability of claimants to bring a regular section 47A claim following a section 47B claim that is unsuccessful for any of the reasons set out above.

Questions were raised at the time of the 2015 reforms as to how these new rules would be affected by the requirements of the Damages Directive: whilst the basic limitation period of six years meets the requirements of the Damages Directive, the rules introduced by the

2015 Act did not mirror the requirements relating to when the limitation period should be deemed to start running, or the circumstances in which it should be suspended. This has now been addressed by the Damages Directive Implementing Regulations, which insert detailed provisions relating to limitation periods into new Schedule 8A to the 1998 Act mirroring the requirements of the Damages Directive on these points. As such, in proceedings brought on or after 1 March 2017, where the relevant infringement and harm also occurred on or after that date, the limitation period will not start to run until the later of: (i) the day on which the relevant infringement of competition law ceases; or (ii) the claimant's "day of knowledge". This is defined as the day on which the claimant first knows or could reasonably be expected to know: (i) of the infringer's behaviour; (ii) that the behaviour constitutes an infringement of competition law; (iii) that the claimant has suffered loss or damage arising from that infringement; and (iv) the identity of the infringer. In addition, the limitation period will be suspended during the course of any investigation by a competition authority into the relevant alleged infringement (and for one year after the conclusion of the investigation), and pending any appeals against the relevant infringement decision. In practice, this is likely to lead to extremely long limitation periods.

It is worth noting however that the amended 1998 Act fails to deal with the issue raised in the **Deutsche Bahn** appeal referred to above, regarding whether an infringement decision becomes "final" on an addressee-by-addressee basis, or only once all appeals by any of the addressees have been exhausted. It is anticipated that the English courts will continue to follow the approach adopted in **Deutsche Bahn**, pending any reference to the ECJ for a preliminary ruling on this point with a view to ensuring a consistent approach by national courts across all EU Member States.

There is a further complication to the limitation rules applicable in England and Wales with regard to claims before the CAT where the cause of action arose prior to 1 October 2015 (even if proceedings are commenced at a later date). Rule 119 of the CAT Rules 2015 provides that such claims remain subject the old 'two year' limitation rules (discussed above). Given the length of some cartels and the often significant lapse of time between the commencement of an investigation and the adoption of an infringement decision, a scenario can easily be imagined in which a decision relating to a long-lasting cartel ending long before 1 October 2015 is not adopted until after 1 October 2015. The possibility of appeals may result in such a decision not becoming final for several years after that, and the limitation period not expiring for a further two years. Hence, the old 'two year' limitation rules are likely to continue to apply in the CAT for several years to come.

The net result of these various reforms is as follows:

- (a) For claims in the High Court, a six-year basic limitation period applies in all cases. However, the rules relating to when the limitation period commences and when it is suspended will differ depending on when the cause of action arises and when proceedings are commenced: the regime set out in new Schedule 8A of the 1998 Act (reflecting the damages requirements) will only apply where proceedings are commenced on or after 9 March 2017 and the infringement and harm also occurred on or after that date;
- (b) For claims in the CAT:
 - (i) if the cause of action arose prior to 1 October 2015, the old two-year limitation period provided for in Rule 31(1)-(3) of the CAT Rules 2003 will apply (irrespective of when proceedings are commenced);
 - (ii) if the cause of action arose after 1 October 2015, and proceedings are commenced prior to 9 March 2017, the six-year limitation period provided for in the 2015 Act will apply, but the new rules contained in Schedule 8A of the 1998 Act regarding when the limitation period starts and when it is suspended will not; and

- (iii) if the cause of action arises on or after 9 March 2017 and proceedings are also commenced on or after this date, both the six-year limitation period provided for in the 2015 Act and the new regime contained in Schedule 8A of the 1998 Act will apply.

It should be noted, however, that High Court proceedings transferred to the CAT which would ordinarily fall within the scope of Rule 119 of the CAT Rules 2015 do not do so. This was specifically considered by the High Court when transferring the **Sainsbury's** case to the CAT. The Court made clear that the parties to a transferred claim should not be subject to different limitation rules by reason of that transfer (see **Sainsbury's-v-Mastercard [2015] EWHC 3472 (Ch)**).

The alignment of the limitation rules in CAT proceedings with those that apply in High Court proceedings extends to the application of foreign limitation periods to claims which are governed by foreign law. It is well established that the High Court will apply the relevant foreign limitation period to a claim governed by foreign law. In **Deutsche Bahn and Ors-v-Mastercard Incorporated and Peugeot Citroën Automobiles UK Ltd and Ors-v-Pilkington Group Limited and Ors [2016] CAT 14**, the CAT confirmed that it would do the same notwithstanding the fact that the causes of action pleaded in those cases arose prior to the entry into force of the 2015 Act which aligned the CAT limitation rules with those of the High Court.

This makes clear that, for limitation purposes, the CAT intends to treat claims governed by foreign law arising prior to the entry into force of the 2015 Act in the same way as claims before the High Court or claims arising post-2015 Act. However, this could also increase the risk that foreign law claims arising from historic infringement decisions and subject to stricter limitation periods will become time-barred.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

English High Court

Generally, first instance High Court proceedings can be expected to take around two years to complete, from issuing a claim form to attending trial. Much will depend on: (i) the number of witnesses; (ii) the volume of disclosure; (iii) the legal and economic complexities in the case; and (iv) the need for expert evidence.

It is possible to obtain an order to expedite the proceedings which can significantly reduce the lead-time to trial. It will be a matter of discretion by the judge as to whether it is appropriate or not to expedite matters or order a speedy trial. In **Purple Parking Limited and Meteor Parking Limited-v-Heathrow Airport Limited [2011] EWHC 987 (Ch)**, a case in relation to an abuse of dominant position, the judge ordered that the case be dealt with on an expedited basis. The High Court handed down a judgment 10 months after the proceedings had commenced. This case is cited as an example of a relatively small company obtaining rapid redress against anti-competitive behaviour from the High Court.

Although in theory competition cases may be dealt with by obtaining summary judgment from the court, it will be a rare case indeed where judgment will be made prior to a full examination of the facts of the case.

CAT

It is more difficult to make general comments about the length of time taken to reach final judgment for competition law claims in the CAT, because to date only four claims for damages before the CAT have actually reached a final judgment: **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 Ltd-v-Mastercard Incorporated and Ors [2016] CAT 11; and Socrates Training Limited-v-The Law Society of England and Wales [2017] CAT 10. These proceedings lasted, respectively, 18 months, slightly less than three years, two and a half years and three and a half years. This is broadly similar to tightly managed actions in the High Court.

Like the High Court, the CAT has the power to award summary judgments in damages actions (CAT Rules 2015, Rule 43), but to date it has never done so.

Following the entry into force of the 2015 Act, a quicker, cheaper and simpler "fast-track" route has been introduced in the CAT. This is intended to be used for simpler cases and/or short applications for injunctive relief. When the 2015 reforms were originally proposed, it was envisaged that this new fast-track route would be limited to claims brought by SMEs but, in light of responses to a consultation on the proposed reforms, the UK Government concluded that the new procedure should, in principle, be available to all types of claimant, provided the case in question is suitable for the fast-track approach. The factors relevant to determining whether a particular case is suitable for the fast-track route are set out at Rule 58 of the CAT Rules 2015. These factors include: (i) whether the time estimate for the final hearing is three days or less; (ii) the complexity and novelty of the issues involved; (iii) the scale and nature of the documentary evidence involved; and (iv) the number of witnesses involved.

The scale and nature of disclosure is likely to be a particularly relevant factor for determining the correct 'threshold' at which actions will not be appropriate for the fast-track. In a recent "follow-on" damages action arising from the European Commission's decision in respect of the Polyurethane Foam cartel, the CAT held that the disclosure sought by the parties was of a scale and scope well beyond that which was commensurate with the fast-track procedure. In particular, the court considered that, although the extent of disclosure may well be smaller than in other cartel cases, monthly and/or annual transactional data covering a 10-year period would need to be disclosed, as would data in relation to pass-on. More generally, the CAT noted that cases involving damages for harm caused by a cartel (particularly a cartel of long duration) are unlikely to be appropriate for the fast-track procedure (**Breasley Pillows Limited and Ors-v-Vita Cellular Foams (UK) Limited and Anor [2016] CAT 8**).

Notwithstanding the above, the fast-track procedure appears to be proving reasonably popular, with at least five allocation applications having been made to date. At the time of writing, one of those has been declined (see above), one has been granted (resulting in a judgment in favour of the claimant – see **Socrates Training Limited-v-The Law Society of England and Wales**) and the other three cases settled prior to the applications being determined (see **Shahid Latif & Mohammed Abdul Waheed-v-Tesco Stores Limited; NCRQ Ltd v Institution of Occupational Safety and Health and Westpoint Group Trading Limited & Ors-v-XL Farmcare UK Limited & Ors**).

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

As a general point, there is a tendency for competition claims to settle. This tendency is supported by both the English courts' encouragement of alternative dispute resolution and the availability

of a wide range of different means by which to resolve disputes, including but not limited to, mediation, adjudication and expert determination.

In the High Court, it is open to the claimant to discontinue proceedings at any stage, upon filing a notice of discontinuance to the court and upon serving a copy on every other party to the proceedings (Part 38 of the CPR). In the ordinary course, where a party discontinues its action prior to judgment it is liable to pay the reasonable costs incurred by the other parties up to that point. A claimant does not generally require the permission of the court to discontinue all, or only a part, of the proceedings it has issued. Permission is required, however, if the court has previously granted an interim injunction, the claimant is in receipt of an interim payment in relation to the claim, or where there is more than one claimant. In addition, once proceedings have been issued, it is necessary to notify the court if a settlement has been reached. Note that if a claim has been discontinued, a claimant who makes another claim against the same defendant will require the permission of the court if: (i) the claimant discontinued the claim after the defendant had filed a defence; and (ii) the 'new' claim arises out of facts which are the same or very similar to those in the discontinued claim (see Part 38.7 of the CPR).

Under Rule 44 of the CAT Rules 2015, a claimant may withdraw a claim for damages before the CAT only with the consent of the defendant, or with the permission of the CAT President or, if the case has already proceeded to a hearing, the Tribunal. Note that a claim may be resubmitted in the CAT after it has been withdrawn (**Case 1263/5/7/16 – Labinvesta Limited-v-Dako Denmark A/S and Others**).

Under Rule 13 of the CAT Rules 2015, an appellant may only withdraw an appeal against a competition authority's decision with the permission of the Tribunal (or the CAT President if the Tribunal has not yet been constituted).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As discussed above, both opt-in and opt-out collective claims are permitted before the CAT. The 2015 Act also introduced sections 49A and 49B into the 1998 Act which give the CAT the power to review and approve any proposed collective settlement where a collective proceedings order has been (or could be) made. The procedural rules governing such settlements of proceedings are to be found in Rules 94–97 of the CAT Rules 2015.

Where a collective proceedings order has been made in relation to "opt-out" collective proceedings, the CAT may make a collective settlement order (binding all persons covered by the order based in the UK who do not "opt-out" of the settlement, as well as those not based in the UK if they "opt-in") if it is satisfied that its terms are just and reasonable. The representative body and the defendant(s) must apply to the CAT for approval of any proposed collective settlement, providing both details of the claims to be settled and the proposed terms of the settlement.

Where however a collective proceedings order has been made in relation to "opt-in" collective proceedings, the representative body may not settle the proceedings prior to the expiry of the time specified in the collective proceedings order (as the time by which a class member may without the permission of the CAT opt in to the proceedings) without the prior permission of the CAT (see Rule 95 of the CAT Rules 2015).

Collective settlement is also possible in circumstances where a collective proceedings order has not been made, such that parallel claims which were not initiated as collective proceedings, but which would have satisfied the certification requirements for collective proceedings, can be settled collectively. The relevant procedural rules are set out in Rule 96 of the CAT Rules 2015. Before the CAT can approve such a settlement, it must make a collective settlement order allowing a nominated collective settlement representative for the claimants to act in respect of the proposed collective settlement. As above, before it approves the collective settlement, the CAT must be satisfied that the terms of the collective settlement order are just and reasonable. Once approved, the collective settlement is binding on all persons falling within the class of persons described in the collective settlement order (save those who have "opted-out" of the settlement if based in the UK and those who did not "opt-in" if based outside the UK).

Relatedly, the Damages Directive provides that when a defendant settles, any claimant(s) claim must be reduced by the amount of loss attributable to that defendant (so that a settling defendant is no worse off than a non-settling one). It also provides that settling defendants will be exempted from liability to pay contributions to non-settling co infringers. This has been carried into Article 41 of the Damages Directive Implementing Regulations and contrasts with the previous position under English law where settling defendants could sometimes still be pursued under contribution proceedings. We note again however that in practice, the rule stated in Article 41 of the Damages Directive Implementing Regulations will not apply to cases for a number of years and therefore the previous position under English law will likely be applicable in a number of cases.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The general rule in the High Court is that the unsuccessful party to the proceedings will be ordered to pay the reasonable costs of the successful party. The jurisdiction to award costs lies solely with the court and judges are free to exercise their discretion. For hearings of less than one day, costs awards are commonly ordered summarily, upon application. A typical final costs order, however, will not state the proportion of costs to be awarded, but merely the fact that costs have been awarded to the successful party either in whole or as to part only of the proceedings.

The parties then face an unfortunately often comparatively lengthy negotiation over the costs to be paid, or a detailed assessment process conducted by a costs judge. As a rule of thumb, a successful party can expect to receive approximately two-thirds of its reasonable costs upon detailed assessment by a costs judge.

In the CAT, the award of costs is within the Tribunal's discretion pursuant to Rule 104(2) of the CAT Rules 2015. The Court of Appeal has confirmed that the CAT has a wide discretion in considering the question of costs and that it is not bound to follow the approach in the CPR (detailed above) that costs should follow the event (**Quarmby Construction-v-OFT [2012] EWCA Civ 1552**). In awarding costs the CAT may consider the parties' conduct, success in parts of their case (even if a party does not succeed in recovering the full amount claimed), proportionality and reasonableness. The CAT may also take into account any admissible offers to settle which have been made by parties (see Rule 104(4) of the CAT Rules 2015). In the costs ruling in **Albion Water Limited-v-Dwr Cymru Cyfyngedig ([2013] CAT 16)**, the CAT held that Albion (the successful claimant) should be awarded all of its costs relating

to its compensatory damages claims, despite not having succeeded on every point. In contrast, Dwr Cymru was not able to recover its costs relating to defending an unsuccessful exemplary damages claim made by Albion, due to the lack of assistance provided to the CAT by one of their chosen witnesses.

If the CAT makes an order for costs to be paid by a party, the actual amount paid in respect of costs is usually negotiated between the parties. If a figure cannot be agreed, costs will be subjected to an assessment. In the context of appeals against competition authority decisions, it is notable that the CAT has decided not to award costs against the unsuccessful party in a number of cases so as not to discourage appeals as a matter of policy.

In 2012, Lord Justice Jackson published a detailed review of the costs of litigation (“**Jackson Report**”) which contained a number of recommendations in relation to costs in civil litigation (including collective redress actions). Among other topics, the Jackson Report considered whether the rules on costs shifting and costs capping should be amended in certain circumstances. A number of these recommendations were accepted by the UK Government and incorporated into the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“**LASPO 2012**”), which came into force in April 2013. Since April 2013, not only do judges have greater discretion on whether to cap costs, which they were previously only permitted to do in exceptional circumstances; but the normal costs shifting principle (i.e. “the loser pays”) in personal injury claims has changed and this may soon be extended to other types of claim such as defamation and privacy. At the date of writing, however, there has been no indication to suggest that the normal costs shifting principle will be changed in relation to non-collective competition damages claims. Indeed, the UK Government has in fact stated that it will be maintained for competition collective actions.

8.2 Are lawyers permitted to act on a contingency fee basis?

Damages-based agreements

The use of damages-based agreements (“**DBAs**”) (i.e. where the lawyers’ fees are related to the damages awarded, not the work done) was the subject of considerable scrutiny in the Jackson Report. Under LASPO 2012, the use of such DBAs was extended post-1 April 2013 to all general civil litigation (except criminal or family proceedings) where conditional fee agreements (see below) are permitted. In general commercial litigation, including competition claims (save opt-out proceedings), the contingency amount (i.e. the percentage of the client’s damages award that the lawyer is entitled to receive in the event of success) is capped at 50 per cent of the sums recovered. The Damages-Based Agreements Regulations 2013 set out how DBAs are meant to work in practice.

Paragraph 37 of Schedule 8 of the 2015 Act provides for an exception to the permitted use of DBAs in relation to “opt-out” collective proceedings relating to competition law claims. Accordingly, the new section 47C of the 1998 Act provides that DBAs are unenforceable where they related to “opt-out” collective proceedings. This new section aligns the UK with a 2013 European Commission recommendation that contingency fees should be prohibited in the context of collective redress.

The fact that this ‘no-risk’ model is not available may likely have an impact on the number of (often high value) opt-out claims brought. Parties may be less inclined to step forward as a ‘class representative’ and become exposed to liability for costs. This may in turn therefore prevent frivolous claims, or even the development of a litigation culture akin to that which has developed in the United States of America.

Conditional fee agreements

The use of conditional fee agreements (“**CFAs**”), whereby the client pays different amounts for the legal services depending on the outcome of the case, is permitted for contentious work (including competition litigation) subject to specific terms and conditions. CFAs can be structured in different ways so that the amount the client pays will vary. However, there is a limit on the uplift that the solicitor can charge in the event of success, which is currently set at 100 per cent.

Currently, CFAs are available to fund High Court litigation and arbitration and can be used by claimants and defendants. Both solicitors and barristers are able to accept instructions on a conditional fee basis.

Rule 113 of the CAT Rules 2015 provides that, subject to the prohibition on the use of DBAs in collective proceedings, the rules on funding arrangements made under Part II of the Courts and Legal Service Act 1990 apply to proceedings before the CAT. These rules specify: (i) the criteria that must be fulfilled in order for a CFA to be enforceable; and (ii) the proceedings which cannot be the subject of an enforceable CFA.

When LASPO 2012 came into force in April 2013, CFA success fees ceased to be recoverable from the other side in the event of a success (a success fee is an additional amount payable for legal services, over and above the amount that would normally be payable if there was no CFA, payable on success). Any CFA success fee in respect of a CFA entered into after 1 April 2013 must now usually be paid by the CFA-funded party rather than by the losing party (although CFA success fees remain recoverable from the other side in respect of CFAs entered into before 1 April 2013 and after that date in certain specific types of case (but not in competition claims)). The hope is that this will give the CFA-funded party a financial incentive to keep costs down.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of litigation in England has historically been strongly discouraged, as a matter of public policy. However, over time, inroads have been made into these principles. The English courts now adopt a more pragmatic and liberal approach to third party funding. The OFT (predecessor to the CMA) considered that the major obstacle to bringing competition actions was the cost and took the view that third party funding was an important potential source of funding which should be encouraged. It appears that the CMA has maintained a similar view.

Provided that the funding agreement does not give the funder the right to control the action or give it an interest in the action itself (as opposed to a share of the proceeds), the funding agreement should not be in breach of the maintenance and champerty rules. Recent years have seen significant growth in the litigation funding industry. This growth looks set to continue. The Financial Services Authority (predecessor to the Financial Conduct Authority) gave its approval to certain brokers to offer third party funding in support of private litigation. With such backing, there are an increasing number of financial institutions that are prepared to share the financial risk of commercial disputes.

Although statistics are not publicly available, there are indications from the industry that third party funding of competition damages claims is taking place, particularly in “follow-on” cases which are deemed to be lower risk. Examples include: (i) the potential “opt-out” collective follow-on damages claim for up to GBP 14 billion

against Mastercard (referred to in the response to question 1.5 above) in respect of which up to GBP 40 million is said to have been available by third party funders; (ii) reports in 2016 that the BT Group signed a \$45 million litigation funding arrangement with Burford Capital in respect of its on-going litigation portfolio; (iii) in 2017, 27 retail firms securing a funding package with Therium Capital Management to commence legal proceedings in the English courts against both Visa Inc and Mastercard Inc in relation to interchange fees worth in the region of GBP 300 million; and (iv) both the UKTC and RHA prospective “opt-out” collective actions referred to in question 1.5 above are third party funded (by Calunius Capital and Therium Capital, respectively).

That said, concerns have been raised in relation to the lack of transparency in the third party funding market and the risk that funders may not have sufficient capital to fund cases. The debate is now therefore focusing on whether third party funders should be regulated and what can be done to avoid further cases like **Excalibur Ventures LLC-v-Texas Keystone Inc & Ors [2013] EWHC 4278 (Comm)**, in which Excalibur lost its claim for US\$1.6 billion and only two of the three third party funders, who were required to cover a portion of the GBP 23.1 million costs bill, remained solvent. Important questions have also arisen as to the incentives available to funders to become involved in collective damages actions (where the availability of third party funding is likely to be critical to enabling many such claims to “get off the ground”). The default position under Rule 93 of the CAT Rules is that any unclaimed damages in an opt-out collective action (which are likely to be substantial in practice) be paid to charity. The CAT does have discretion to make an order directing that all or part of the undistributed damages be paid to the class representative in respect of all or part of any costs incurred by the class representative in connection with the collective proceedings, but it is unclear how the CAT will exercise its discretion in this regard, and whether this mechanism could offer a way to distribute some of the unclaimed damages to a third party funder of the claim.

A voluntary code of conduct was published by the Association of Litigation Funders (“ALF”) in 2011. In 2012, the Jackson Report recommended that, if the third party funding market does expand, there should be further consideration of whether statutory regulation would be more appropriate. Possibly with this in mind, the ALF announced in 2013 that it would call for stricter rules for third party funders to improve protection for litigants. In 2014, the ALF updated its code of conduct which introduced a new requirement for its members to hold at least GBP 2 million in capital to fund cases (which met with criticism from a number of ALF members) and established direct accountability in respect of subsidiaries and associated entities of funders. The ALF code of conduct was updated again in January 2018 and ALF members must now hold at least GBP 5 million in capital.

9 Appeal

9.1 Can decisions of the court be appealed?

Appeal from the High Court

Appeals can be made by a party from the High Court to the Court of Appeal on a point of law. Permission to appeal must be obtained either from the High Court or the Court of Appeal. It is possible to appeal further to the Supreme Court (again, only on a point of law), but only with the permission of the Supreme Court itself.

Appeal from the CAT

Appeals from the CAT are permitted under section 49 of the 1998 Act. Such appeals can concern either: (i) the CAT’s judgment in respect of a point of law; or (ii) the CAT’s judgment in respect of damages awards under section 47A or section 47B of the 1998 Act.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The CMA is prepared to offer lenient treatment to businesses that come forward with information about a cartel in which they are involved. Under the UK leniency programme, successful leniency applicants may be able to avoid a penalty for infringement of competition law altogether (i.e. immunity) or alternatively obtain a reduction in the amount of any fine imposed by the CMA. Leniency granted by the CMA does not provide immunity from any penalty that may be imposed on the business by other competition authorities outside the UK, such as the European Commission or other national competition authorities, although it may be possible to secure immunity or leniency via a separate application to those authorities.

However, any grant of immunity or leniency in respect of fines imposed by the CMA under the public enforcement regime does not extend to protection from civil claims for damages brought by victims of the infringement (and the position is the same under the European Commission’s leniency regime). Indeed, a leniency applicant can often find that it is the main initial target for damages claims, given that it will be required to admit liability for the infringement as a condition of being granted immunity/leniency (and in England and Wales this risk is likely to increase following the Supreme Court decision in the **Deutsche Bahn** case, discussed above in response to question 6.1).

That said, some limitations on the liability of immunity recipients have been introduced by the Damages Directive Implementing Regulations. As discussed in response to question 5.3 above, immunity recipients will generally only be liable for the harm caused to their own direct and indirect purchasers, rather than being jointly and severally liable for the entire harm caused by the relevant infringement (subject to an exception where the remaining co-infringers are unable to fully compensate the other victims of the infringement). As such, they will also generally be protected from contribution claims from other co-infringers. This is intended to provide an additional incentive for participants in cartels to disclose details of the infringement to the competition authorities, and address the growing reluctance of companies to take advantage of leniency regimes due to the likelihood of becoming a target for damages claims. However, the protection only extends to immunity recipients (i.e. 100 per cent leniency), not also to those who benefit from a lesser degree of leniency (by virtue of not being “first in”, or applying for leniency once the competition authority has already initiated an investigation). Moreover, immunity recipients are likely to have to wait a number of years to determine the full extent of their liability (it is unclear how long the courts will wait before determining whether the other co-infringers are unable to fully compensate the remaining victims of the infringement). The intended additional impetus to apply for leniency may therefore be somewhat diluted in practice. As previously highlighted, it is also important to note

that this protection will only apply in any event in the context of proceedings commenced on or after 9 March 2017 where the relevant infringement and harm also occurred on or after that date.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

In the case of **National Grid Electricity Transmission Plc-v-ABB & Ors [2012] EWCH 869** the High Court ruled in favour of disclosing limited extracts from leniency documents, having carried out the “balancing exercise” between competing interests advocated by the ECJ in **Case C-360/09 Pfeleiderer AG-v-Bundeskartellamt and Case C-536/11 – Bundeswettbewerbbehörden-v-Donau Chemie AG and others**. Precise details of what was considered to be disclosable are unfortunately not in the public domain, and the case settled in June 2014, but this case was often cited as an illustration of the wide scope of the English disclosure regime.

However, following implementation of the Damages Directive into English law, cartel leniency statements now benefit from absolute protection from disclosure in proceedings commenced on or after 9 March 2017, pursuant to paragraph 28 of the new Schedule 8A of the 1998 Act inserted by the Damages Directive Implementing Regulations. On the basis that provisions relating to disclosure are deemed to be “procedural” rather than “substantive”, the new rules apply from 9 March 2017, irrespective of when the relevant infringement and harm occurred.

However, it is important to note that this protection does not extend to pre-existing evidence referred to in an application for leniency, or other documents relating to the application other than the actual corporate leniency statement itself (although literal quotations from the leniency statement in other documents will be protected: in practice, it appears inevitable that claimants and defendants will often disagree on where exactly the line should be drawn). When deciding whether to order disclosure of such documents, the English courts will continue to weigh up competing interests when assessing the proportionality of disclosure. It is worth noting in this regard that the need to safeguard the effectiveness of public enforcement of competition law is expressly included in the list of matters to be taken into account as part of the proportionality assessment when disclosure is sought of any other documents on a competition authority’s file.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The implementation of the Damages Directive into English law is already beginning to have an impact on antitrust damages actions in the England and Wales (e.g. in respect of disclosure applications), but perhaps less so than in some other Member States as the pre-existing English private enforcement regime already met (or included provisions very close to) many of the requirements of the Damages Directive. For example, the principle of joint and several liability was already applied by the English courts, disclosure rules were already very wide, and decisions of the national competition authority were already binding on the CAT and national courts in “follow-on” actions (see also the more detailed discussion in Chapter 1).

However, the implementation of the Damages Directive (through the Damages Directive Implementing Regulations) has resulted in

some important amendments to national procedure in England and Wales. In particular (and as discussed in more detail above):

- The disclosure requirements of the Damages Directive have altered some aspects of the existing English disclosure rules (for example, in respect of absolute protection for corporate leniency statements and settlement submissions, and the restrictions on disclosure of a competition authority’s file and ‘investigative materials’). English courts, with their wide disclosure practices, will be compelled to adopt a slightly more restrictive approach in some cases than they did prior to implementation of the Damages Directive (for example, it is unclear whether the limited extracts from leniency documents which were ordered to be disclosed by Sir Peter Roth in **National Grid Electricity Transmission Plc-v-ABB & Ors** would be permitted to be disclosed under the new regime). However, Member States are generally permitted to adopt wider rules than those set out in the Damages Directive, and it is anticipated that England and Wales will continue to have one of the broadest disclosure regimes in the EU.
- The award of exemplary damages (previously available as a remedy in exceptional circumstances) will be prohibited.
- Limitation periods applicable to antitrust damages actions brought in England and Wales will be adjusted to reflect the requirements of the Damages Directive relating to when time starts to run and the circumstances in which the limitation period is suspended. As discussed in section 6, the combined effect of the temporal application of the Damages Directive Implementing Regulations and the existing transitional regime contained in Rule 119 of the CAT Rules following the 2015 reforms is a complex web of different rules depending on when the cause of action arose and when proceedings are commenced.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

As discussed above, despite the UK’s decision to leave the EU, the Damages Directive has been implemented into English law by the Damages Directive Implementing Regulations. It remains to be seen whether any further amendments will be made post-Brexit (see further comments in the response to question 11.4 below).

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The temporal application of the new Schedule 8A of the 1998 Act inserted by the Damages Directive Implementing Regulations is specified in paragraphs 42–44 of that Schedule:

- (a) provisions which implement substantive provisions of the Damages Directive will only apply where proceedings are commenced on or after 9 March 2017 and the relevant infringement and harm also occurred on or after this date; and
- (b) other provisions which implement purely procedural provisions of the Damages Directive will apply to all proceedings commenced on or after 9 March 2017.

This reflects the requirements of Article 22 of the Damages Directive, which provides that national measures adopted in order to comply with the substantive provisions of the Directive must not apply retroactively. Unlike the Directive itself, and many other Member States’ national implementing legislation, the Damages

Directive Implementing Regulations also go on to expressly specify which provisions are to be deemed substantive for this purpose. These include: (i) limitation periods; (ii) passing on; (iii) the rebuttable presumption of harm; (iv) the restrictions on liability of immunity recipients and SMEs; (v) the prohibition on exemplary damages; and (vi) contribution and consensual settlement. The only provisions which are deemed to be “procedural” for these purposes are those relating to disclosure and use of evidence.

As already noted, the practical effect of these provisions is that the amended regime reflecting the requirements of the Damages Directive will be unlikely to apply in many cases brought before the English courts or the CAT for a number of years, given that the existence of cartels often takes a substantial period of time to light. In fact, some practitioners have estimated that it may take as long as a decade before the amended regime is being regularly applied and tested by the courts. The approach adopted by the UK Government in this regard differs quite significantly from that adopted in a number of other Member States (as discussed in Chapter 1), and it remains to be seen what impact this will have on the traditional popularity of the English courts as a forum for bringing competition damages claims.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

No other reforms to competition litigation in England and Wales have been proposed in any detail at the time of writing. However, perhaps the largest elephant in the room is what will be the impact of the Brexit Act (once it falls to be applied) on competition litigation in the medium-long term. In the short term, there is unlikely to

be any major impact, pending the conclusion of Brexit negotiations between the UK and the EU. Indeed, the UK Government has repeatedly emphasised that the UK remains a full member of the EU until it formally exits on 29 March 2019 and all aspects of EU law applied in the UK will continue to be so applied until that time.

However, in the medium to longer term, it is unclear whether Brexit will result in fewer claims relating to EU-wide/global cartels being brought before the English courts. At the time of writing there is still uncertainty as to what the outcome of the Brexit negotiations will be, and what the UK’s future relationship with the EU will look like (particularly in light of growing political in-fighting as to how negotiations should be conducted). Some commentators have suggested that the impact on competition litigation will be minimal, but much will depend on the detail of the position reached. Key issues will include: the arrangements in relation to jurisdiction and enforceability of judgments; and the extent to which English courts continue to accept European Commission infringement decisions as binding proof of liability. It is also important to consider that by the time the UK leaves the EU it will have been some years post-implementation of the Damages Directive, and other EU jurisdictions may slowly be positioning themselves as more favourable arenas for competition litigation. That said, it has been suggested that the English courts may in fact be in an advantageous position compared to those of the remaining EU Member States, if those national courts are tied up for a number of years with preliminary references to the ECJ regarding the interpretation of various requirements of the Damages Directive. On balance, it is too early to say how this will all play out in practice, and whether the UK will maintain its status as a favoured jurisdiction for competition damages claims.

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European Union

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Antoni Terra



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

For the purposes of this discussion, we will refer to claims that can be brought before the General Court and the Court of Justice of the European Union (hereafter the “European Court of Justice”) (together the “European Courts”) or the national courts of the European Union (hereafter “EU”) Member States in general.

The scope of claims that may be brought before the national courts of the EU Member States for breach of EU competition law (*i.e.*, violation of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union (hereafter “TFEU”)) includes: (i) actions for a declaration of nullity of contractual arrangements that are contrary to EU competition law; (ii) interim measures (including cease and desist orders in relation to conduct violating EU competition law); and (iii) actions for damages.

The scope of claims that may be brought before the General Court includes: (i) actions for the annulment of a European Commission (hereafter “Commission”) “act”, defined as any Commission measure capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (Case C-60/81, *IBM v Commission*); (ii) actions for failure to act; (iii) interim measures and (iv) damages actions for excessive delay in proceedings before the EU courts. Appeals on points of law against the judgments of the General Court may be brought before the European Court of Justice. The EU courts have confirmed in many instances that only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, may be the subject of an action for annulment under Article 263 TFEU. *See* in particular the European Court judgment of 20 December 2017 in Case C-364/16 P, *Trioplast Industrier v Commission* (and case-law cited), where the Court stated that “it is also apparent from settled case-law that only measures or decisions which seek to produce legal effects which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment. Thus, an action for annulment is, in principle, only available against a measure by which the institution concerned definitively determines its position upon the conclusion of an administrative procedure. On the other hand, intermediate measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure or purely implementing measures, cannot be treated as ‘acts

open to challenge’, in that such acts are not intended to produce autonomous binding legal effects compared with those of the act of the EU institution which is prepared, confirmed or enforced”.

The European Court of Justice confirmed that an excessive delay in proceedings before the General Court is an actionable breach which can only be addressed by bringing a damages action before the General Court under Articles 268 and 340 of the TFEU and not to the European Court of Justice in the context of an appeal (*see* Case C-40/12 P, *Gascogne Sack Deutschland GmbH v Commission*, Case C-58/12 P, *Groupe Gascogne SA v Commission*, and Case C-50/12 P, *Kendrion v Commission*, judgments of 26 November 2013).

The European Court of Justice may also be consulted for a preliminary ruling, whereby the Court, at the request of a national court of an EU Member State, renders an interpretative ruling on a point of EU law that has arisen in the context of litigation before the national court.

1.2 What is the legal basis for bringing an action for breach of competition law?

Articles 101 and 102 TFEU and Regulation 1/2003 on the implementation of Articles 101 and 102 TFEU, as interpreted by the European Courts, form the substantive basis for an action for breach of EU competition law.

According to the case-law of the European Court of Justice, Articles 101/102 TFEU have ‘direct effect’, which means they create rights for individuals which the National Competition Authorities and the national courts of the EU must safeguard (Case C-127/73, *BRT v SABAM*, Case C-282/95 P, *Guérin Automobiles v Commission*, and Case C-453/99, *Courage and Crehan*). In addition, the TFEU, and in particular Articles 101 and 102, have primacy over the national laws of the EU Member States (Case C-6/64, *Costa v ENEL*).

The procedural grounds for bringing a claim before the European Courts include Article 263 TFEU, which permits the European Courts to annul a Commission decision on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or misuses of powers. Article 265 TFEU enables action to be taken against the Commission’s failure to act, and Article 278 TFEU provides for interim relief.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Articles 101 and 102 TFEU are integrated into the national legal order of each EU Member State. National courts are required to set aside any national legislation and/or contractual arrangements that contravene Articles 101/102 TFEU (*see* question 1.2 above).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The European Courts are not specialist competition law courts. In addition, they do not have jurisdiction to rule on matters between private litigants, except pursuant to the procedure of preliminary rulings, described above.

At national level, there may be specialist courts to which competition law cases are assigned depending on the EU Member State in question. However, all national courts and authorities in the EU Member States are required to ensure the full effectiveness of the EU competition rules (see question 1.3 above).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

As discussed in questions 1.2 and 1.3 above, Articles 101 and 102 TFEU as well as Regulation 1/2003 have primacy over national law and are directly applicable. As a result, they can be invoked by any individual or undertaking in civil disputes before national courts, in accordance with the procedural rules of the Member State and court in question.

Any individual or undertaking with direct and individual concern may bring an action before the European Courts (Article 263 TFEU).

In addition, under the *Courage v Crehan* (C-453/99) and *Manfredi* (joined cases C-295/04 to C-298/04) judgments of the European Court of Justice, any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This was further confirmed in Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, which found that “it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition” stressing that “actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union”.

Moreover, the European Court of Justice, in Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, indicated that the Commission itself was entitled to bring a damages claim before national courts. In that respect, the Court of Justice noted that “the Charter [of Fundamental Rights of the European Union] does not preclude the Commission from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the EU as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU”.

The *Manfredi* judgment also stated that indirect purchasers who had no direct dealings with the infringer should have standing to sue. The exercise of the right to sue is governed by national law provisions, but the right to sue for damages pursuant to EU competition law may not be less favourable than the equivalent domestic law right. Indeed, as explained in Case C-536/11, *Bundeswettbewerbshörde v Donau Chemie AG and Others*, given that “Article 101(1) TFEU produces direct effects in relations between individuals and creates rights for individuals, the practical effect of the prohibition laid down in that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.

Whilst the right for compensation for harm caused by an infringement of the EU competition rules is an EU right, its exercise is governed by national rules. In practice, most victims rarely claim compensation because national rules often make it difficult for them to bring antitrust damages actions. For that reason, the Commission proposed a Directive to remove the main obstacles to effective compensation throughout the EU Member States. Directive 2014/104 on antitrust damages actions entered into force on 26 December 2014. The purpose of the Directive is to foster private enforcement in Europe while protecting the efficacy of the Commission’s leniency programme. The Directive set forth measures to be implemented in Member States’ legislation by no later than 27 December 2016. All Member States have now transposed the measures into their national system. Portugal was last to implement the rules. Whilst Portugal sought the views of the European Court of Justice on the interpretation of the Directive and its compatibility with its national legislation (see Case C-637/17, *Cogeco Communications*), on 20 April 2018, Portugal’s Parliament eventually voted in favour of a transposition of the Directive into national law.

As a complement to the Directive, the Commission issued a Recommendation on collective redress (see Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law). Although the Recommendation is non-binding, it invited all Member States to introduce by 26 July 2015 collective redress principles and mechanisms, including actions for damages in those Member States where such mechanisms were not yet available. The Recommendation, along with a Communication, set out the Commission’s views as to the appropriate mechanisms for enabling citizens to obtain effective redress through collective actions while limiting the potential for excessive and abusive litigation. This Recommendation applies not only to collective redress for infringements of competition law, but also for infringements of, *inter alia*, consumer protection, environmental, and financial services laws.

The Recommendation lays out a series of “principles” that all Member States should follow in devising and implementing collective redress mechanisms. In particular, two important aspects should be mentioned. First, the Recommendation sets out that the claimant party should be formed on the basis of the “opt-in” principle, any deviation from which should be justified by “reasons of sound administration of justice”.

Second, the Recommendation explains that representative actions should be brought only by public authorities or by representative entities that have been designated in advance or certified on an *ad hoc* basis by a national court for a particular case and that: (i) are non-profit entities; (ii) have a direct relationship between their main objectives and the rights claimed to have been violated; and (iii) have sufficient financial resources, human resources, and legal expertise to adequately represent multiple claimants.

In January 2018, the Commission published a report looking at the progress made by Member States on the implementation of collective redress measures and principles following the 2013 Recommendation (see Commission Communication of 25 January 2018 COM(2018) 40 final). In particular, the report shows that the availability of collective redress mechanisms and the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU and that a number of Member States still do not provide for collective compensatory redress mechanisms for “mass harm” situations where a large number of consumers are affected by EU law breaches. In light of these findings, the Commission intends to further promote the principles set out in the Recommendation and to strengthen the consumer redress and

enforcement aspects of the Injunctions Directive 2009/22/EC. For that purpose, on 11 April 2018 the Commission proposed a new Directive on representative actions for the protection of the collective interests of consumers which will repeal the Injunctions Directive (*see* COM(2018) 184 final). The proposal was presented together with amendments to four EU consumer law Directives as part of a “New Deal for Consumers” designed, *inter alia*, to improve the effectiveness of the injunction procedure and collective redress. In particular, the Commission proposes to improve the rules on representative actions by qualified entities and the rules on injunctive and compensatory redress. The proposal concerns not only collective redress for infringements of competition law but also infringements of EU law across all policy fields.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Directive on antitrust damages actions does not cover this matter. There are no specific rules at the EU level governing jurisdictional matters for competition law claims. The jurisdiction of the European Courts is determined by the scope of its judicial review, as discussed below. In relation to actions for damages, the Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Council Regulation (EC) 1215/2012), the “Recast Brussels Regulation” provides that a defendant who is domiciled in an EU Member State can be sued in that Member State, irrespective of where the contract was concluded or the damage was suffered.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Private actions for damages take place at the national level and thus depend on the national procedures of each Member State. With the Directive on antitrust damages actions, the Commission sought to remove a “number of practical difficulties which victims frequently face when they try to obtain compensation for the harm they have suffered” (IP/14/455). As described in question 1.5 above, on 11 April 2018, the Commission unveiled a package of proposals designed to facilitate access to justice to safeguard consumers’ interests and to ensure adequate safeguards from abusive litigation.

As described in question 1.1 above, the European Courts have jurisdiction only over a limited number of claims, including: (i) actions for annulment of a Commission “act”, defined as any Commission measure capable of affecting the interests of the applicant by bringing about a distinct change in his legal position; (ii) actions for failure to act; and (iii) interim measures.

Claimants should consider a few factors when bringing actions before European Courts. For example, when seeking to annul a Commission “act”, claimants should bear in mind the level of discretion that the Commission enjoys when assessing purported infringements of competition law. For further details, please refer to question 4.1 below.

1.8 Is the judicial process adversarial or inquisitorial?

The process before national courts depends on the national procedures of each Member State, provided that, as stated above, the national procedures applicable to EU law rights are not less favourable than those applicable to equivalent domestic law rights, and do not deprive EU law rights of their full effectiveness (*see* Case C-213/89, *Factortame I*).

The process before the European Courts is adversarial, and relies nearly exclusively on written pleadings.

In this respect, the *Menarini* judgment of the European Court of Human Rights of 27 September 2011, in its application of Article 6 of the European Convention on Human Rights (“ECHR”) embodying the right to a fair trial, found that administrative authorities can impose criminal sanctions, provided their decisions are subject to review by a court having full jurisdiction. The Court of Justice in its *KME* and *Chalkor* judgments of 8 December 2011 (Cases C-386/10 P, *Chalkor v Commission*, C-389/10 P, *KME v Commission*, and C-272/09 P, *KME v Commission*), after carefully setting out the various standards of review, concluded that the EU courts provide effective judicial protection within the meaning of Article 47 of the Charter of Fundamental Rights (which implements Article 6 of the ECHR).

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The European Courts may grant interim relief in relation to an action pending before them.

Private parties can also seek interim measures before the national courts. Under the established case-law of the European Court of Justice (*Factortame I*), national courts have jurisdiction to grant interim relief when a right derived directly from effective EU law (such as Articles 101 and 102 TFEU) is under judicial examination.

2.2 What interim remedies are available and under what conditions will a court grant them?

The European Courts can grant interim measures when (i) a *prima facie* case for a violation of EU competition law is established, and (ii) there is urgency, *i.e.*, there will be serious and irreparable damage absent interim measures before the judgment on the substance of the case. These two conditions are cumulative. There is urgency only if the serious and irreparable harm feared by the party is so imminent that its occurrence can be foreseen with a sufficient degree of probability (*see* Case T-423/17 R, *Nexans v Commission*, order of 23 November 2017). It is settled case-law that damage of a pecuniary nature cannot, otherwise than in exceptional circumstances, be regarded as irreparable. Interim measures are without prejudice to the final decision on the substance (Cases C-60/81 R and C-190/81 R, *IBM v Commission*).

Interim measures granted by the European Courts may consist of a decision to suspend a Commission decision entirely or in part. This may apply to Commission decisions ordering undertakings to modify their conduct, or to decisions ordering the payment of a fine. Interim relief may also take the form of an order to the Commission to take certain measures. It is only exceptionally that the judge hearing an application for interim measures will order suspension of a Commission decision before the General Court or prescribe other interim measures (*see* Case T-423/17 R, *Nexans v Commission*, order of 23 November 2017 and case-law cited). Moreover, the European Courts have generally been reluctant to grant a request for interim relief against strictly procedural decisions of the Commission.

The two main conditions set out at EU level are also generally followed by national courts of the EU Member States. However, the specific application of these conditions and the related procedures for seeking and obtaining interim relief are a matter of national law (joined Cases C-430/93 and C-431/93, *Van Schijndel*). The

adoption of Regulation 1/2003 has prompted the introduction of a series of national legislative amendments to align the interim relief powers conferred to national competition authorities under EU law with those conferred by national law.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Final remedies granted by the European Courts consist of the annulment of the Commission decision under appeal, or the issuance of a judgment ordering the Commission to take certain measures.

Undertakings or individuals may also claim damages for harm caused as a result of competition law infringements before national courts. In the landmark 2001 European Court of Justice judgment, *Courage v Crehan* (Case C-453/99) confirmed by the *Manfredi* judgment in 2006, both cited in question 1.5 above, the Court held that any individual or undertaking who has suffered loss by a contract or by conduct liable to restrict or distort competition within the meaning of Articles 101 and 102 TFEU can claim damages from the undertaking that has committed the breach. This was confirmed in Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, in which the court explained that “it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition”. As noted in Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, the right of any individual to claim damages for loss caused to him by conduct liable to restrict or distort competition within the meaning of Articles 101 and 102 TFEU, “constitutes effective protection against the adverse effects that any infringement [...] is liable to cause to individuals, as it allows persons who have suffered harm due to that infringement to seek full compensation”.

Whilst the right for compensation for harm caused by an infringement of the EU competition rules is an EU right, its exercise is governed by national rules. In practice, most victims rarely claim compensation because national rules often make it difficult for them to bring antitrust damages actions. For that reason, the Commission proposed a Directive to remove the main obstacles to effective compensation throughout the EU Member States. Directive 2014/104 on Antitrust Damages Actions entered into force on 26 December 2014. The purpose of the Directive is to foster private enforcement in Europe while protecting the efficacy of the Commission’s leniency programme. The Directive set forth measures to be implemented in Member States’ legislation by no later than 27 December 2016. All Member States have now transposed the measures into their national system.

The provisions of the Directive do not affect damages actions for infringements of national competition law which do not relate to trade between Member States within the meaning of Articles 101 or 102 TFEU.

Key principles include that: (i) claimants are able to rely on a final decision of a national competition authority or a review court finding an antitrust infringement as proof of the infringement (for actions brought in other Member States, the decision of the national competition authority will be considered at least as *prima facie* evidence that an infringement of competition law has occurred); (ii) claimants with access to certain types of evidence and courts can order the defendant or other third parties to produce the relevant evidence; (iii) rules on limitation periods have been harmonised to provide for a limitation period of at least five years; and (iv) a rebuttable

presumption applies that cartels cause harm. The Court confirmed in Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, that the procedural rules governing actions for damages “must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law”. This is also confirmed by Recital 7 of Regulation 1/2003, which states that national courts within the EU, when dealing with disputes between private individuals, shall protect the subjective rights under EU law, for example by awarding damages to the victims of infringements. See question 1.5 above regarding legislation at the EU level in relation to mechanisms of collective redress before the Member State courts.

The European Court of Justice also confirmed that an excessive delay in proceedings before the General Court is an actionable breach which can only be addressed by bringing a damages action before the General Court under Articles 268 and 340 (the non-contractual liability of the EU) of the TFEU and not to the European Court of Justice in the context of an appeal (see Case C-40/12 P, *Gascogne Sack Deutschland GmbH v Commission*, Case C-58/12 P, *Groupe Gascogne SA v Commission*, and Case C-50/12 P, *Kendrion v Commission*, judgments of 26 November 2013). It is for the General Court to assess, in the light of the circumstances specific to each case, whether it has observed the reasonable time principle and whether the parties concerned have actually suffered harm because their right to effective legal protection was breached. In doing so, the General Court is to apply the criteria set out in the *Gascogne Sack* judgment (C-40/12P, paras. 91–95). Reparation must correspond to the loss or damage sustained. The Court enjoys full jurisdictional discretion in relation to the amount of compensation to be awarded. In three separate actions for damages, *Gascogne*, *Kendrion* and *ASPLA* claimed compensation for the General Court’s delay in ruling on their appeals of the cartel fines. In each case, the General Court found that the claimants satisfied the test and awarded damages for delayed proceedings (see Case T-577/14, *Gascogne Sack Deutschland* and *Gascogne v European Union*, Case T-479/14, *Kendrion v European Union*, and Case T-40/15, *ASPLA v European Union*). Appeals were brought to the European Court of Justice by the Commission and *Groupe Gascogne* – and the cases are still ongoing.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under EU law, the damages that can be sought by private plaintiffs are compensatory (and not punitive). In *Manfredi*, the European Court of Justice held that victims of antitrust infringements should be able to obtain full compensation of the real value of the loss suffered. The entitlement to full compensation extends not only to the actual loss due to an anticompetitive conduct, but also to the loss of profit as a result of any reduction in sales and includes a right to interest.

While there is no guidance on the actual methodology to be used for the quantification of damages at EU level, the Commission issued guidance to national courts: a Communication on quantifying harm in actions for damages based on breaches of Articles 101 or 102 TFEU and a Practical Guide accompanying the Communication prepared by the Commission’s staff. The aim of the Practical Guide is to “offer assistance to national courts and parties involved in actions for damages by making more widely available information relevant for quantifying the harm caused by antitrust infringements”. The Guide illustrates types of harm typically caused by anticompetitive practices and offers an overview of the main methods and techniques available to quantify such harm in practice.

The Directive on Antitrust Damages Actions does not provide specific guidance on the quantification of harm, but establishes a rebuttable presumption of harm in the case of cartels. It is for the domestic legal system of each Member State to quantify harm and for the Member States and the national courts to determine the requirements the claimant has to meet when proving the amount of the harm suffered. However, these domestic requirements should not be less favourable than those governing similar domestic actions, nor should they render the exercise of the right to damages practically impossible or excessively difficult.

There have already been a number of successful follow-on damages claims in national courts for breach of the EU competition rules following the Directive. In France, Outremer Telecom was awarded €2.6 million in damages from Orange for abuse of dominant position in relation to services in the Caribbean. While the Paris Commercial Court had initially awarded €8 million, on 10 May 2017, the Paris Court of Appeal found that Outremer Telecom did not prove the direct and causal link between the anticompetitive practices and the damages and so decided to reduce the damages to €2.6 million. In relation to the same abuse of dominance case, on 18 December 2017, the Paris Commercial Court ordered Orange to pay rival operator Digicel €179.64 million in damages plus 10.4% interest per year for a total of €346 million. In three judgments on 6 April 2017, the French courts ordered the state-owned railway firm SNCF to pay the travel operator Switch €6.9 million in damages resulting from an illegal online booking agreement with Expedia, as found in 2009 by the French competition authority. Also, in France, a court ordered several road sign cartelists to pay damages totalling €5.54 million to two governmental departments. Participants in a German bid-rigging cartel that affected railway tracks, switches, and sleepers were also found liable for damages by the Dortmund Regional Court on 21 December 2016, following a claim by a public rail transportation company. Finally, on 19 July 2017, a Düsseldorf court ruled that state-owned broadcasters ARD and WDR breached antitrust rules by agreeing to cut contracts with an unnamed network operator in 2012, since they decided to end the contracts not because of individual economic motives, but based on an anticompetitive agreement. Consequently, the contract termination was void and the payment obligation to the cable network operator remained valid. As a compensation, the court awarded €3.5 million in damages to the cable network company.

Given the difficulty of the quantification exercise and in order to safeguard effective claims for compensation, the Directive on Antitrust Damages Actions provides that Member States should ensure that, where requested, and if they deem it appropriate, national competition authorities provide guidance on the determination of the quantum of damages.

As explained in question 3.1 above, the European Court of Justice has confirmed that an excessive delay in proceedings before the General Court is an actionable breach which can only be addressed by bringing a damages action before the General Court under Articles 268 and 340 (the non-contractual liability of the EU) of the TFEU and not to the European Court of Justice in the context of an appeal (see Case C-40/12 P, *Gascogne Sack Deutschland GmbH v Commission*, Case C-58/12 P, *Groupe Gascogne SA v Commission*, and Case C-50/12 P, *Kendrion v Commission*, judgments of 26 November 2013). It is for the General Court to assess, in the light of the circumstances specific to each case, whether it has observed the reasonable time principle and whether the parties concerned have actually suffered harm because their right to effective legal protection was breached. In doing so, the General Court is to apply the criteria set out in the *Gascogne Sack* judgment (C-40/12P, paras. 91–95). Reparation must correspond to the loss or damage sustained.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

No. The fines imposed by competition authorities are aimed at punishing and deterring individuals and/or undertakings from breaching EU competition law, whereas damages are compensatory and aim to compensate the harm done to victims of a competition law infringement. (See MEMO/14/310: Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violation that addresses this specific question.) However, competition authority decisions finding an infringement increasingly also quantify the harm caused by the competition law infringement. References to the value of harm caused by the infringement are a basis for follow-on actions for damages before the national courts.

4 Evidence

4.1 What is the standard of proof?

In the following discussion, we will be referring to the procedure before the European Courts. There is a great diversity of procedural rules of the courts in the different Member States that will be assessed in other chapters of this publication.

It is important to underline that the European Courts are judicial review courts, and they do not have full appellate jurisdiction with the power to adopt decisions on the merits of the case. Article 263 TFEU permits the European Courts to annul a Commission decision where it is based on a manifest error of assessment, which includes factual error, a material error in the assessment of the relevant facts, the drawing of incorrect legal conclusions from the facts, or violations of procedural rules and due process principles. The General Court in its judgment in *GlaxoSmithKline v Commission* (Case T-168/01) specified that where the Court's review requires a complex economic assessment, "the review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and on the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of assessment of those facts".

The European Courts have generally referred to the standard for judicial review as one requiring the Commission to produce sufficiently precise, consistent, and convincing evidence for the existence of an infringement (see joined Cases 29/83 and 30/83, *CRAM & Rheinzink v Commission*). This standard is reflected in Article 2 of Regulation 1/2003. Furthermore, this was confirmed in Case T-439/07, *Coats Holdings v Commission*, which held that "[the Commission] must produce sufficiently precise and coherent proof to establish that the alleged infringement took place". In addition, the European Courts have held that in proceedings which may result in severe fines for the defendants, the Commission, in assessing the evidence, should apply the principle of presumption of innocence under Article 6(2) of the ECHR, which the European Court of Justice has recognised as a general principle of the European Union's legal order (see Case T-442/08, *CISAC v Commission*). In this respect, the European Courts will generally accept the existence of an infringement if the Commission has been able to establish certain key facts. For example, the European Courts have accepted the existence of an infringement on the basis of the single statement "where its evidential value is undoubted" (see Case T-25/95, *Cimenteries CBR v Commission*). The Commission also applies

presumptions that have been confirmed by the courts, such as the presumption of participation in an identified cartel when certain facts have been established, the presumption of the continuous nature of the infringement (again, when certain facts have been proved) and, the most controversial, the presumption of parental liability.

4.2 Who bears the evidential burden of proof?

In proceedings brought before the European Courts, the Commission bears the burden of proving that Articles 101 or 102 TFEU were infringed. Conversely, an undertaking relying on Article 101(3) TFEU must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied. The burden of proof thus falls on the undertaking requesting the exemption.

In its judgment in *Commission v GlaxoSmithKline* (Case C-513/06 P), the European Court of Justice confirmed that restrictions by object within the meaning of Article 101(1) TFEU do not constitute violations *per se* but are, in theory, capable of exemption and are entitled to a serious and exhaustive analysis under Article 101(3) if the company provides relevant and credible arguments in favour of an exemption. The Court also specified that Article 101(3) requires a prospective analysis on whether the claimed efficiencies in the form of objective advantages are “sufficiently likely”, and that this analysis must be undertaken in the light of the factual arguments and evidence provided by the company seeking an exemption.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Yes. The Directive on Antitrust Damages Actions includes two rebuttable presumptions that will make it easier to prove damages claims.

First, in order to “remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages”, the Directive introduces a presumption that cartel infringements cause harm. As explained in the Directive, “it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm”. Such presumption results from the Commission’s reliance on studies indicating that a small but significant portion of cartels (7%) do not lead to overcharging (see, for example, Oxera’s study prepared for the Commission on quantifying antitrust damages of December 2009).

Second, the Directive puts in place a presumption that cartel overcharges are at least in part passed on to indirect purchasers. As explained in the Directive, “taking into account the commercial practice that price increases are passed on down the supply chain”, it is “appropriate to provide that, where the existence of a claim for damages or the amount to be awarded depends on whether or to what degree an overcharge paid by the direct purchaser of the infringer has been passed on to the indirect purchaser, the latter is regarded as having brought the proof that an overcharge paid by that direct purchaser has been passed on to his level, where he is able to show *prima facie* that such passing-on has occurred, unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser”. This rebuttable presumption gives

indirect purchasers much higher chances to obtain compensation as compared to the previous systems in most EU countries. Under those, in fact, indirect purchasers had the burdensome task of proving that the harm has been passed on down the supply chain.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The value of the evidence brought before the European Courts is assessed based on “the credibility of the account it contains”, in particular on “the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed, and whether, on its face, the document appears sound and reliable” (see Case T-180/15, *Icap and Others v Commission* and case-law cited). In this respect, the European Courts attach more importance to contemporaneous documents, because they are written in *tempore non suspecto*, i.e., before any infringement was alleged to have taken place. It is important to note that in an appeal, the European Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Therefore, and provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it (see Case C-7/95 P, *John Deere v Commission*).

The introduction by the Commission of a leniency system has resulted in greater reliance also on non-contemporaneous statements (see joined Cases T-67/00 *et al.*, *JFE Engineering v Commission*). In its *ICI* judgment of 5 June 2012 (Case T-214/06, *Imperial Chemical Industries Ltd. v European Commission*), the General Court confirmed that statements made by companies in support of leniency could not be regarded as devoid of probative value as any attempt by the company applying for leniency to deceive the European Commission could endanger its potential favourable position under the Leniency Notice. The General Court stated that corporate statements made in the context of an immunity application could not be disregarded, in particular when their content was confirmed by subsequent leniency applications submitted by other companies.

In its judgment of 8 September 2016 *Goldfish and Others v Commission* (Case T-54/14), the General Court had the opportunity to rule on the use of secret telephone conversations as evidence in an investigation relating to an infringement of competition law. The Court stated that it followed from the case-law of the European Court of Human Rights that the use of an illegal recording as evidence (in that case by the Commission while assessing an infringement of Article 101 TFEU) did not in itself conflict with the principles of fairness laid down in Article 6(1) of the ECHR, even where that evidence had been obtained in breach of the requirements of Article 8 of the same Convention, where the applicant in question had not been deprived of a fair proceeding or of his rights of defence, and also where that had not been the only item of evidence relied on in support of the decision.

The European Courts accept the submission of expert evidence. The Statute of the European Court of Justice as well as the Rules of Procedure of each the General Court and the European Court of Justice allow the two courts to appoint an expert to provide an opinion or prepare a report (see Article 46.6 and Title III, Chapter 6, Section 2 of the Rules of Procedure of the General Court; Article 45.2 (d) and Title II, Chapter 7, Section 2 of the Rules of Procedure of the European Court of Justice; and Articles 20, 25, and 35 of the Statute of the European Court of Justice).

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Both the European Court of Justice and the General Court can require parties to the proceeding or third parties to produce relevant documents and information, including “Member States and institutions, bodies, offices and agencies not being parties to the case”. The procedures pursuant to which access is provided are in those cases governed by the Statute of the European Court of Justice (see Articles 24 and 54 of the Statute of the European Court of Justice).

Access to the documents of the European Institutions is governed by Regulation 1049/2001, which aims to ensure the greatest possible transparency of the decision-making process of the EU institutions, such as the Commission. The Regulation is used increasingly by damages claimants as a basis to request access to leniency material and other documents in the Commission’s file relevant to findings of infringement of Articles 101 and 102 TFEU. Regulation 773/2004 relating to the conduct of proceedings under Articles 101 and 102 TFEU by the Commission operates in parallel with Regulation 1049/2001, and grants addressees of a Statement of Objections a right to access the Commission’s administrative file. In contrast, damages claimants are not granted access to file under Regulation 773/2004. Both Regulations contain limitations as to the types of documents to which undertakings may obtain access, including limitations relating to business secrets or commercially sensitive information.

There have been a number of judgments by the EU courts on the application of Regulation 1049/2001. The EU courts have also refined the rules applicable to undertakings seeking to obtain access to the administrative files of the Commission in relation to Articles 101 and 102 TFEU investigations.

In its judgments of 28 June 2012 (Case C-404/10, *European Commission v Éditions Odile Jacob SAS* and Case C-477/10 P, *European Commission v Agrofert Holding a.s.*), the European Court of Justice found that the Commission is entitled to refuse access to all documents relating to the merger control proceedings exchanged between the Commission and notifying parties and third parties, without carrying out a concrete, individual examination of those documents.

In relation to leniency documents, the European Court of Justice held in its *Pfleiderer* judgment of 14 June 2011 that, absent legislation, the scope of access to leniency documents was for national courts to decide on a case-by-case basis, according to national law. According to *Pfleiderer*, it is for national courts to conduct a “weighing exercise”, i.e., to weigh the “respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency”. The judgment left a number of questions unresolved, including the application of this weighing exercise to the different types of leniency materials included in a Member State competition authority’s file, such as corporate statements and pre-existing documents, and the application of the weighing exercise to materials in the EU Commission’s file. The Court in *Pfleiderer* also gave little guidance as to the determining factors for conducting the balancing of interests, arguably leaving substantial discretion to the national courts of EU Member States. The EU Commission has subsequently confirmed that it considers the principles of *Pfleiderer* to apply equally to leniency materials in the EU Commission’s file. See also question 10.2 below.

In its *Bundeswettbewerbsbehörde* judgment of 6 June 2013, the General Court confirmed the “weighing exercise” set forth in *Pfleiderer*, clearly stating that, pursuant to the principle of effectiveness, national courts must have the possibility to conduct such an exercise. The General Court ruled that “EU law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved”.

In addition, although the General Court admitted that leniency programmes are “useful tools”, which as such may justify a refusal to grant access to certain documents, these programmes “do not necessarily mean that [such an] access may be systematically refused”. As the Court noted, “any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case”. Accordingly, “[i]t is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency program that non-disclosure of that document may be justified”. However, similarly to the *Pfleiderer* judgment, the *Bundeswettbewerbsbehörde* judgment left a number of questions unresolved, e.g., the application of this weighing exercise to different types of leniency materials.

Pursuant to the Directive on Antitrust Damages Actions, the legislation of the Member States must provide for access to evidence once the plaintiff “has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages” (Article 5 of the Directive). Member States must ensure the disclosure of evidence by order of the courts relevant to their claim without it being necessary for the claimants to specify individual items of evidence.

Disclosure will extend to third parties, i.e., including public authorities. The Directive does not cover the disclosure of internal documents of competition authorities and correspondence between competition authorities.

National courts must limit the disclosure of evidence to what is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts will have to consider the legitimate interests of all parties concerned.

The Directive provides that national courts cannot, at any time, order the disclosure or permit the use of leniency corporate statements or settlement submissions. It also notes that information prepared specifically for the proceedings of a competition authority, as well as information drawn up by a competition authority in the course of its proceedings, can only be disclosed or used by national courts after a competition authority has closed its proceedings.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses can be summoned by the European Court of Justice or the General Court at their own motion, on application by a party, on the initiative of the Advocate General or at the suggestion of an expert appointed by the Court. The President of the Court can put questions to the witness, as can the other judges and the Advocate General. The representatives of the parties can also put questions to the witness, under the control of the President of the Court. Both the

General Court's and European Court of Justice's Rules of Procedure provide that if a witness who has been duly summoned fails to appear, refuses to give evidence or take the oath, a penalty may be imposed upon him by the Court (*see* Articles 26–30 of the Statute of the European Court of Justice; Article 95 of the General Court's Rules of Procedure; Article 69 of the European Court of Justice's Rules of Procedure). Available procedures before Member State courts are determined by national legislation.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

A finding by the European Commission or a national competition authority that a violation of Article 101 or 102 TFEU has occurred has probative value as to the existence of an infringement and can be the basis for a follow-on action for damages in a Member State court.

The Directive on Antitrust Damages Actions provides that a claimant can rely on a final decision of a national competition authority (or a review court) finding an infringement. Such decision or judgment will be considered as proof of the infringement (Article 9(1) of the Directive). A decision of a national competition authority will be considered at least as *prima facie* evidence that an infringement of competition law has occurred in a different Member State (Article 9(2) of the Directive).

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Parties are allowed to submit non-confidential versions of their written pleadings within a time frame imposed by the European Courts, providing a description of the redacted information and a justification for confidential treatment. The Courts will grant confidential treatment if it can be demonstrated that the disclosure of the information could result in serious harm to the undertaking (*see* Case T-353/94, *Postbank N.V. v Commission*). Available procedures before Member State courts are determined by national legislation.

The Directive on Antitrust Damages Actions provides that even if relevant evidence contains business secrets or any other confidential information, such evidence should in principle be made available to claimants. However, the Directive also considers that such confidential information needs to be adequately protected. Disclosure of evidence must be appropriate.

Within the framework of the rules on disclosure in the Directive, a range of measures to protect confidential information from being disclosed during the proceedings is envisaged, such as redaction, hearings *in camera*, limitation of the individuals entitled to access the evidence, and production of expert summaries.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Pursuant to Article 15(1) of Regulation 1/2003, national courts can request the opinion of the Commission on economic, factual, and legal matters. Opinions generally relate to the relevant case-law or the Commission's guidelines and regulations. Pursuant

to Article 15(3) of Regulation 1/2003, the Commission can also submit observations to national courts when required to ensure the consistent application of Articles 101 and 102 TFEU. These provisions are not used frequently. Available procedures before national courts are determined by national legislation.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

An undertaking may appeal a Commission decision finding a violation of Article 101 TFEU on the basis of a public interest justification, provided that it can show that the conduct referred to in the decision had procompetitive benefits that were necessary and proportional to its anticompetitive effects pursuant to Article 101(3) TFEU. (*See* also question 4.2 above.)

While the European Courts have not recognised a similar "efficiencies" defence to be available in relation to conduct allegedly infringing Article 102 TFEU, the Commission's Guidance Paper on its enforcement priorities in applying Article 82 EC [now Article 102 TFEU] also discusses the conditions for an efficiency defence.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The passing on defence is specific to actions for damages, which are brought before national courts. Available procedures before national courts are determined by national legislation.

The passing on defence is provided for in the Directive on Antitrust Damages Actions (Article 13), which allows antitrust infringers to demonstrate that the price increase was, at least partially, passed on by the claimant to his own customers. When applying this defence, the defendant must prove the existence and extent of the pass-on of the overcharge.

The Directive also addresses the situation of indirect purchasers (Article 14) and makes it easier for them to prove that passing on occurred further in the supply chain. For that purpose, the indirect purchaser must merely establish that (i) the defendant has committed an infringement of competition law, (ii) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant, and (iii) he purchased the goods or services that were the subject of the infringement of competition law.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Private actions for damages take place at the national level and thus depend on the national procedures of each Member State.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

An appeal before the General Court must be brought within two months of the notification of the decision appealed against or, in case the appeal is brought by an undertaking who is not the addressee of the decision, within two months from the date of the

publication of the decision in the Official Journal of the European Union (*see* Article 263 TFEU). This time period is increased by 10 days on account of geographic distance. Similarly, appeals against judgments of the General Court must be brought within two months of the notification of the final judgment of the General Court (*see* Article 56 of the EC Statute). Limitation periods for claims to be brought before national courts are based on the legislative provisions of each Member State.

The Directive on Antitrust Damages Actions requires Member States to clarify their national rules regarding limitation periods applicable to damage claims. The limitation period for bringing damages actions must be at least five years (Article 10(3) of the Directive) and shall begin when the infringement has ceased and the claimant knows, or can reasonably be expected to know: (i) the behaviour; (ii) the fact that the behaviour constitutes an infringement of competition law; (iii) the fact that the infringement of competition law caused harm to him; and (iv) the identity of the infringing undertaking (Article 10(2) of the Directive).

In addition, the Directive sets out that the limitation period will be suspended (or interrupted, depending on the national legislation) from the moment a competition authority starts investigating an alleged infringement. The suspension will end, at the earliest, one year after the infringement decision has become final. In practice, this means that claimants will have at least one full year to bring a civil action for damages following the competition authority's final decision.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The European Court of Justice's 2017 Annual Report on Judicial Activity reports that the average duration of court proceedings before the General Court was estimated at 21.6 months for competition cases (judgments and orders) for the year 2017 (*see* p. 215 of the Report). The average duration of court proceedings before the European Court of Justice, across all areas of EU law, was estimated at 15.7 months for references for a preliminary ruling and 17.1 months for appeals for the year 2017 (*see* p. 114 of the Report).

On application of one of the parties, and having heard the other parties and the Advocate General, the General Court may apply an expedited procedure, in which case the Court will impose conditions limiting the volume and presentation of the pleadings. In 2016, the European Court of Justice adopted a simplified method for dealing with appeals brought in the area of access to documents (as well as relating to public procurement and intellectual and industrial property). Available procedures before Member State courts are determined by national legislation.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Parties may withdraw their appeal before the General Court or the European Court of Justice. Upon request from the other parties to the proceedings, the party withdrawing its appeal may be ordered to pay the costs of the proceedings (*see* Article 136 of the Rules of Procedure of the General Court and Article 141 of the Rules of Procedure of the Court of Justice). Available procedures before national courts are determined by national legislation.

The Directive on Antitrust Damages Actions requires Member States to introduce, if not already applicable, rules to facilitate out-of-court resolution of private claims. The limitation periods and court proceedings must be suspended during the settlement discussions for a period not exceeding two years but only for the parties to the negotiations (Article 18(1) of the Directive). The Directive also addresses the effect of partial consensual settlement on any subsequent private actions (Article 19 of the Directive).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Collective damages actions are especially important for consumers harmed by antitrust violations. Collective settlements are in principle allowed, but specific rules are set out or will be determined at the national level. Please refer to question 1.5 above for further details.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The European Courts will generally order payment at a party's specific request. Moreover, the Courts have discretion to order a party, even if successful, to pay for some or all of the legal costs incurred by the other party or parties in case they consider that the successful party unreasonably caused these costs to be incurred (*see* Articles 134 and 135 of the Rules of Procedure of the General Court and Articles 138 and 139 of the Rules of Procedure of the Court of Justice). Available procedures before national courts are determined by national legislation.

The Commission's 2013 Recommendation on collective redress provides that the legal costs of the winning party should be borne by the losing party.

8.2 Are lawyers permitted to act on a contingency fee basis?

There are no rules under EU competition law prohibiting contingency fee arrangements for appeals before the European Courts. Available procedures before national courts are determined by national legislation.

The Commission's 2013 Recommendation on collective redress provides that Member States should not allow methods of attorney compensation, such as contingency fees, that risk creating an incentive to unnecessary litigation. If a Member State decides to allow contingency fees, appropriate national regulation of those fees in collective redress cases should be implemented.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There are no rules under EU competition law regulating or prohibiting third party funding of appeals before the European Courts. Available procedures before national courts are determined by national legislation.

As explained at question 1.5 above, in its 2013 Recommendation on collective redress, the Commission set out a series of common, non-

binding principles that all Member States should follow in devising and implementing collective redress mechanisms, including, *inter alia*, third party funding.

As a general principle, the Commission's 2013 Recommendation states that third party funding should be allowed, but only under certain conditions. In particular, the third party should be prohibited from: (i) seeking to influence procedural decisions of the claimant party, including on settlements; (ii) providing financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependent; and (iii) charging excessive interest on the funds provided.

Additionally, the Commission's 2013 Recommendation sets out that the court should be allowed to stay the proceedings if: (i) there is a conflict of interest between the third party and the claimant and its members; (ii) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure; and (iii) the claimant has insufficient resources to meet any adverse costs should the collective redress procedure fail.

Lastly, compensation to third party funders may not be based on the amount of the settlement reached or compensation awarded to the claimant unless this funding arrangement is regulated by a public authority.

9 Appeal

9.1 Can decisions of the court be appealed?

Judgments of the General Court are subject to appeal before the European Court of Justice. Available appeal procedures before national courts are determined by national legislation.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Full or partial immunity from fines can be offered by the Commission for cartel infringements. Applicants for leniency with the Commission are not granted immunity from civil claims.

However, pursuant to the Directive on Antitrust Damages Actions, immunity recipients are not jointly and severally liable to all claimants. Indeed, immunity recipients would only be liable to claimants who are their own direct or indirect purchasers or providers, except when other claimants show that they are unable to obtain full compensation from other defendants (*see* Article 11(3) of the Directive).

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The question of whether a leniency applicant can be forced to submit or make available leniency materials and related documents provided to the Commission in a follow-on court proceeding has not yet been decided by the European Courts, although there have been some national court judgments on this subject (*e.g.*, in Germany). Leniency applicants will generally refer to the fact that their applications and related documents form part of the competition authority's file and it is up to the authority to decide on disclosure.

As explained at question 4.5 above, in its *Pfleiderer* judgment of 14 June 2011, the European Court of Justice concluded on a matter involving access to information submitted pursuant to a Member State leniency programme, that it is for the Member States to establish and apply national rules on the right of access to documents relating to leniency procedures by persons adversely affected by a cartel. The Court noted that the application of these rules entailed a "*balancing act*" between protecting the effectiveness of the leniency programmes, and the right of individuals to claim damages for losses caused by an infringement of the competition laws. Advocate General Mazak had, in his Opinion in the same case, distinguished between voluntary self-incriminating statements, which should not be made available, and other pre-existing documents submitted by a leniency applicant. (*See* Case C-360/09, *Pfleiderer AG v Bundeskartellamt*.) This "*balancing act*" was confirmed in the *Bundeswettbewerbshörde* judgment, although this judgment also made no distinction between different leniency materials forming part of the Commission's file. The Court simply noted that the "*weighing exercise*" should be undertaken for all the documents in the Commission's file, including the documents made available under the leniency programme.

In July 2011, in the *National Grid* litigation before the English High Court, Mr. Justice Roth invited the EU Commission to give its views on a number of issues relating to the application and implications of *Pfleiderer* for national discovery rules and its application to materials on the EU Commission's file. In response, the Commission stated in an open letter to the Court in November 2011 that it considers the *Pfleiderer* judgment, which related to access to documents in the German *Bundeskartellamt*'s file, to apply equally to documents on the Commission's file. The Commission further noted that the national court should assess whether the disclosure is proportionate in light of the information that is contained in the documents and the other information available to the parties and that it should ensure that the leniency applicant is not worse off than the other defendants.

In May 2012, the heads of the national competition authorities in EU Member States issued a joint resolution in which they promised to protect evidence voluntarily submitted by leniency applicants "*without unduly restricting the right to civil damages*". This pledge came only months after the U.S. Department of Justice's announcement in November 2011 that it would "*aggressively protect from disclosure in U.S. federal courts*" not only its own leniency materials but also those of other jurisdictions, including the EU.

The Directive on Antitrust Damages Actions requires the Member States to introduce certain restrictions on the disclosure of certain types of evidence. For instance, oral statements of immunity or leniency applicants will remain protected. The same applies for settlement submissions (Article 6(6) of the Directive). Other documents including documents originating from the defendants prepared specifically for the proceedings of a competition authority or related to the authority's investigation (*e.g.*, information requests) are not protected from disclosure, which can be ordered after the competition authority concerned has closed its proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Member States had until 27 December 2016 to implement all measures set forth by the Directive on Antitrust Damages Actions. All Member States have now transposed the measures into their national system. Portugal was last to implement the rules. Whilst

Portugal sought the views of the European Court of Justice on the interpretation of the Directive and its compatibility with its national legislation (*see* Case C-637/17, *Cogeco Communications*), on 20 April 2018, Portugal's Parliament eventually voted in favour of a transposition of the Directive into national law.

The transposition of the Directive had a limited impact for some Member States that already had a set of rules that provide for compensation for victims of antitrust violations. For other jurisdictions, the impact was significant.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

On 3 August 2015, the Commission adopted certain amendments to its procedural rules (*i.e.*, Regulation 773/2004) and to four related notices, namely the Notice on Access to File, Notice on Leniency, Notice on Settlements, and Notice on Cooperation with National Courts. These amendments to Regulation 773/2004 and to the notices strive to reflect the provisions of the Directive in ensuring that documents used during EC investigations are effectively protected.

The Notice on Access to File provides that documents that prove to be unrelated to the subject matter of an investigation shall be returned to the parties. Upon return, these documents will no longer constitute part of the file.

The Notice on Leniency now states that the Commission shall not transmit company leniency statements to national courts for use in damages actions.

The amended Notice on Settlements provides that companies may not withdraw a settlement request unilaterally. If the Commission adopted a statement of objections, without reflecting companies' settlement requests, those requests will be disregarded and may not be used as evidence against any of the parties to the case. New settlement rules also provide that the Commission will not transmit settlement submissions to national courts for use in damages proceedings.

As far as the Notice on Cooperation with National Courts is concerned, the Commission will not send documents specifically created for the Commission proceedings to national courts, so long as these proceedings are ongoing. Furthermore, the Commission will not hand over information it has sent to third party firms it has involved as part of the proceedings.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Aspects of the transposition in EU Member States of the Directive on Antitrust Damages Actions will be assessed in other chapters of this publication.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

As explained at question 1.5 above, in January 2018, the Commission published a report looking at the progress made by Member States on the implementation of collective redress measures and principles following the 2013 Recommendation (*see* Commission Communication of 25 January 2018 COM(2018) 40 final). In particular, the report shows that the availability of collective redress mechanisms and the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU and that a number of Member States still do not provide for collective compensatory redress mechanisms for "mass harm" situations where a large number of consumers are effected by EU law breaches. In light of these findings, the Commission intends to further promote the principles set out in the 2013 Recommendation and to strengthen the consumer redress and enforcement aspects of the Injunctions Directive 2009/22/EC. For that purpose, on 11 April 2018, the Commission proposed a new Directive on representative actions for the protection of the collective interests of consumers which will repeal the Injunctions Directive (*see* COM(2018) 184 final). The proposal was presented together with amendments to four EU consumer law Directives as part of a "New Deal for Consumers" designed, *inter alia*, to improve the effectiveness of the injunction procedure and collective redress. In particular, the Commission proposes to improve the rules on representative actions by qualified entities and the rules on injunctive and compensatory redress. The proposal concerns not only collective redress for infringements of competition law but also infringements of EU law across all policy fields.

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Finland

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Finnish private enforcement case law is developing, and a number of final judgments are available, with more expected in the near future. Several significant private damages proceedings are still pending. The size of the cases has increased tremendously over the past decade. In all the cases filed before 2008, the total aggregate interest was approximately EUR 13 million. In the cases filed after 2008, the total aggregate interest is approximately EUR 600 million. The cases have mainly concerned Finnish infringements. However, in 2011, a damages claim was brought against the Finnish member of the European hydrogen peroxide cartel, who is facing a similar claim in Germany. The Finnish part was settled in 2014. In fact, the lack of public case law is partly due to many cases being settled out of court or solved in arbitration proceedings. Further, competition law issues are still, in practice, usually dealt with by the Finnish Competition and Consumer Authority and the Market Court in an administrative process which may lead to administrative fines, an obligation to deliver, or an obligation to terminate the restrictive practice. These administrative instances may not, however, award damages for breach of competition law.

Private damages claims can, in principle, be based on any type of anticompetitive conduct by business undertakings (including price-fixing and other types of concerted behaviour between competitors such as collusive bidding, abuse of a dominant market position, retail price maintenance and certain other vertical restrictions) prohibited by the national competition law or by the Treaty on the Functioning of the European Union (“TFEU”). However, certain sectoral activities are specifically excluded from the scope of application of national competition law, such as agreements relating to the primary production of agricultural products exempted in accordance with Article 42 of the TFEU or arrangements concerning the labour market. In practice, damages claims have been brought for both price-fixing and abuse of dominance.

Besides damages claims, competition law issues can be raised as a part of commercial disputes. One of the parties to an agreement may argue that a specific restrictive clause or arrangement, e.g., a non-compete or exclusivity clause, is null and void because it breaches national or EU competition rules and the court is requested to decide whether that clause or arrangement is enforceable.

An infringement of competition legislation does not constitute a criminal offence under Finnish law.

1.2 What is the legal basis for bringing an action for breach of competition law?

The legal basis for bringing a damages action can be the Competition Damages Act, a breach of contract or, for legacy cases, Section 20 of the Competition Act. Section 20 of the Competition Act is applicable to harm caused between November 2011 and December 2016. According to Section 20, an undertaking or an association of undertakings that deliberately or negligently violates the prohibitions included in the Competition Act or in Articles 101 and 102 of the TFEU is liable to compensate the damage caused by such violation. Therefore, anyone who has suffered harm caused by a competition infringement is entitled to claim damages thereof on the basis of the Act. The Competition Damages Act is the national implementation of the EU Competition Damages Directive, and is applicable to harm caused after December 2016. In addition to such statutory claims, antitrust damages claims for breach of contract have been successful in court.

Competition law claims that are not damages actions would normally require a contractual relationship between the claimant and the defendant.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Please see the answer to question 1.2.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Private competition law claims are heard by district courts in the first instance with appeals to the courts of appeal and, subject to a leave to appeal, the Supreme Court.

For public enforcement, a national specialist court, the Market Court, has exclusive competence over competition matters. A case in the Market Court is typically commenced by a proposal for an infringement fine by the Finnish Competition and Consumer Authority or by an appeal against the Authority’s decision. The decision of the Market Court can be appealed against in the Supreme Administrative Court. The Market Court cannot consider damages claims.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Anyone who has suffered harm caused by a competition law infringement has the right to claim damages on the basis of the Competition Damages Act. This also applies to business undertakings further down the distribution chain if there is a causal connection between the infringement and the damage they have suffered.

It may be possible for the Consumer Ombudsman to bring an opt-in class action for damages on behalf of consumers. However, any claimants can authorise, for instance, a joint representative to bring an action on their behalf, resulting in a type of opt-in claim by bundling numerous claims.

In the Timber Cartel damages litigation, two claimant groups of 600 and 1,000 forest owners were formed by consolidating the claims to one law firm.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Competition Act generally applies to conduct that restricts competition in the Finnish markets. A Finnish court has jurisdiction if the defendant is domiciled in Finland. However, a Finnish court could also hear a case against a foreign entity domiciled in the EU if the infringement or damage has occurred in Finland. The court will decide on a case-by-case basis whether the case has a sufficient link to Finland.

As a main rule, proceedings shall be instituted before the court of the place of domicile of the defendant. According to the Code of Judicial Procedure, claims brought at the same time against several defendants must be dealt with in the same proceeding if the claims are based on the same grounds for action. Such claims can be brought in any district court which has jurisdiction to deal with claims against one of the defendants. Once a damages claim has been brought in one district court having jurisdiction, a claim based on the same matter cannot be tried in another jurisdiction (*lis pendens* rule).

Competition law claims may also go before an arbitral tribunal. Pursuant to the Finnish Arbitration Act, any dispute in a civil matter which can be settled by agreement between the parties may be referred for final decision in arbitration. Parties to an agreement may also agree that disputes arising from the agreement shall be finally decided by one or more arbitrators, unless otherwise provided in statutory law.

The District Court of Helsinki has found itself competent to hear a damages claim despite the presence of arbitration clauses in the supply agreements that contained the alleged overcharge. Thus, it seems that claimants can choose whether to pursue their claims in court or in arbitration.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Finnish private enforcement is still developing, so it is too early to assess its attractiveness. Relative to its size, Finland has a high level of private enforcement. So far, there is one instance where part of an international case was litigated in Finland (see question 1.1). It was settled for EUR 18.5 million.

1.8 Is the judicial process adversarial or inquisitorial?

The Finnish judicial process can be characterised as an adversarial process with case management by judges. In Finnish court proceedings, the judge conducts the trial, but the parties bear the responsibility of presenting the evidence that they wish to be considered by the court.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The interim remedies provided for in the Code of Judicial Procedure, applied in civil proceedings, are also available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

A district court may, pursuant to the Code of Judicial Procedure:

- (1) prohibit the deed or action of the opposing party, under threat of a fine;
- (2) order the opposing party to do something, under threat of a fine;
- (3) empower the applicant to do something or to have something done;
- (4) order that property of the opposing party be placed under the administration and care of a trustee; or
- (5) order other measures necessary to secure the right of the applicant to be undertaken.

Granting the above interim remedies requires the applicant to establish that it has a probable right against the opposing party and that there is a danger that the opposing party by action or omission or in some other manner hinders or undermines the realisation of the right of the applicant or essentially decreases its value or significance. When deciding on the interim remedy referred to above, the court shall ensure that the opposing party does not suffer undue inconvenience in comparison with the benefit to be secured. The court may also order attachment of real or movable property of the opposing party if the applicant can establish a probability that it holds a receivable (e.g., a competition law damages claim) that may be rendered payable by a decision that can be enforced, and if there is a danger that the opposing party hides, destroys or conveys his property or takes other action endangering the payment of the receivable.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The most important final remedy in a private competition law claim is damages. The compensation for damages based on a breach of competition law covers compensation for the actual loss, i.e., overcharges, lost profits, expenses, and other direct or indirect economic damage resulting from the competition restriction.

Late payment interest can be claimed as of 30 days from the date on which a demand for payment was first presented. Antitrust damages cases typically take several years to conclude, so the amount of accrued interest can be substantial. Interest can also be claimed for the time between the occurrence of the harm and the demand for payment but the interest rate is very low.

It is also possible to obtain a declaratory judgment confirming, for instance, that part of an agreement is in breach of competition law and therefore null and void.

Further, the interim remedies referred to in question 2.2 may be confirmed as part of the final decision.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Only actual loss and damages foreseeable at the time the damage is caused can be compensated. Punitive or exemplary damages cannot be awarded under Finnish law.

As a general principle, the amount of damages should correspond to the actual loss suffered. The claimant has the burden of proof regarding the amount of the actual loss and the causal connection between the defendant's behaviour and the loss. At the same time, the damages awarded should not be over-compensatory, allowing the claimant to benefit from the breach of competition law. Damages may be adjusted if full compensation is considered unreasonably onerous, taking into consideration the nature and extent of the damage, the circumstances of the parties involved and other relevant issues.

If the claimant can prove that it suffered harm but cannot prove the exact amount, Finnish courts are entitled to award damages based on an estimate of the harm.

So far, damages have been awarded in a number of judgments related to the Asphalt Cartel damages litigation. In 2013, the District Court of Helsinki awarded damages to 39 municipalities that had been overcharged by an asphalt cartel. The principal amount was EUR 37.4 million. Interest and costs orders increased the total to approximately EUR 66 million. In 2016, the awards were considerably reduced by the Helsinki Court of Appeal, and the matter is currently pending in the Supreme Court.

In 2017, the Helsinki Court of Appeal awarded EUR 90,000 for abuse of dominance in the telecoms sector.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Courts have considerable discretion to determine the amount of damages. There are no specific provisions regarding the treatment of fines or redress schemes in the calculation of damages. In competition damages judgments so far, courts have ruled that fines already imposed are not taken into account when calculating the award of damages. Any redress already paid should reduce the amount of compensable damage correspondingly.

4 Evidence

4.1 What is the standard of proof?

In theory, a preponderance of evidence is required in private enforcement cases. In practice, there are no specific provisions on the standard of proof in Finnish legislation concerning damages. The court can freely evaluate the weight and relevance of the evidence on a case-by-case basis.

4.2 Who bears the evidential burden of proof?

The claimant has the burden of proving that the defendant has intentionally or negligently breached competition rules. The claimant can rely on an infringement decision of the competition authorities which establishes that a breach has occurred. The claimant must then prove that it has suffered an actual loss caused by the defendant's competition law infringement. The difficulty of the defendant's burden of disproving the claimant's allegations will then depend on the strength of the claimant's evidence. For cartel cases, the Competition Damages Act introduces a reversed burden of proof where the defendant has to prove it did not cause harm.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Competition Damages Act includes a rebuttable presumption of harm for cartel cases. There are no other statutory evidential presumptions of loss.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no restrictions concerning the form of evidence as such in Finnish legislation, but certain rules exist for specific types of evidence. For instance, written witness testimonies are not accepted in district courts, but they can be used in arbitral proceedings. Written and oral expert evidence is accepted, and experts will often provide both written and oral statements. The courts have free discretion to consider the weight of the expert evidence provided.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The Finnish legal system does not recognise discovery as understood and applied in the common law system. In Finnish court proceedings, each party presents and discloses the evidence that it is going to refer to in the proceedings. According to the Code of Judicial Procedure, a court may, upon a request of a party to the proceedings, order any party or third party to disclose sufficiently specific documents in its possession, should the court consider the documents to be relevant as evidence. The Code of Judicial Procedure also includes rules on documents and information that do not have to be disclosed, such as business secrets. The EU Competition Damages Directive has been implemented by referring to these existing rules on document disclosure. Most importantly, the existing rules do not contain

provisions concerning the disclosure of categories of evidence, which is required by the Directive, so this is left to the discretion of the courts.

The Finnish Act on the Openness of Government Activities (“Openness Act”) empowers anyone to request copies of public documents from public authorities. According to the Act on the Publicity of Administrative Court Proceedings, the principles of the Openness Act also apply in the Market Court and the Supreme Administrative Court regarding trial documents. This means that documents on the Finnish Competition and Consumer Authority’s case file and trial documents from public enforcement proceedings are, as a default, available. The main exceptions are corporate statements contained in leniency applications as well as business secrets and similar documents where a public or private interest prevents making them public.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Pursuant to the Code of Judicial Procedure, a witness can be called under threat of a fine. If a witness is absent without a valid excuse or leaves without permission, the fine shall be enforced and the court may order that the witness be immediately brought to the court, unless the hearing of the case is adjourned.

The party who has called the witness conducts the direct examination. Thereafter, the witness is cross-examined by the opposing party. Leading questions are allowed in cross-examination for the purpose of ascertaining the congruence between the testimony and the true state of affairs.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Infringement decisions by the European Commission are always binding. Under the Competition Damages Act, applicable to harm caused after December 2016, infringement decisions by the Finnish Competition and Consumer Authority are also binding. Decisions by authorities from other countries can be submitted as evidence, their evidentiary value to be evaluated by the court.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a general principle, court proceedings in Finland are public and proceedings can be conducted without public access only in very limited circumstances. Therefore, any documents submitted to the court are also generally public. However, at the request of a party the court can, at its discretion, declare documents or parts of documents containing business secrets as confidential if their publication would cause financial harm to a party.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The Competition Act empowers general courts to request a statement from the Finnish Competition and Consumer Authority

regarding the case. This possibility has been used a few times. These statements tend to be quite generic because the Authority has not actually investigated the case. A request for a statement has also led to the opening of a full investigation, rendering the initial statement moot.

On the basis of Article 15 of the Regulation (EC) 1/2003, national courts may ask the Commission for its opinion on the application of Articles 101 and 102 of the TFEU. Article 15 also empowers both the Finnish Competition and Consumer Authority and the European Commission to submit their observations regarding the application of Articles 101 and 102 of the TFEU to a national court. We are not aware of any cases where Article 15 would have been applied in Finland.

The above provisions relate to the existence of a competition law infringement. They are thus more important in stand-alone damages claims where the claimant has to prove the infringement without a previous infringement decision. In addition, the new Competition Damages Act enables a court to request a statement from the Finnish Competition and Consumer Authority concerning the amount of harm.

In addition, officials from the Finnish Competition and Consumer Authority have appeared as witnesses in damages cases.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Using a defence of justification/public interest is not restricted in the Finnish legislation. However, it is difficult to assess the practical relevance of such defences due to lack of case law. It is unlikely that this type of argument would exclude liability for damages in clear infringement cases. The defendant could, however, attempt to justify an adjustment to the amount of damages.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

The Competition Damages Act explicitly allows the passing-on defence and provides indirect purchasers the standing to sue. While there is no case law on it, it seems clear that the passing-on defence has been available already before the Competition Damages Act because a claimant should only be able to recover actual losses. Indirect purchasers have likewise had legal standing to sue already before the Competition Damages Act.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Defendants may not join other cartel participants as defendants in the original claim. However, defendants may bring a contribution claim against them. The court will then decide whether to join the contribution claim with the original claim so that liability can be established and apportioned for all the defendants as part of the same proceedings.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

According to the Competition Damages Act, there are two concurrent limitation periods. Both can only be interrupted by

filing a claim. The first limitation period is five years. It begins to run when the claimant knew or ought to have known about the breach of competition law, the harm and the liable person. This limitation period is suspended if a competition authority begins an investigation concerning the infringement. The suspension ends one year after the decision in the competition authority's investigation matter has become final. The second limitation period is 10 years from the date when the infringement happened or a continuous infringement ended. As long as either limitation period is running, the claim cannot become time-barred. These rules apply only to harm caused after December 2016.

According to the Competition Act, unless a claim is filed, the right to claim damages expires 10 years from the date on which the infringement was committed or a continuous infringement ceased. If the damages claim is based on a prohibition decision of the Finnish Competition and Consumer Authority or its proposal on the imposition of an infringement fine, the limitation period expires one year after the decision has become final. These rules entered into force with the Competition Act in November 2011 and apply only to infringements committed under that Act and before the entry into force of the Competition Damages Act in December 2016. Infringements committed before November 2011 are subject to the previous competition legislation, where the limitation period was five years from the time the claimant became aware of the damage.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

So far, follow-on claims are more common. In such cases, the time taken by the infringement proceedings has to be taken into account. An investigation by the Finnish Competition and Consumer Authority may take two to three years. The Authority cannot impose sanctions but may propose that the Market Court impose administrative fines. A case may be pending in the Market Court for another two to three years. The decisions of the Market Court can be appealed to the Supreme Administrative Court where proceedings may take a couple of years.

Although the district court handling an action for damages is not obliged to stay the damages claim until a final decision has been issued in the administrative proceedings, it will in most cases be inclined to do so to avoid a contradictory judgment.

The length of the proceedings in a district court depends on the circumstances of the matter and the workload of the court. Competition law damages cases often involve complex multi-party litigation, and have taken two to four years at the district court level. In practice, it is rarely possible to expedite proceedings.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No permission is needed to discontinue claims. Parties are allowed to withdraw their claims to stop the proceedings.

Permission of the court is also not required for a settlement. Adjournment of the proceedings is usually granted by the court if negotiations for settlement are pending between the parties. After settlement is reached, the parties confirm to the court that they no longer have any claims against each other.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

It may be possible for the Consumer Ombudsman to bring a class action for damages on behalf of consumers. The Consumer Ombudsman is also permitted to settle on behalf of the class. Also, if several entities have transferred their claims to one claims vehicle (such as CDC), that entity is permitted to settle alone. If a number of parties are merely represented by the same attorney, a separate consent for settlement is required from all the clients.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The unsuccessful party will, as a main rule, be ordered to compensate the prevailing party's reasonable legal fees and costs incurred by necessary measures. The court is entitled to use free discretion when awarding the legal costs. The courts may also order partial compensation or make a decision that each party shall bear its own costs; the latter especially when the matter has been so unclear that both parties have had good reason to conduct the proceedings.

If some claims are decided in favour of one party and some in favour of the other party, the parties often bear their own costs.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers, in general, are not prohibited from acting on a contingency fee basis. However, members of the Finnish Bar Association are allowed contingency fee structures only on specific grounds. The most common fee structure in Finland is based on hourly rates.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding is not prohibited or restricted by law. However, we are not aware of any instances of use. The closest to third party funding so far is a case where two victims of a cartel sold their receivables to a third party that then began proceedings against the cartel members.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of a district court can be appealed in a court of appeal and, should leave to appeal be granted, from the court of appeal to the Supreme Court. The threshold for granting leave to appeal is quite high.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency rules were introduced to the Finnish Competition Act in 2004. Leniency applicants are not given immunity from civil claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The Competition Damages Act requires that the corporate statements included in leniency applications shall not be permissible evidence, unless the leniency applicant itself discloses its own corporate statement.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Due to contradictory judgments in different antitrust damages cases, it is difficult to say whether the Directive will introduce major changes to the current law. The expected changes relate at least to limitation periods, presumption of harm in cartel cases, disclosure of evidence, and the application of joint and several liability.

One of the major competition litigation cases, the Asphalt Cartel damages litigation, is currently pending before the Supreme Court of Finland. The Supreme Court has requested a preliminary ruling from the Court of Justice of the European Union concerning whether the liability for antitrust damages is determined in the same manner as liability for competition fines.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Directive was transposed into the Competition Damages Act which entered into force on 26 December 2016.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Matters that were pending when the Competition Damages Act entered into force will be decided based on the previous legislation. To the extent that the infringement happened before the entry into force of the Competition Damages Act, only certain parts of the new Act are applicable. The attempt is to only apply the procedural but not substantive parts of the new legislation to the infringements that happened before the Act entered into force.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Not at the time of writing (6 July 2018).



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Ilkka has been involved in various landmark competition cases, including the largest competition cases in Finland. He is regularly involved in assessing potential competition law issues in a transactional context and possesses significant experience in both domestic and multijurisdictional merger control procedures. He has also represented clients in numerous precedent-setting competition law related damages cases. Ilkka has also acted as a counsel and as an expert on Finnish law in some of the most notable international antitrust damages cases.

Ilkka is one of the five members of the Competition Law Expert Group of the Finnish Bar Association. He is a regular chairman and speaker at competition law conferences and seminars. He is listed as a leading competition law expert in all major international ranking publications.



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He specialises in antitrust damages and has experience from both the claimant and defendant side in the first major cartel damages cases in Finland, including the precedent-setting Asphalt Cartel damages litigation. He has acted as an expert concerning Finnish law aspects in antitrust damages litigation abroad.

Toni participated in the Expert Committee appointed to draft Finland's new Competition Damages Act, based on the EU directive on damages actions for infringements of competition law. He regularly lectures and publishes academic articles concerning antitrust damages. His publications include the first Finnish book on antitrust damages. He is also preparing a Ph.D. on antitrust damages at the University of Helsinki.

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Breaching competition law (mainly articles L.420-1 and L.420-2 of the Commercial Code, i.e. the equivalent of articles 101§1 and 102 TFEU) can result in claims brought before the French Competition Authority (“FCA”) as well as before the State courts. Both French and EU law provisions can be invoked.

Injunctive relief is also available both before State courts and the FCA.

Moreover, private enforcement claims such as follow-on or stand-alone claims have been traditionally available either under general tort liability (article 1240 of the Civil Code) or sometimes contractual liability (article 1103 *et seq.* of the Civil Code) principles. (See, for example, Cass. Com, April 26, 2017, No. 15-28.197 on a stand-alone claim on the basis of article 1382 of the Civil Code the former provision for torts; now article 1240.)

Furthermore, collective proceedings (class actions) provisions were set forth by Law No. 2014-344 dated March 17, 2014 on Consumption (*Loi Hamon*). Finally, more recently, a specific competition follow-on legal framework has been implemented through the transposition by France of the Antitrust Damages Directive 2014/104/EU by Order No. 2017-303 dated March 9, 2017. The first judgment on this basis was delivered on January 27, 2016 by the Tribunal de Grande Instance de Paris (15/00835).

1.2 What is the legal basis for bringing an action for breach of competition law?

Anticompetitive practices are set forth under article L.420-1 *et seq.* of the Commercial Code. More particularly, anticompetitive agreements fall under article L.420-1 of the French Commercial Code (the equivalent of article 101§1 TFEU) and abuse of dominance under article L.420-2 of the Commercial Code (the equivalent of article 102 TFEU).

EU law provisions (articles 101 and 102 TFEU) are also applicable before French courts and the FCA.

Specific provisions of the Commercial Code might also be applicable, in particular those related to pricing (article L.410-1 *et seq.*), anticompetitive behaviours (article L.420-1 *et seq.*), merger control (article L.430-1 *et seq.*), exclusive rights in French overseas communities (L.420-2-1), abusively low prices (L.420-5) and restrictive practices (article L.442-1 *et seq.*).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

French law is EU law compliant in respect of competition law rules. However, certain particularities do exist (see questions 1.1 and question 1.2).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

At first instance, competition law litigation is subject to the competence of specialised commercial and civil courts, depending on rules governing territorial competence for the claim.

Appeals are lodged with the Court of Appeals in Paris.

The *Cour de cassation* (highest civil and commercial court) and the *Conseil d’Etat* (highest administrative court) are competent as the ultimate jurisdiction excluding factual questions.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

An action in court for breach of competition law can be brought before a court or the FCA by any person having a legal interest. Follow-on or stand-alone claims based on general tort principles or contractual liabilities are possible. The transposition by France of the Antitrust Damages Directive 2014/104/EU by Order No. 2017-303 dated March 9, 2017 has facilitated follow-on claims.

Collective claims (class actions or *actions de groupe*) are available since the entering into force of Law No. 2014-344 dated March 17, 2014 on Consumption (*Loi Hamon*) but only for a limited number of accredited consumer associations. Follow-on actions are available to said associations provided the competition law-related decision concerned is final. For now, to our best knowledge, this type of action never has yet received a favourable outcome.

The French class action legal framework is an “opt-in” system, as the victims represented by the consumer association have to come forward in order to join the class.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The FCA is the authority to which usual competition law (related claims are referred to when applying article L.420-1 of the French Commercial Code (or article 101§1 TFEU) relating to anticompetitive agreements and article L.420-2 of the French Commercial Code (or article 102 TFEU) relating to abuse of market dominance.

State courts are also competent either to annul any breach of article L.420-1 and/or article L.420-2 or for the application of other competition law-related provisions, in particular by application of article L.442-6 of the French Commercial Code even in fast-track proceedings (*référé*) (see also question 1.2).

The main factor to consider when issuing a writ before a State court is the specialisation of the court, as only certain courts are competent to handle competition law-related disputes (see question 1.4). These are mandatory public order rules and non-specialised courts do not hesitate to decline competence.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The FCA is one of the most respected competition authorities in the European Union. It is usually considered as independent, professional and efficient. Claimants often appreciate its inclination to grant interim measures (*mesures conservatoires*).

From a defendant perspective, the FCA is also generally considered as professional. In recent years, valuable efforts have been made in order to better protect defendants' rights.

Private enforcement is much more frequent in France nowadays. The transposition by France of the Antitrust Damages Directive 2014/104/EU by Order No. 2017-303 dated March 9, 2017 has contributed to this change although the main factor for the increase of antitrust damage claims is a change in the attitude of undertakings which do not hesitate anymore to launch such claims and the fact that French courts are now responsive to such claims.

One can already observe a real change in the attitude of certain judges in this respect. As an example, Paris wants to be an attractive jurisdiction for international claims and a section of the Paris Commercial Court is able not only to consider documents drafted in the English language, but also to rule on cases with proceedings fully held in the English language. The Government in place as of May 2017 is favouring this kind of initiatives.

1.8 Is the judicial process adversarial or inquisitorial?

The French legal system is quite reluctant to perform an inquisitorial process. Before the State courts, civil and commercial litigations are generally based on evidence provided by the parties, but the judge plays an active part. He is able, in particular, to order investigation measures (*mesures d'instruction*) that may have similar effects as disclosure proceedings.

The FCA possesses investigative powers and uses extensive means of investigation or expertise to prove the existence of anticompetitive practices. However, once evidence has been gathered, the procedure becomes adversarial again.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available in France both before the FCA (see, for example, the decision of the FCA No. 16-MC-01 of May 10, 2016 (Engie) and State courts (see, for example, Paris Court of Appeal, December 7, 2016 (*Pétanque Longue*) RG No. 16/15228).

2.2 What interim remedies are available and under what conditions will a court grant them?

Before the FCA, the claimant may ask for interim remedies (*mesures conservatoires*) provided he does so simultaneously with a claim on the merits (*saisine au fond*) (article L.464-1 of the French Commercial Code). Moreover, several conditions are to be fulfilled:

- proof that the facts presented in the claim might be a breach of competition law (article L.420-1 and/or article L.420-2 of the French Commercial Code);
- the competition law breach shall lead to serious and immediate consequences; and
- there shall be an urgency justifying interim measures in the context of irreversible or hardly reversible consequences to the economy, a specific sector or to plaintiff or consumer interests.

Before State courts, according to article 808 *et seq.* of the French Civil Proceedings Code (civil courts) or article 872 *et seq.* of the French Civil Proceedings Code (commercial courts), judicial courts may grant interim measures (*mesures conservatoires ou provisoires*) in fast-track proceedings (*référé*) without ruling on the merits (*fond*). Should the case fail to raise serious grounds for challenging (*absence de contestations sérieuses*) the court may grant as an interim measure an amount of money (*provision*) or specific performance, even in the event of a positive obligation (*obligation de faire*).

If there is ground for challenging (*contestation sérieuse*), protective measures may be awarded in order to avoid an imminent damage (*dommage imminent*) or to prevent an obviously illicit trouble (*trouble manifestement illicite*).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

A competition law breach (articles L.420-1 and L.420-2 of the French Commercial Code or articles 101 and 102 TFEU) can result in sanctions being enforced by the FCA up to 10% of the parties' annual turnover.

A competition law breach can also result in the annulment of the clause or the agreement either by the FCA or by judicial courts.

The FCA or State courts can also order the end of the unlawful practice.

Follow-on remedy claims resulting from an anticompetitive agreement, behaviour or practice are also available under the general tort principle or contractual liability regime before judicial courts, it being said that the claimant shall prove a fault, a damage and a causal link between the fault and damage (see, notably, question 1.1).

Publicity of the decisions can also be ordered by the FCA or the courts.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Class actions (*actions de groupe*) were introduced in the French legal system in 2014 and are limited to the initiative of some accredited consumer associations in the framework of an “opt-in” system, quite far away from the impressive damage awarding the US “opt-out” class action type of legal regime (see also question 1.5).

Most of the antitrust cases resulting in significant awarding of damages are based on general tort liability principles (article 1240 *et seq.* of the French Civil Code).

Before French courts, exemplary or punitive damages are not awarded. However, damages compensate the entire prejudice suffered by the victim. This includes awarding interests.

Compensation usually covers the overcharge suffered and the loss of chance. Non-pecuniary damages (for example) can also be granted. Many cases actually result in out-of-court settlements.

There are notable, publicly available examples of damages being awarded by the courts in competition law cases, such as the quite recent *Outremer Telecom* case where Orange SA (former France Telecom) and its subsidiary Orange Caraïbes were sanctioned by the FCA for abuse of dominance, and a competitor of Outremer Telecom was awarded several million euro compensation (*Paris Commercial Court, March 16, 2015, SAS Outremer Telecom c/ SA Orange Caraïbe et SA Orange; Paris Court of Appeal, May 10, 2017, case No. 15/05918*). Until recently, French courts were not used to easily awarding important compensation in damages to victims of a competition law breach. However, the courts have demonstrated a real willingness to make things change in this respect, and with the transposition of the Antitrust Damages Directive 2014/104/EU, there will be soon notable case law to report on. As an example, a major damage claim has been filed by SFR Numericable with the Paris Commercial Court in June 2015 against Orange seeking €2.4 billion following the €350 million fine imposed by the FCA to Orange (Decision No. 15-D-20 dated December 17, 2015) for having abusively hindered the development of competition since the early 2000s.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

French courts do not take into account fines or the redress scheme imposed by the FCA when calculating the damage compensation award. The fines imposed by the FCA take into account the “damage to the economy” (*dommage à l'économie*) which is different from that suffered by the victims of the anticompetitive conduct.

In a recent case, a claimant was even awarded compensation before the Paris Commercial Court in a follow-on litigation, whereas the defendant undertook commitments before the FCA (*Paris Commercial Court, March 30, 2015, SARL DKT International c/ SA Eco-Emballages et Valorplast*).

4 Evidence

4.1 What is the standard of proof?

For commercial matters (the main area of competition law-related litigations), evidence is freely presented by the parties.

4.2 Who bears the evidential burden of proof?

As a principle, the burden of proof rests on the one who alleges a fact.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Evidential presumptions related to a competition law breach (under article L.420-1 and/or article L.420-2 of the French Commercial Code and/or article 101 and/or article 102 TFEU) play an important role in the following cases:

- (i) Order No. 2017-303 dated March 9, 2017, governing damages actions for infringements of competition law, implementing Directive 2014/104/EU on antitrust damage claims created several presumptions as regards follow-on claims in general (see question 11.2).
- (ii) More specifically, competition infringements related to follow-on actions initiated in the context of class actions (*actions de groupe*), as implemented in the French legal system (article L.623-1 *et seq.* of the French Consumer Code), can result in liability for the professional who committed the breach only in the case of a final decision of an EU competition authority, which also constitutes an irrebuttable presumption of the breach by the professional (article L.623-24 *et seq.* of the French Consumer Code).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Regarding commercial matters (the main area of competition law-related litigations), there is no limitation on the form of evidence. In civil matters, written evidence shall be generally given for any agreement exceeding €1,500.

Expert evidence is often required or ordered by courts.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

There is no disclosure proceeding under French law.

However, based on article 145 of the French Civil Proceedings Code, judicial courts may order any legally admissible investigation measure (*mesures d'instruction légalement admissibles*) prior to a claim on the merits if there is a legitimate ground (*motif légitime*) to obtain proof of facts on which the solution of a law suit may depend. These measures can be granted by fast-track proceedings (*référé*) which are contradictory, but also based on *ex parte* non-contradictory requests (*requête*).

Courts can also order investigation measures (*mesures d'instruction*) during the course of a law suit (article 143 *et seq.* of the French Civil Proceedings Code) or even request a third party including the FCA or the French Directorate General for Competition Consumer Affairs and Repression of Fraud (“DGCCRF”) to submit evidence (articles 138 *et seq.* of the French Civil Proceedings Code and L.483-1 of the French Commercial Code).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

As a principle, French civil proceeding rules can compel a witness to appear in court by applying a fine in case of refusal.

Cross-examination of witnesses is not allowed under French civil proceeding rules, but questions submitted to the judge by the parties can be asked by the judge to the witness.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

As a general rule, a competition law infringement decision by a national (non-French) or international competition authority or an authority from another country is not binding on French courts. National (non-French) or international competition authority decisions can, however, be invoked by claimants as evidence for the anticompetitive conduct (article L.481-2 of the French Commercial Code – see question 11.2).

Nevertheless, the uniform application of EU competition law principles set forth by article 16(1) of the Council Regulation No. 1/2003 apply so that when French courts rule on agreements, decisions or practices under article 101 or article 102 TFEU which are already the subject of a Commission decision, they cannot make decisions running counter to the decision adopted by the Commission.

More recently, Order No. 2017-303 dated March 9, 2017, implementing Directive 2014/104/EU on antitrust damage claims, added article L.481-2 of the French Commercial Code, according to which where the existence of an anticompetitive practice and its attribution to a person have been established by a decision pronounced by the Competition Authority or by the appeal court, which can no longer be the subject of an appeal for the party relating to that finding, the anticompetitive practice benefits of an irrebuttable presumption (see question 11.2). Consequently, the compensation judge will be bound by this finding for the follow-on claim of the victim of the practice.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

It is usually assessed on a case-by-case basis. However, now that Directive 2014/104/EU on antitrust damage claims has been transposed by Order No. 2017-303 dated March 9, 2017 under French law and in order to avoid excessive communication of evidence, the judge has to make sure that the request of evidence by the victims is proportionate. Based on article L.483-8 of the Code of Commerce, the judge can order the communication of documents out from the file of the FCA, but only if the proceedings are closed by a decision of the FCA and if the evidence requested does not come from a leniency or a settlement proceeding.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The FCA can be asked by French courts to express its views on the anticompetitive practices set forth by articles L.420-1 (for anticompetitive agreements, the same applies to article 101 TFEU), L.420-2 (for abuse of dominance, the same applies to article 102 TFEU), L.420-2-1 (exclusivities in the French overseas) and L.420-5 (abusively low prices) of the French Commercial Code. This provision is not commonly used by French courts but there is a tendency to use that mechanism more often (for an example, see opinion 14-A-18 of the FCA requesting the Paris Court of Appeal on the case *Bottin Cartographes/Google* in order to assess the existence of an abuse of a dominant position).

It should also be noted that, according to article 15 of the Council Regulation No. 1/2003, French courts may also ask the Commission to transmit its opinion on questions concerning the application of EU competition rules, and the FCA, acting on its own initiative, may submit written observations to French courts relating to the application of article 101 or 102 TFEU. Courts may also request guidance from the FCA regarding damage assessment (article R.481-1 of the French Commercial Code).

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

According to article L.420-4 of the French Commercial Code, the prohibitions set forth for anticompetitive practices by articles L.420-1 and L.420-2 of the French Commercial Code do not cover practices:

- which result from the application of law or subsequent regulations; and
- for which the authors can justify that they result in economic progress including by creating or maintaining jobs, and reserve to users a fair share of the benefit that will emerge from the practice, without eliminating competition (altogether). Specific provisions also apply for the agricultural sector.

Specific justifications also apply for French overseas collectivities.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Pursuant to Order No. 2017-303 dated March 9, 2017, implementing Directive 2014/104/EU on antitrust damage claims, direct or indirect purchasers from victims of an infringement of competition law benefit from a presumption that they have not passed on the overcharge resulting from the breach of competition law (article L.481-4 of the French Commercial Code). Direct or indirect purchasers that allege to have suffered an overcharge as a result of the anticompetitive conduct have to prove it. However, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that: (1) the defendant has committed an infringement of competition law; (2) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (3) 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 (article L.481-5 of the French Commercial Code).

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Before French courts, defendants might join other cartel participants to a claim as co-defendants according to regular civil proceedings rules (article 325 *et seq.*).

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

As a principle, the limitation period in commercial (article L.110-4 of the French Commercial Code), competition (article 462-7 of the French Commercial Code) and civil (article 2224 of the French Civil Code) matters is five years as of the acknowledgment of the facts on which the claim is based. Pursuant to Order No. 2017-303 dated March 9, 2017, the five-year limitation period runs from the day when the claimant is aware or should have been aware of (1) an anticompetitive practice qualified as such, (2) the fact that such practice causes the claimant a damage, and (3) the identity of one of the authors of such anticompetitive practice (article L.482-1 of the French Commercial Code).

One also has to mention that, in any case, the claim is time-barred with the FCA 10 years after the breach of competition law has ceased if the FCA has not ruled on the matter.

Moreover, as a result of article L.623-1 of the French Consumer Code, follow-on competition law-related class actions cannot be engaged in more than five years after the decision ruling on the infringement has become final and from the moment the claimant is aware or should have been aware of (1) the conduct in question, (2) the fact that it constitutes an anticompetitive practice, (3) the damage he suffers, and (4) the identity of the author of the practice (article L.623-25 of the French Consumer Code).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

There is no typical timing for the FCA to rule on a case, although the FCA is generally efficient and has already made a significant effort to “clean up” the stock of affairs that were under investigation for several years. As regards courts of first instance, timing is variable on a case-by-case basis.

Before the Paris Court of Appeal, proceedings usually take between six and 12 months.

Before the *Cour de cassation*, proceedings usually take between 12 and 24 months.

Interim measures might of course be granted more rapidly, and relatively fast proceedings (*référé*) are available when not on the merits or on the merits on fixed dates in case of urgency upon authorisation (*requête*) by the competent court (*procédure à jour fixe*).

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

A settlement by the parties usually results in the withdrawal of the claim and sets forth that the counterparty accepts such withdrawal, which is a condition for the court to effectively withdraw the case (article 394 of the French Civil Proceedings Code).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Collective settlements are available under the same conditions as bilateral settlements (see question 7.1).

However, the class actions regime as implemented by article L.623-1 *et seq.* of the French Consumer Code sets forth that, in the case of an agreement resulting from mediation and negotiated on behalf of the group, the competent court has to homologate the agreement (article L.623-23 of the French Consumer Code).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Article 695 *et seq.* of the French Civil Proceedings Code sets forth a number of situations that result in costs being borne by the dismissed party or another party if the court so decides.

Moreover, according to article 700 of the French Civil Proceedings Code, the judge will estimate the amount due by any party for proceeding costs, albeit such amount rarely equals the effective legal costs.

8.2 Are lawyers permitted to act on a contingency fee basis?

Contingency fees (*honoraires de résultat*) are not allowed as such.

However, fees which are not solely based on the result of the case are allowed and usually regarded as not excessive if limited to 10% of the amount obtained by the claimant.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of a competition law claim is becoming more frequent in France. This offer is indeed already available on the market.

Moreover, the French *Cour de cassation* (highest civil court) has ruled in a case dating back to 2006 that a right to a claim (*droit à agir en justice*) can be sold to a third party (*Cour de cassation, First Chamber, January 10, 2006 nr. 03-17839*) so that third party funding may develop.

9 Appeal

9.1 Can decisions of the court be appealed?

As a general principle, French court decisions relating to competition law matters can be appealed before the Paris Court of Appeal within a month after the servicing of the court decision (see, for example, Paris Court of Appeal, May 12, 2016 No. 2014/24742 concerning the appeal of a decision of the FCA by BrandAlley). In the context of fast-track proceedings (*référé*), the appeal has to be lodged within 15 days.

The case can be further referred to the *Cour de Cassation* (highest civil court) or the *Conseil d'Etat* (highest administrative court) two months after the appeal decision has been served.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, leniency proceedings exist under French law in the context of FCA proceedings.

Total or partial immunity can be granted in respect of the fine applied by the FCA, but such does not prevent the applicant for leniency from facing civil/commercial claim litigations and thus payment of damages to the victims of the competition law breach.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Since discovery proceedings are not allowed under French law, the party applying for leniency can, as a principle, withhold evidence disclosed when obtaining the application of leniency proceedings before the FCA.

However, the FCA might have to disclose evidence when requested by the courts, except in case of refusal based on legitimate grounds as provided in article 11 of the French Civil Proceedings Code or article L.462-3 of the French Commercial Code, in order to protect the attractiveness of the leniency programme.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Directive 2014/104/EU on antitrust damage claims was implemented by Order No. 2017-303 dated March 9, 2017. It has surely eased follow-on claims in France (see question 11.2).

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

Some of the provisions set forth by Directive 2014/104/EU already

existed in the current French legal framework or have been partially anticipated by the Law on Consumption No. 2014-344 dated March 17, 2014 (*Loi Hamon*) on the irrebuttable presumption of breach by a professional in French follow-on class actions and the Law No. 2012-1270 dated November 20, 2012 (*Loi Lurel*) on the confidentiality of information provided in the framework of leniency programmes. Some other implementations result from French court case law.

Most of the legislative adaptations come, however, from the transposition in French law of Directive 2014/104/EU by Order No. 2017-303 dated March 9, 2017, governing damages actions for infringements of competition law. The main impact of Order No. 2017-303 dated March 9, 2017 is on:

- The irrebuttable presumption of a fault resulting from an anticompetitive conduct recognised as such by the FCA. The recognition deriving from a decision of a foreign competition authority has only a probative value (article L.481-2 of the French Commercial Code).
- The presumption that direct and indirect purchasers as victims of the anticompetitive conduct did not pass on the overcharge resulting from the breach of competition law (see question 5.2).
- The presumption that a cartel caused damages, which does not have to be proved by the claimant (article L.481-7 of the French Commercial Code).
- The joint liability of the multiple offenders when there exist various anticompetitive conduct authors (article L.481-9 of the French Commercial Code).
- New limitation period terms (article L.482-1 of the French Commercial Code).

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

As a principle, the substantive provisions of Order No. 2017-303 dated March 9, 2017, implementing the Directive, came into force the day after the Order's publication, i.e. on March 11, 2017 and provisions regarding presumptions, rules of evidence and tort law are applicable to claims derived from events giving rise to damages which have happened after the entry into force of Order No. 2017-303.

As regards procedural provisions, in accordance with article 22 of the Directive, a transitional provision of Order No. 2017-303 dated March 9, 2017 makes procedural provisions applicable only to actions for damages of which a national court was seized after December 26, 2014.

Finally, pursuant to Order No. 2017-303 dated March 9, 2017, provisions extending the limitation period are applicable to cases for which the expiration date of the limitation period has not been reached; in that case, the time period already elapsed is taken into account to calculate the remaining period (article 12 of the Order).

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

L.2015-990 dated August 6, 2015 (*Loi Macron*) implemented several provisions which have had an impact on competition law. The non-objection proceeding (*procédure de non-contestation*) in case of litigation before the FCA has been replaced with a settlement

proceeding (*procedure de transaction*) which determines the limits of the pecuniary sanction for the author of the infringement.

As of October 1, 2016, a new contract legal framework came into force. This impacts competition litigation, notably by implementing more into the commercial area some concepts deriving from consumer law.

Regarding class actions, L.2016-41 of January 21, 2016 and Decree 2016-1249 of September 26, 2016 extended class actions to health matters. More recently, Decree 2017-888 of May 10, 2017 implementing L.2016-1547 of November 18, 2016 specified the procedural rules applying to class actions relating to environment, labour, health and e-privacy matters.



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Alexandre was involved in many of the most significant vertical restraints cases in France (notably the "Perfume case", the "Toys case" and the "Dermo-cosmetics case" concerning the issue of Internet reselling of products the object of selective distribution) and he regularly assists clients during dawn raids and cartel litigation or for merger control filings.

He is actively involved in numerous commercial litigations and his expertise includes antitrust private enforcement expertise.

The Osborne Clarke Paris team lead by Alexandre Glatz is recommended by the *2019 EU Competition & Distribution Legal 500 Edition* and Alexandre is included in the *Best Lawyers in France 2019 Edition* (Competition/Antitrust law).



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The competition team led by Alexandre Glatz has developed in-depth knowledge on all aspects of antitrust, dawn raids and subsequent litigations, private enforcement and all kinds of commercial litigations.

Germany

Prof. Dr. Ulrich Schnelle



Dr. Volker Soyez



Haver & Mailänder

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Pursuant to Sections 33 and 33a of the German Act against Restraints of Competition (“GWB”), parties that are affected by a breach of German or European competition law can bring claims for abatement and removal as well as claims for damages against the tortfeasors. Where claimants are unable to determine the precise scope of their damages claims (which is normally the case), it is also possible to bring actions for declaratory relief. Finally, claims can be brought in respect of disclosure of relevant documentation or the provision of information that the claimant requires in order to substantiate or quantify its claims.

1.2 What is the legal basis for bringing an action for breach of competition law?

The primary legal basis for claims for abatement and removal is Section 33 GWB. The primary legal basis for damages claims is Sections 33a GWB. Depending on the individual circumstances of the case, legal action can also be based on Section 826 German Civil Code (“BGB”) if the infringement of competition law was conducted with the intent of harming the claimant, on a breach of contractual or pre-contractual duties, on a violation of the German Act against Unfair Competition, or on the principle of unjust enrichment.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition claims in Germany is mainly derived from national law, which gave rise to competition law claims and their efficient prosecution way before the *Courage* and *Manfredi* judgments set the scene at EU level. Obviously, however, the policy and jurisprudential developments at EU level had a significant impact also on German national law and its interpretation by the national courts. With the implementation of the EU Directive on Antitrust Damages (“EU Damages Directive”), it is now fair to say that the legal basis for competition law claims is now at least in part derived from international law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Specific competition law courts exist in Germany. According to

Section 87 GWB, the ordinary Regional Courts (*Landgerichte*) have exclusive jurisdiction over civil claims for breach of competition law. The Regional Courts usually have specialised cartel divisions before which these cases are heard with judges specifically trained and experienced in competition law. Moreover, most *Bundesländer* have assigned exclusive jurisdiction to one or more specific Regional Courts and thus concentrated competition litigation cases before these courts.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Actions for breach of competition law (e.g., actions for abatement and removal or damages claims) can be brought by any affected market participant according to Sections 33 and 33a GWB. This is in line with Articles 3 and 12 EU Damages Directive and generally includes any natural or legal person which has been directly or indirectly affected by a breach of competition law.

While class actions are alien to German law, a number of different means of collective redress exist nonetheless. According to Section 33 (4) GWB, for instance, certain registered trade associations and consumer protection organisations are entitled to bring collective claims for abatement and removal where a breach of competition law affects their members. Note: Section 33 (4) GWB does not entitle organisations to bring damages actions on behalf of their members.

Also, German procedural law allows for a joinder of parties on both the claimant and defendant side (*Streitgenossenschaft*). A joinder of parties requires that the joint parties are entitled or obliged for the same factual and legal cause, e.g. various customers affected by a cartel arrangement *versus* various participants of a cartel. However, joinder of parties does not necessarily result in a single uniform decision regarding the joined parties. Rather, even though the various claims are litigated in the same proceedings, the joined parties and their respective claims remain legally independent.

An increasing trend in German competition law litigation is the collective enforcement of claims by special purpose vehicles which aggregate and take assignment of cartel damage claims (see question 8.3).

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

One relevant factor to determine the competent Regional Court is the domicile or registered seat of the defendant. A German court has jurisdiction over competition law claims brought against one or more defendants domiciled in the relevant court district.

Another important jurisdictional factor for competition law claims is the special jurisdiction of tort under Section 32 German Code of Civil Procedure (“ZPO”) and Article 7 (2) of regulation (EU) 1215/2015. Under these provisions, jurisdiction can lie with the courts at the place where the tortfeasor acted or where a legally protected interest has been impaired. Therefore, in the context of claims relating to a breach of competition law, actions can be brought before those German courts in whose district the anti-competitive conduct was committed or where it produced its effects.

In addition, all EU-based defendants can be jointly sued for damages in any EU Member State where one of them is domiciled according to Article 8 (1) of regulation (EU) 1215/2015.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Germany is a claimant-friendly and popular European venue for cartel damages claims. This development has its roots in the early 90s when the first significant claims for damages were awarded by German courts and was further fostered by the 2005 reform of the GWB, which introduced a set of rules that significantly improved the conditions for private competition litigation in Germany. Furthermore, the jurisprudence of the German Federal Court of Justice has also significantly contributed to rendering Germany one of the most interesting venues for bringing cartel damages claims, e.g. by establishing legal presumptions in respect of the effects of cartels and the existence of cartel damages. The extensive jurisprudence that exists in the meantime provides significant legal certainty and allows claimants to pinpoint any of the potential procedural risks and anticipate the likely outcome of their cases. Last but not least, the comparatively short duration of judicial proceedings is appealing to many claimants.

1.8 Is the judicial process adversarial or inquisitorial?

The German judicial process is in essence adversarial. As a general rule, the court may consider only the facts and assertions presented (and as the case may be proven) by the parties and may not look for evidentiary material on its own. For this purpose, Section 138 ZPO stipulates that the parties are to make their declarations as to the facts fully and completely and are obliged to tell the truth. Deliberately making false factual allegations qualifies as a crime.

The general principle of an adversarial process is somewhat limited by the court’s duty of constructively moderating the proceedings, i.e. to ensure that the parties (i) make full declarations regarding all material facts, (ii) designate sources of evidence, and (iii) make the appropriate demands for relief. It is thus usual that a court would provide the parties with certain hints and indications regarding potential gaps in their factual allegations or submissions of evidence.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available.

2.2 What interim remedies are available and under what conditions will a court grant them?

Interim remedies are available both as preventive measures as well as interim remedies for abatement and removal. They require that the claimant can convince the court of the urgency of the matter, which, in practice, is only conceivable in respect of claims for abatement and removal: interim remedies for performance (in particular damages compensation or supply) are only available under very exceptional circumstances as the claimant would be awarded remedies which are not interim but final. This is usually only possible in a final judgment. Therefore, they are only conceivable if the failure to supply is expected to cause the claimant such significant harm that he is no longer able to continue the main proceedings.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Final remedies are dependent on the claimant’s request.

Under Section 33 GWB, a claimant can lodge a claim for abatement and removal, ask for injunctive relief, or – under Section 33a – claim damages. As a special subcategory to those, there are also claims for performance.

The court will award damages to the extent that the claimant has been affected by a culpable (i.e., at least negligent) competition law infringement, which inflicted harm on the claimant.

Claims for abatement and removal as well as for injunctive relief are successful if the claimant is affected by a culpable competition infringement which is still ongoing, so that the restrictions can be removed.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Damages are an available remedy under German law. However, German law does not provide for exemplary, punitive or treble damages or the like. Rather, German law is based on the concept of simple but full compensation. The courts are free to estimate the approximate amount of damages, provided that the court disposes of sufficient facts in order to make a reasonable and resistant estimate.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Payments to competition authorities or other payments or payment commitments are not taken into account when calculating the award. As a general rule, German civil law/tort law aims at compensating the claimant by putting him in the situation he would have been in if the harmful event had not occurred. This is also the approach taken in Article 3 (2) EU Damages Directive.

4 Evidence

4.1 What is the standard of proof?

According to the general standard of proof, the claimant has to fully convince the court beyond any reasonable doubt in regard to all requirements of a claim, including the chain of causation. However, there are some exceptions to this general rule. First of all, one will have to mention the binding effect of decisions by the European Commission or one of the national competition authorities within the EU here. Moreover, according to Section 287 ZPO, the court is allowed to estimate the amount of damages if the claimant is able to show that all other requirements for a successful damages claim are met but is unable to specify the amount of harm suffered.

4.2 Who bears the evidential burden of proof?

As a general rule in German Civil Procedure, a party bears the burden of proof for all facts which are to its benefit, i.e. the claimant bears the burden of proof for all facts that are required to successfully claim damages and the defendant bears the full burden of proof for all defences against the substantive claim. However, there may be a shift in the burden of proof in certain situations; for instance, when evidential presumptions apply (see question 4.3).

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Claimants benefit from a number of legal presumptions which have been developed by the courts over time, such as (i) the presumption that dealings with the cartelists during the cartel period can generally be considered to be affected by the cartel, and (ii) the presumption that cartels generally result in higher prices (now explicitly regulated in Section 33a (2) GWB).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are five different forms of evidence admissible under the ZPO, namely documentary evidence, witness testimony, expert testimony, inspection by the court (not of practical relevance in competition litigation) and party testimony.

Documentary evidence is the most important form of evidence in German litigation. As a general rule, all documents are deemed to be authentic until their authenticity is disputed by a party.

Witnesses are heard individually and give evidence during the oral hearing in front of the court and the parties.

Proof by formal party testimony does exist, but is secondary to other forms of evidence and plays only a minor role in German litigation.

Upon request of a party, the court may appoint an expert. Court-appointed experts provide strictly independent and neutral advice to the court in matters where the judges are lacking expertise. Prior to the oral hearing, each party can submit the written expert opinion of its own party-appointed expert. However, these opinions are not considered independent expert testimony but rather part of the respective party's statement of facts.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The newly introduced Section 33g (1) GWB provides for a substantive claim for access to documents/information. This claim exists at any time (provided that the claimant can show that he might be entitled to damages caused by the cartel) and also before proceedings have begun. The claimant has to identify the required documents as accurately as possible with reasonable effort. However, if such a request for documents is refused, the demanding party has no choice but to start separate proceedings against the refusing (third) party for the disclosure of the relevant documents.

Under Section 33g (2) GWB, the defendant is also able to claim access to documents which are necessary to defend against a claim for damages if the proceedings have already begun. Importantly, however, the claim pursuant to Section 33g (2) GWB is only available to defendants once legal proceedings have been initiated against them.

Moreover, pursuant to Section 142 ZPO together with Sections 421 *et seqq.* ZPO, the claimant has a procedural right to request the defendant to present documents in his possession during the court proceedings. This right exists in particular if the claimant can demonstrate a legal interest in exploring the content of certain documents, or if the defendant has referred to the content of those documents in his own submissions.

The civil courts can request access to records of the FCO and/or the public prosecution authorities according to Sections 474 (1) German Code of Criminal Procedure at any time when this is required in the interest of justice.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

If a duly summoned witness does not appear, the court can impose a coercive fine on that witness. In the event of a witness failing to appear in several instances, a court may also impose compulsory attendance.

Certain persons are entitled to refuse to testify. This, *inter alia*, includes persons – such as lawyers, tax advisors and certified accountants – to whom facts are entrusted by virtue of their profession, provided that their testimony would concern facts to which their professional confidentiality obligation refers. Furthermore, a witness may also be entitled to refuse to testify to the extent that the witness would not be able to answer a given question without disclosing trade secrets or to the extent that his testimony could result in the witness being prosecuted for a criminal or administrative offence.

There is no US-style cross-examination of witnesses in German civil proceedings. The questioning of witnesses is primarily conducted by the court. However, the parties and their attorneys are allowed to ask questions to the witness.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Yes. If damages are claimed for an infringement of a provision of the GWB or of Article 101 or 102 TFEU according to Section 33b GWB, the court is bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the German competition authority, the Commission of the European Community, or the competition authority or court of another Member State of the European Community. Therefore, the claimants in follow-on actions do not have to show that there was an infringement of competition law. However, the probative value of such a decision is limited to the finding of anti-competitive behaviour and does not discharge the claimant from its burden of proof in respect of the causation and quantification of the damage.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Under German law, parties are generally not obliged to disclose any information or documents at all. However, as described above, Section 142 ZPO and § 33a GWB (in conjunction with Section 89b GWB) allows the court to order the parties to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference.

However, the disclosure of documents can be restricted if the court concludes that disclosure of a certain piece of evidence would be disproportionate. In its assessment the court will in particular have to consider whether the evidence being disclosed contains confidential information, especially concerning any third parties, and whether the required information can be obtained from third parties.

Moreover, according to Section 33g (5) GWB, certain documents contained in the file of a competition authority may only be disclosed after the authority has closed its proceedings (i.e.: (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). The disclosure of leniency statements and settlement submissions are generally prohibited by Section 33g (4) GWB.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

According to Section 90 (1) GWB, the courts have to inform the FCO about any pending competition litigation proceedings, and are obliged to submit any written pleadings or other relevant documents if requested to do so by the FCO. Section 90 (2) GWB allows the FCO to send representatives, who are allowed to appear and plead in court as well as to question witnesses, experts or the parties. The FCO regularly makes use of this right as *amicus curiae*.

If the damages claim deals with an infringement of Article 101 or 102 TFEU, the European Commission is allowed to submit written statements and plead in oral hearings according to Section 90a GWB. This provision, however, has not played any role in private competition litigation in Germany in the past.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

No. There is no justification/public interest defence available in damages proceedings. However, damages can only be awarded if the defendant has culpably infringed the competition laws. There is no such infringement if the defendant's conduct was justified.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Yes, according to Section 33c GWB the passing on defence is available. The defendant bears the burden of proof for showing that the claimant was able to pass through its damages to its own customers if the claimant is a direct customer. As this requires detailed knowledge of the claimant's relationship with its customers, in particular its pricing policy, it is very difficult for the defendant to fulfil this burden of proof. Therefore, under Section 33c (5) GWB, the court is allowed to estimate the amount of damages which have been passed on if the defendant has shown and proven verifiable facts that a passing on of damages was likely. Nevertheless, an economic expert opinion that focuses on market structure and market conditions which have made it possible to pass on damages will be inevitable in such case.

If the claimant is an indirect purchaser there is a rebuttable presumption to the benefit of that indirect purchaser that damages have been passed on. However, this presumption is not available for the defendant.

Finally, it should be emphasised that the practical relevance of the passing on defence has been and will likely be limited in private competition litigation in Germany. This results in the first place from the extraordinary high standards that defendants must meet in order to prove the existence and scope of a potential passing on. Secondly, to the extent that the claimant can base its claims on the principle of unjust enrichment (which will normally be the case in follow-on actions), according to the jurisprudence of the German Federal Court of Justice the passing on defence cannot apply as a matter of law.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Defendants can serve a third party notice to other cartel participants – who are jointly and severally liable for the totality of the damages – together with the request to join the dispute as intervener in support of the defendants, according to Section 72 ZPO. Third party notices serve the purpose of securing contribution claims against the cartel participants not directly involved in the litigation.

Once third party notice has been served, the recipient can decide whether it wishes to join the lawsuit as intervener. In any event, the outcome of the litigation will be binding for the third party recipient once formal notice has been given. Thus, even if the third party decides not to join the dispute, it has to accept the factual and legal findings of the court and cannot refute them in a subsequent litigation.

As an intervener, the joining third party is not formally a party to the dispute. However, the intervener has the right to file its own motions and submissions in the proceedings as long as they are not in opposition to the procedural actions taken by the main party.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

According to Section 33h (1) GWB, the regular knowledge-based limitation period is five years. Under Section 33h (2) GWB, the limitation period begins from the end of the year in which (1) the claim arose, (2) the claimant obtains knowledge of the circumstances giving rise to the claim, the fact that these circumstances constitute an infringement of competition law, and of the identity of the defendant, or would have obtained such knowledge if he had not shown gross negligence, and (3) the infringement has ended.

Moreover, claims for damages become statute-barred (1) notwithstanding knowledge or a grossly negligent lack of knowledge, 10 years after they arise and the infringement ended, and (2) regardless of how they arose and of knowledge or a grossly negligent lack of knowledge, 30 years from the date on which the act, breach of duty or other event that caused the damage occurred, whichever period ends first.

According to Section 33h (6) GWB, the limitation period of a claim for cartel damages is suspended if proceedings are initiated by the FCO, the European Commission or the competition authority of another Member State of the EU. The suspensive effect ceases one year after these proceedings have been closed.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The average duration of civil litigation proceedings in Germany is between eight and 10 months. However, due to the complex economic issues involved and the regular need for expert evidence in relation to damages calculations, cartel damages actions will take significantly more time in the first instance, especially where international cartel arrangements with multiple participants are concerned.

If the claimant merely seeks a declaratory judgment, first instance proceedings will normally be closed within 15–20 months.

No specific forms of expedited proceedings exist within main litigation proceedings. However, expedition of proceedings is a fundamental principle of German procedural law and judges are expected to ensure at every stage of the proceedings that the lawsuit is conducted expeditiously, by both the court and the parties.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Prior to an oral hearing, claimants can withdraw their claims at any time without the court's permission (e.g., following an out-of-court settlement). However, once an oral hearing has taken place, withdrawal of the action requires the defendant's consent.

The parties to the dispute may also mutually discontinue the lawsuit by way of a court settlement according to Section 278 (6) ZPO. Such settlement is made by either submitting to the court a settlement proposal in writing or by accepting a settlement proposal made by the court.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Collective settlements are generally possible, but they are limited to the parties of the court proceedings (see question 1.5). Class actions or representative actions do not exist under German law so that it is also not possible that a representative body would enter into settlement negotiation or a settlement agreement on behalf of other claimants.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The court allocates the legal costs, i.e. the court fees and expenses, as well as the statutory attorney fees, on a *pro-rata* basis in relation to the outcome of the case. As a general rule, the legal costs must be borne by the unsuccessful party.

8.2 Are lawyers permitted to act on a contingency fee basis?

Under statutory German law, contingency fees are allowed in exceptional circumstances only. They are permitted if the claimant would – due to his economic situation – be unable to assume the statutory attorney fees and would thus be prevented from asserting his rights without the possibility of a contingency fee agreement.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party litigation funding is permitted under German law and several companies offer these services in the well-established German funding market. Funders usually assume the financial risk associated with a lawsuit in exchange for a share of the potential proceeds.

A more recent trend in German competition law litigation is the appearance of special purpose entities which aggregate and take assignment of cartel damage claims and then litigate them. However, this trend could be somewhat slowed down by the cement cartel ruling of the Higher Regional Court of Düsseldorf of 18 February 2015. The court found that the claimant vehicle's mechanism for assigning and collecting claims was illegal, as the vehicle did not have sufficient funds to pay the defendants' costs if the claim failed.

9 Appeal

9.1 Can decisions of the court be appealed?

German procedural law provides for a two-tier appellate system

against judgments, namely a first appeal (*Berufung*) and a second appeal (*Revision*). While in the framework of the *Berufung* the entire case can be reassessed, the *Revision* is confined to a review of questions of law.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The FCO offers immunity from or a reduction in fines for leniency applicants in administrative proceedings. However, regardless of whether the leniency application was successful or not, the leniency applicant will not be granted immunity from civil damages claims.

However, according to Section 33e (1) and (3) GWB, the liability of a – jointly and severally – liable immunity recipient is limited to harm suffered by its direct or indirect purchasers or providers. Other injured parties can only claim compensation from the leniency applicant where full compensation cannot be obtained from the other cartel participants.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

As no pre-trial discovery exists in Germany, the parties are, in general, not obliged to disclose any documents whatsoever. In those cases in which the claimant has a right to demand disclosure of certain information/documentation (see question 4.8) certain additional restrictions apply in that Section 33g (4) GWB prohibits the disclosure of the leniency application itself, as well as settlement agreements. Evidence that is available irrespective of the competition authority's proceedings is not protected even if it is contained in the authority's file.

In addition, prior to the closing of public cartel investigations evidence is protected from being disclosed if it either contains (i) information that has been compiled for the purposes of the ongoing administrative proceedings, (ii) communication from the competition authority to the parties of the proceedings, or (iii) settlement submissions that have been withdrawn.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The EU Damages Directive will not have a significant impact on competition litigation in Germany as German law already either contains many similar provisions, or the required instruments have been adopted by settled case law. The only significant changes are the prolongation of the limitation period from three to five years and the now statutory claim for access to information/documentation.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

Germany had already enacted provisions which anticipated the provisions of the EU Damages Directive. Nevertheless, Germany introduced the EU Damages Directive in the GWB only partially by changing the numbering of the articles in the GWB. Germany was more reluctant on the transition of all rules in order to avoid any retroactive effect of the new rules. In Germany, the relevant date as contemplated in Article 22 EU Damages Directive is 26 December 2016.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

In contrast to prior amendments of the GWB, the 9th amendment to the GWB contains specific transitional regulations for cartel damages claims and thus avoids legal uncertainties in this respect. The 9th amendment to the GWB largely follows the requirements of Article 22 EU Damages Directive, in that substantive law changes only apply to claims that arise after 26 December 2016 whereas procedural law changes shall apply in all cases in which the writ of summons was served before 26 December 2014. In respect of limitation, the new rules apply to all claims which were not already time-barred on 26 December 2016 while the beginning/suspension of the limitation periods shall follow the former rules.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The German government reached a political agreement to introduce a general framework for collective redress in terms of model case proceedings (*Musterfeststellungsverfahren*) which is expected to take effect by November 2018. Under the model case proceedings, associations for consumer protection which have to be registered as “certified” may bring an action for declaratory relief in which certain factual and legal issues which are common to a number of potential claims will be decided. They need a group of 50 registered “Opt-In” claimants. The judgment would be binding for all other claimants in a mass damage situation. The background of this bill is the “Diesel scandal” but also certain cartels have instigated the lawmakers' interest. However, any individual claimants would themselves have to bring an action for payment. The government encourages the consumer associations to reach settlements with the defendants which would be binding for all claimants registered with the association at the time of the settlement.

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Greece

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Law 3959/2011 (hereinafter the “Law”), as amended, is the core competition law in Greece. Any breach of its antitrust provisions (i.e. articles 1 and 2 which mirror articles 101 and 102 TFEU, respectively) as well as primary EU legislation on competition law raises the following claims, which may be brought before the national competent civil courts (*private enforcement*):

- a claim for declaring a contractual relationship as null and void (case no. 928/2006 issued by the Patras Court of Appeal);
- a claim for damages by persons who have suffered injury due to antitrust violations. Damages may be discerned into pecuniary and non-pecuniary/moral damages. Following the seminal cases *Courage* and *Manfredi*, issued by the European Court of Justice, articles 101 and 102 TFEU are directly applicable and produce direct effects in the sense that any individual can claim compensation for the harm suffered due to antitrust infringements. Similarly, such right to damages is also recognised under Greek jurisprudence regarding violations of articles 1 and 2 of the Law (case no. 1286/2011 issued by the Supreme Court). In addition, a right to full compensation is stipulated in Law 4529/2018 which implemented into Greek law the Antitrust Damages Directive 2014/104/EU;
- according to the prevalent view of Greek legal theory, an individual may ask the competent civil courts to order the cessation and the non-recurrence in the future of an infringement of antitrust laws; and
- an individual may submit a complaint concerning antitrust violations before the Hellenic Competition Commission (hereinafter the “HCC”), which is the competent authority for the public enforcement of competition law. The HCC may, upon examination of the complaint, impose administrative fines (*public enforcement*).

This chapter shall solely cover aspects of private enforcement of competition law in Greece.

1.2 What is the legal basis for bringing an action for breach of competition law?

- Articles 1 and 2 of the Law, as well as articles 101 and 102 TFEU, constitute the legal basis for bringing actions for declaratory judgments. Article 70 of the Greek Code of Civil Procedure (hereinafter the “GCCP”) recognises the right to such action, provided that certain conditions are met (i.e. such

action must concern a specific legal relationship and requires a legal interest on the claimant’s part especially worthy of protection).

- Law 4529/2018 constitutes the legal basis for bringing claims for damages. In particular, any person (natural or legal) irrespective of whether he is a direct or indirect customer of the infringer and has suffered harm due to an infringement of EU and/or Greek competition law is entitled to full compensation.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

As aforementioned, the legal basis may derive from both national and European law, whereas no regional law exists.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

At present, there are no such specialist courts in Greece. Greek civil courts, namely the Magistrate’s Court or the Court of First Instance, are competent, depending on the value of the claim, to hear private disputes due to infringements of competition law.

It should be noted that article 13 of the recently voted Law 4529/2018 provides for the establishment of specialised chambers in the Athens Courts of First Instance and the Athens Court of Appeal. These courts shall comprise of judges specialised in competition or EU law, whilst their territorial competence shall cover the entire Greek territory. Such provision shall apply to lawsuits filed from 16 September 2018 onwards.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

According to articles 3, 62 and 68 GCCP in conjunction with article 3 of Law 4529/2018, any person (individual or legal entity, direct or indirect purchaser from the infringer, irrespective of nationality, associations of persons and entities without legal personality), who has suffered damage by another party acting unlawfully and in fault, is entitled to bring an action against that party which caused the damage. This is in line with articles 3 and 12 of the Antitrust Damages Directive 2014/104/EU.

Article 74 GCCP provides for the possibility of a joinder if either the claimants' rights for damages arise from the same factual and legal basis or the object of the dispute consists of similar claims based on a similar factual and legal basis.

Class/collective actions are not provided in Greek law for competition law cases. However, article 10(16) of Law 2251/1994, as amended, which is the basic legislative regime for consumer protection, provides for representative actions. Such actions may be brought for the protection of the general interests of the consuming public by a consumers' union, should certain requirements be fulfilled.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Subject matter jurisdiction depends on the value of the claim. The Magistrate's Court is primarily competent to hear all disputes which can be assessed in monetary terms, where the value of the claim does not exceed €20,000.00, whereas the respective thresholds for Single-Member Court of First Instance vary from €20,001.00 to €250,000.00. The Multi-Member Court of First Instance shall adjudicate on all disputes for which the Magistrate's Court and the Single-Member Court of First Instance are not competent (article 14 GCCP *et seq.*).

Concerning territorial jurisdiction, article 22 GCCP provides for a general jurisdiction rule, according to which a defendant may be sued in the courts of his/her residence/domicile. In addition, article 35 GCCP, in compliance with the recast Brussels Regulation (EU Regulation 1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, stipulates that claims in respect of torts may be brought in the courts of the place where the harmful event occurred or may occur. It is up to the claimant to choose one of the foregoing venues.

As noted under question 1.4. above, from 16 September 2018 onwards, the specialised chambers in the Athens Courts of First Instance and the Athens Court of Appeal shall cover the entirety of Greece in terms of territorial competence.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

No, it does not.

1.8 Is the judicial process adversarial or inquisitorial?

Judicial process is adversarial in the sense that evidence is produced at the initiative of the parties, and procedural acts are initiated upon the litigants' diligence (article 106 GCCP *et seq.*).

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available.

2.2 What interim remedies are available and under what conditions will a court grant them?

The following interim remedies are available under the GCCP: (i)

surety; (ii) registration of a mortgage prenotation; (iii) conservative attachment; (iv) judicial sequestration; (v) interim hearing of claims; (vi) interim regulation of the situation; (vii) impoundment; (viii) release from impoundment; (ix) stock-taking; and (x) public deposit. Civil courts shall grant interim remedies:

- i. in case of urgency, or if the courts estimate that this is necessary for the prevention of imminent danger for the purpose of securing or preserving a right or for the purpose of regulating a situation; and
- ii. if it reasonably supposed that the measure will serve to temporarily protect a specific right in the need of protection.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

On the basis of the claims under question 1.1 above, the following final remedies may be awarded:

- a declaratory judgment declaring an anti-competitive agreement void; and
- damages, which include actual damages, loss of profit and interest calculated from the time the harm occurred until the time of the payment of the compensation, provided that the following requirements are met: (a) unlawful act; (b) liability attributed to the defendant (i.e. intent or negligence); (c) damages; and (d) a causal link between the unlawful act and damages.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Damages constitute an available remedy stipulated in Law 4529/2018 and aim to restitute the economic injury that the victim has suffered. Pecuniary damages relate to injury caused to goods that have an economic value and are in principle awarded in the form of monetary compensation, which covers both actual damages and loss of profit. In exceptional circumstances, pecuniary damages may be awarded in the form of "in natura restitution". Non-pecuniary damages are granted as a reasonable pecuniary satisfaction and cover moral damage (e.g. damage to legal personality, reputation, etc.).

In Greece, pecuniary damages are quantified on the basis of the actual losses and the loss of profits incurred by the claimant to the extent that there is a direct causal link between the infringement and the damage suffered. Since no specific economic method is applied by the Greek courts regarding quantification of harm, a useful tool to this effect may be the non-binding Commission's Communication and Practical Guide on [quantifying antitrust harm in damages actions](#), which was issued as a complementary measure to the EU Damages Directive. Non-pecuniary damages are calculated at the discretion of the court and should be reasonable.

In addition, Law 4529/2018 provides that in cases it is practically impossible or excessively difficult for the plaintiff to precisely quantify such damages on the basis of the available evidence the courts may award damages on the basis of likelihood, taking into consideration the kind and the extent of the infringement as well as the claimant's diligence in the collection and proper use of evidence.

The courts may ask for the assistance of the HCC, as *amicus curiae*, if it deems this to be appropriate.

Greek law does not provide for exemplary/punitive damages.

Private litigation for antitrust infringements in Greece is currently underdeveloped. In that regard, there are no notable cases to refer to since the awarded amounts by the courts are rather low.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

No, they are not.

4 Evidence

4.1 What is the standard of proof?

Greek civil courts must be satisfied about the truth of the parties' allegations "beyond reasonable doubt". However, in cases that the courts award interim measures, probability is sufficient regarding the veracity of allegations.

4.2 Who bears the evidential burden of proof?

The burden of proof lies with the party invoking the necessary factual elements in order to substantiate its claim or counterclaim.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Following the entry into force of Law 4529/2018, the following presumptions apply:

- i. in case a litigant party fails or refuses to comply with a disclosure order by the court or is unable to comply due to previous destruction of the evidence, the allegations of the requesting for the disclosure order party are considered to be proven;
- ii. a rebuttable presumption that infringements arising from cartels cause damages; and
- iii. a rebuttable presumption introduced in favour of the pass-on overcharge to an indirect purchaser should certain conditions be met (see question 5.2 below).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The means of evidence that may be invoked by the litigants before the civil courts are exhaustively listed in the GCCP and are, especially: confession; inspection; expert evidence; documents; litigants' examination; witnesses; and affidavits (i.e. sworn statements). As indicated above, expert evidence is an accepted means of evidence by the GCCP. It is noted that documentary evidence is the most important evidence in Greek litigation.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

There are no requirements on a lawyer's duty to ensure full disclosure under the GCCP. Parties are free to choose the documents they wish to disclose and file them with the trial bundles. In principle, any documents/means of evidence referred in an action, which support the factual allegations of a party, must be disclosed with that party's pleadings, within 115 days from the filing of the claim. Such evidence is also taken into account for the proof of the arguments of the opposing party.

Exceptionally, article 450(2) GCCP provides that a litigant may request the competent court to issue an order enforcing the other litigant or a third party (including the HCC) to produce documents in the latter's possession, which may provide evidence regarding the litigants. The requested party may deny such disclosure only for material reasons (e.g. professional secrecy, self-incrimination).

In addition, Law 4529/2018 regulates disclosure of evidence with regards to antitrust damages claims. In particular, upon request of the claimant who invokes specific evidence which is under the control of the defendant or a third party and provided that the claimant has submitted reasonably available evidence, which is sufficient for the substantiation of its claims for damages, the court may order the disclosure of evidence being in the control of the defendant or a third party. In addition, the court may order the claimant or the third party to grant access to the defendant with regards to evidence held by such parties. The court shall order the disclosure of evidence in accordance with the principle of proportionality. In that context, it shall consider: (i) the extent to which the request for disclosure is supported by the available facts and evidence; (ii) the extent and the cost of the disclosure; and (iii) whether the requested evidence includes confidential information.

Furthermore, Law 4529/2018 includes specific rules with regards to disclosure of evidence included in the file of the competition authority. In particular, the court may order the disclosure of evidence kept in such file, taking into account whether the request for disclosure is specifically justified, whether there has been already filed a claim for damages and the need for compliance with the provisions of competition law. Evidence consisting of leniency statements, settlement submissions or documents that include direct extracts of the above is inadmissible in actions for damages (black list). On the other hand, after the competition authority has closed its proceedings, the court may order the disclosure of: (i) documents and information drafted by a natural or legal person in the context of the proceedings before the competition authority; (ii) documents and information drafted by the competition authority; and (iii) withdrawn settlement submissions (grey list). Finally, other pieces of evidence which are included in the file of the competition authority and do not fall within the black or the grey list may be disclosed at any time.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses are not forced to appear under the GCCP. Following the recent amendment of the GCCP by virtue of Law 4335/2015, cross-examination of witnesses is exceptional since it may be conducted only following an order issued by the competent judge. Furthermore, each litigant may submit written sworn statements of witnesses which are accessible by the other litigant.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Article 16(1) of EU Regulation 1/2003 provides that national courts cannot take decisions running counter to the decision adopted or contemplated by the European Commission. Thus, the claimant in subsequent proceedings before national courts may rely on the European Commission's decision finding a breach of the competition rules as a binding proof.

Furthermore, pursuant to article 35(1) of the Law, any decisions issued by the Administrative Court of Appeal (i.e. competent court to hear appeals upon points of fact and law against decisions issued by the HCC) and the Council of State (its judicial review covers appeals against decisions issued by the Administrative Court of Appeal, only on points of law) have the force of "*res judicata*" and accordingly they are binding regarding their findings on whether an antitrust violation has occurred.

In line with the above, Law 4529/2018 stipulates that the courts are bound by final decisions (i.e. not subject to appeal) of either the national competition authority or the European Commission with regards to competition law infringements. Final decisions issued by other Member States constitute *prima facie* evidence with regards to the infringement.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As described in question 4.5 above, the requested party by virtue of article 450(2) GCCP is not obliged to disclose information that entails issues of commercial confidentiality. In addition, Law 4529/2018 lists confidential information among the factors which should be considered by the court for ordering disclosure of evidence.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

As per article 35(3) of the Law, courts of all jurisdictions which apply articles 101 and 102 TFEU may ask: (a) the European Commission to send them information in its possession or to formulate an opinion on matters pertaining to the application of EU competition law; and (b) the HCC to formulate an opinion on the above matters and on matters pertaining to the application of articles 1 and 2 of the Law.

In line with the above, Law 4529/2018 provides that with regards to the quantification of damages the courts may ask for the assistance of the HCC as *amicus curiae*, if it deems this to be appropriate.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

For events of *force majeure*, self-defence and reaction to illegal conduct, consent may be invoked by the defendant as grounds of justification. Public interest defence is not available under the GCC.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The defendant, bearing the relevant burden of proof, may invoke as a defence against a claim for damages the fact that the claimant raised the downstream prices to its customers and thus "*passed on*" all or part of the overcharge arising from the competition law infringement.

A rebuttable presumption is introduced in favour of the pass-on of the overcharge to an indirect purchaser provided that the latter proves that: (i) the defendant has breached EU and/or Greek competition law; (ii) competition law infringement resulted in the overcharging of the direct purchaser by the defendant; and (iii) the indirect purchaser bought the related to the infringement goods/services.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

There are no specific provisions regarding the intervention of a third party in competition law proceedings. Under the GCCP, a third party may intervene in support of a defendant if it has a legal interest (i.e. win the pending case).

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Law 4529/2018 provides for a five (5) year limitation period which starts to run after the injured party knows or is reasonably expected to know the antitrust infringement, the damage and the infringer's identity. In the event that the infringement ceased subsequently, the limitation period starts running as of the time the infringement ceased.

In any case, claims against the infringer are time-barred twenty (20) years following the cease of the infringement. The limitation period is suspended if a competition authority launches an investigation on the infringement or if proceedings are brought before the competition authority regarding the infringement. The suspension ends one (1) year after the infringement decision has become final or the proceedings have been otherwise terminated.

With regards to horizontal anti-competitive agreements (cartels), the limitation period for claims that are raised by a party other than direct or indirect buyers or suppliers and are directed against infringers who participate in leniency programmes commences following the fruitless enforcement or following the final rejection of the injured party's action against the other participants of such horizontal agreement.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Until the recent amendment of the GCCP by virtue of Law 4335/2015, the hearing of a case was normally scheduled after a period of approximately one year from the date the claim was lodged before the secretary of the competent court. Courts normally delivered their judgments within six months from the hearing. Nevertheless, it should be emphasised that the foregoing time-frames varied, especially in cases of adjournment of the hearing, which was a common practice in the Greek judicial system.

Following the recent amendment of the GCCP, which intends to accelerate the judicial proceedings, hearing of a case may take place within 160 days from the filing of the claim. It should be noted that such a timeline is indicative. Moreover, under the new legislative framework, it is not possible to postpone the hearing.

Finally, it is not possible to expedite proceedings in Greece.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Discontinuation of any action may be achieved in various ways, none of which requires the court's permission. With respect to settlement, the GCCP provides for judicial as well as extra-judicial settlement of disputes, according to which the parties are entitled to attempt to resolve their disputes at any time following the initiation of the legal proceedings (or even before such initiation in the case of judicial settlement) and before the issuance of a final court decision. Regarding extra-judicial settlement, the parties should conclude a settlement agreement and submit such agreement dated and signed by them before the presiding judge of the competent court, in order to have such agreement duly stamped and certified. Following this procedure, the trial is abolished. With respect to judicial settlement, if the parties reach an agreement, minutes of the mediation should be drawn and signed by the mediator, the parties and their lawyers in order to be filed with the court secretariat where the mediation took place.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As indicated under question 1.5 above, no class/collective actions are provided for competition law claims.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The general rule is that the losing party pays the legal costs. Nevertheless, in cases of partial winning and partial defeat, the court may allocate the legal costs in proportion to the extent of the success or defeat of each party. Finally, the court may set off the legal costs in cases where the interpretation of the applicable law is rather complicated.

8.2 Are lawyers permitted to act on a contingency fee basis?

In accordance with the Code of Lawyers, a lawyer may agree with his/her client to be remunerated on the basis of the outcome of the case or on any other criterion. However, such remuneration shall not exceed 20% of the value of the case.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding is not provided for in the Greek legal system.

9 Appeal

9.1 Can decisions of the court be appealed?

Judgments issued by the Court of First Instance may be appealed against before the Court of Appeal on errors in law and in fact. An appeal may be filed by either the defeated party or the successful party, if its case has only partially been accepted. Following the issuance of a decision by the appellate court, this decision may be contested by means of a cassation before the Supreme Court, but only on the basis of errors in law.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Decision no. 526/VI/2011, issued by the HCC, provides for leniency in Greece. Law 4529/2018 does not attribute immunity from civil claims to leniency applicants. In addition, Law 4529/2018 derogates from the principle that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law with regards to immunity recipients. In that case, the injured parties may claim compensation from the leniency applicant where full compensation cannot be obtained from other cartel participants.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Law 4529/2018 prohibits disclosure by a court order of leniency statements and settlement submissions on follow-on actions. In addition, Greek courts should consider as well the joint position of all ECN Competition Authorities following the *Pfleiderer* judgment, according to which leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Following the transposition of the EU Damages Directive into Greek law, the following reforms to damages litigation have occurred in Greece:

- indirect purchasers' burden of proof is alleviated by the adoption of a rebuttable presumption regarding the passing on of overcharges upon fulfilment of certain conditions;

- proof of compensation for cartel victims' is facilitated, given that a rebuttable presumption is established, according to which cartels cause harm;
- easier access to evidence for victims is provided, since victims are entitled to ask for disclosure of categories of evidence; and
- damages may be assessed on the basis of likelihood in cases it is practically improbable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

Law 4529/2018 is in line with the requirements of the Antitrust Damages Directive.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Law 4529/2018 has followed the Antitrust Damages Directive since its substantive provisions have applied from 27 December 2016, whilst its procedural provisions apply to civil damage actions filed from 26 December 2014.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

No, there are not.



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LAW OFFICE

Stavropoulos & Partners Law Office is a partnership of lawyers established in Athens which offers a wide range of legal services, with a particular emphasis on EU & competition, tax & tax litigation, mergers & acquisitions, corporate & commercial, data protection and dispute resolution. Our team consists of highly competent and experienced professionals working closely together to deliver excellent legal services. With a successful track record of 27 years of operation our law firm has gained a well-established position and a good reputation in the Greek legal market. We are privileged to serve on a regular basis companies which are considered as "blue chip" internationally, but also have vested and continuous interests and activities in Greece, handling complex and important work that requires a high level of expertise and perseverance. Our clients praise our commitment and place their trust in us by maintaining longstanding relationships. Our main target is to successfully meet the increasing demands of our clientele with a high degree of dynamism, flexibility and close personal contact.

Ireland



Richard Ryan



Patrick Horan

Arthur Cox

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The Competition Act 2002 as amended (the “**Competition Act**”) contains two main prohibitions:

- **Prohibition on anti-competitive arrangements between undertakings:** Section 4(1) of the Competition Act prohibits and renders void all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State, including those which:
 - fix prices;
 - limit or control production or markets;
 - share markets or sources of supply;
 - apply dissimilar conditions to equivalent transactions with other trading parties; and
 - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts (e.g. tying).
- **Prohibition on abuse of dominance:** Section 5 of the Competition Act prohibits the abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State. Such abuse may, in particular, consist in:
 - directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - limiting production, markets or technical development to the prejudice of consumers;
 - applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
 - making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

These prohibitions are broadly similar to, and are modelled on, the prohibitions contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (“**TFEU**”).

As regards civil proceedings, sections 14(1) and 14A(1) of the Competition Act provide that aggrieved persons and the Competition and Consumer Protection Commission (the “**CCPC**”) (or the Commission for Communications Regulation, hereafter “**ComReg**”) respectively have a right of action against:

- any undertaking which is/was a party to behaviour prohibited by sections 4 or 5 of the Competition Act or Article 101 or 102 TFEU; and
- any director, manager or other officer of any such undertaking, or any person who purported to act in such capacity, who authorised or consented to such behaviour.

The range of remedies available is set out in Section 14 of the Competition Act and includes:

- declarations;
- injunctions;
- damages (for aggrieved persons but not for the CCPC/ComReg);
- orders requiring a dominant position to be discontinued; and
- orders requiring the undertaking to adopt such measures for the purpose of it ceasing to be in a dominant position or securing an adjustment of that position including the sale of assets.

As regards criminal proceedings, sections 6 and 7 of the Competition Act make it an offence to breach sections 4 or 5 of the Competition Act or Article 101 or 102 TFEU. The CCPC investigates alleged breaches of the Competition Act and can either itself bring a summary prosecution before the District Court or, in more serious cases, refer a case to the Director of Public Prosecutions (“**DPP**”) for prosecution on indictment. Section 8 of the Competition Act sets out the penalties for those found guilty of offences under sections 6 or 7 of the Competition Act.

The responses below are limited to a consideration of civil aspects of competition litigation.

1.2 What is the legal basis for bringing an action for breach of competition law?

Sections 14 and 14A of the Competition Act. Follow-on actions for damages are also governed by the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017 (the “**Damages Regulations**”), which transpose Directive 2014/104/EU on Antitrust Damages Actions into Irish national law. However, the Damages Regulations do not apply to infringements of competition law that occurred before 27 December 2016.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

National law: sections 14 and 14A of the Competition Act allow for the bringing of claims for breaches of sections 4 or 5 of the Competition Act and/or breaches of Articles 101 or 102 TFEU.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There is no specialist competition court in Ireland. Civil competition cases are heard before the Circuit Court or the High Court. In general, the Circuit Court has jurisdiction to hear claims having a monetary value not exceeding €75,000. The High Court has original jurisdiction to hear virtually all matters irrespective of amount.

However, a statutory instrument, *Statutory Instrument 130/2005 The Rules of the Superior Courts (Competition Proceedings) 2005* (“SI 130/2005”), has amended the Rules of the Superior Courts by introducing a High Court Competition List and providing for procedures that apply to the Competition List. As a result, a Judge of the High Court is designated to hear competition law cases and there are specific procedural rules which apply to cases entered into the High Court Competition List.

Proceedings that may be entered into the Competition List include:

- (a) proceedings in exercise of a right of action conferred by the Competition Act on a person aggrieved in consequence of any behaviour prohibited by sections 4 or 5 of the Competition Act;
- (b) proceedings in exercise of a right of action conferred by the Competition Act on the CCPC/ComReg in respect of any behaviour prohibited by sections 4 or 5 of the Competition Act or by Articles 101 or 102 TFEU;
- (c) an appeal against the making of a declaration by the CCPC under section 4(3) of the Competition Act (such declarations are similar to European Commission block exemption regulations);
- (d) an appeal against any determination of the CCPC under Irish merger control rules to either block a transaction or clear it subject to conditions (other than in the case of media mergers);
- (e) proceedings for judicial review of a decision of the CCPC;
- (f) proceedings for an injunction to enforce compliance with the terms of a commitment or determination, or of an order made by the Minister for Jobs, Enterprise & Innovation under section 23(4) of the Competition Act (relating to media mergers);
- (g) proceedings seeking the application of Articles 101 or 102 TFEU;
- (h) proceedings for relief at common law in respect of a condition or covenant in any agreement alleged to be unreasonably in restraint of trade; and
- (i) any other proceedings which concern the application of a provision of the Competition Act, of Regulation (EC) 1/2003 or of Articles 101, 102, 106, 107 or 108 TFEU.

The procedural rules for the Competition List are intended to expedite competition proceedings and provide for enhanced case management. Matters covered by those procedural rules include:

- pre-trial procedures, including directions hearings, motions and applications, interrogatories and case management;
- the use of pre-trial conferences and questionnaires;
- court books;
- the electronic filing and serving of documents;

- exchange of documents and evidence; and
- the appointment of experts to assist the court, particularly in relation to economic matters.

Competition issues may also be raised in cases not entered in the Competition List. In *Ski Apparel v Revolution Workwear et al.* [2013] IEHC 289, for instance, which concerned a dispute involving an Irish distributor of Ski Apparel’s products (clothing) and in which it was argued that a non-compete was anti-competitive, Judge Laffoy said “*application of competition law, both at European and at national level, is a specialised discipline and, understandably, there is a special Competition Case List in the High Court. Notwithstanding that, competition law issues find their way into cases listed elsewhere in the High Court*”.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Section 14(1) of the Competition Act provides that “*any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5, or by Article 101 or 102 of the Treaty on the Functioning of the European Union, shall have a right of action under this subsection for relief*”. “Aggrieved persons” include natural and legal persons.

Section 14A(1) of the Competition Act provides a right of action to the CCPC (or ComReg) in respect of behaviour prohibited by sections 4 or 5 of the Competition Act or by Articles 101 or 102 TFEU.

Follow-on actions are facilitated by the Damages Regulations. Regulation 8 provides that an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be irrefutably established for the purposes of an action for damages, while the final decision of a competition authority in another Member State may be presented as at least *prima facie* evidence that an infringement has occurred.

Prior to the transposition of Directive 2014/104/EU on Antitrust Damages Actions, a provision in the Competition (Amendment) Act 2012 already provided that a finding by an Irish court of a breach of sections 4 or 5 of the Competition Act, or Articles 101 or 102 TFEU, will be regarded as *res judicata* (*i.e.* already adjudicated and unnecessary to be considered again) in any subsequent civil proceedings. Accordingly, a plaintiff in a follow-on action does not have to prove the infringement of competition law occurred and only has to prove causation, loss and the quantum of damages that they are entitled to if successful.

There is currently no procedure in Ireland for the taking of class actions seeking damages, as evidenced by the large volume of individual cases taken in the Irish courts on foot of the European Commission’s decision in the *Trucks* cartel. In practice, parties involved in related actions may agree to one action proceeding as a “pathfinder case” and the other parties (including defendants) may agree to be bound by the outcome of the “pathfinder case”, although there is no obligation on the parties to take such an approach. There have been calls for reform to facilitate the taking of collective/related actions in Ireland, including in a report by the Law Reform Commission published in 2005. However, there are no imminent proposals to introduce such a system.

Representative bodies may bring representative actions on behalf of their members seeking injunctive or declaratory relief, but not damages.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The jurisdiction of certain types of civil claims involving defendants who are domiciled in an EU Member State (apart from Denmark) is governed by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast) (“**Brussels Regulation**”) (which replaced the previous version, Regulation (EU) 44/2001, with effect from 10 January 2015). In summary, in such cases, a defendant may be sued before an Irish court if it is domiciled in Ireland. Alternatively, a defendant may be sued in an Irish court if the anti-competitive behaviour, which is the subject of the complaint, is alleged to have occurred there. A defendant may also be sued in an Irish court if the relevant damage occurred, or will occur there. If these criteria are met then it is likely that the Irish courts will have jurisdiction. In addition, where the parties have agreed that the courts of Ireland are to have jurisdiction to settle any disputes arising in connection with a particular legal relationship, those courts have jurisdiction, unless the agreement is null and void.

Ireland is a party to the Brussels Convention between EU Member States and Denmark and to the Lugano Convention between EU Member States and the members of EFTA, Switzerland, Iceland and Norway. Those Conventions apply similar rules which govern the jurisdiction of certain civil claims involving defendants in those countries.

Where the rules of the Brussels Regulation, the Brussels Convention and the Lugano Convention do not apply, Irish common law jurisdictional rules are applicable. In summary, Irish courts can have jurisdiction under common law rules in the following situations:

- where the defendant has been duly served in Ireland;
- where the parties agree to the jurisdiction of the Irish courts;
- where a defendant submits to the jurisdiction of the Irish courts; or
- where service outside of Ireland has been performed in accordance with Order 11 of the Rules of the Superior Courts.

Order 11 applies to cases where a defendant is not present in Ireland but the case is so closely connected to Ireland or with Irish law that there is ample justification for it being tried in Ireland. Under Order 11, it is necessary to apply for leave of the High Court before documents can be served outside the jurisdiction. This ensures that service on defendants outside the jurisdiction is limited to cases where the court is of the view that it has jurisdiction to consider the particular dispute. The burden of proof is on the applicant to establish that it is a proper case for service under Order 11.

Civil competition law claims can be brought in Ireland before the Circuit Court or the High Court. In general, the Circuit Court has jurisdiction to hear claims having a monetary value not exceeding €75,000. The High Court has original jurisdiction to hear virtually all matters irrespective of amount. However, if a claim is brought in the High Court and the award falls within the jurisdiction of the Circuit Court (*i.e.* up to €75,000), the plaintiff may only be awarded costs applicable to an action before the Circuit Court.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

We are not aware of Ireland having a reputation for attracting claimant or defendant applications from other jurisdictions, although the ongoing litigation arising from the European Commission’s

decision in the *Trucks* cartel shows that Ireland continues to be an attractive venue for competition litigation generally.

1.8 Is the judicial process adversarial or inquisitorial?

Ireland is a common law jurisdiction and has an adversarial judicial process.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The range of remedies available before Irish courts is set out in Sections 14 and 14A of the Competition Act. They include interim measures.

2.2 What interim remedies are available and under what conditions will a court grant them?

The courts may grant interim relief in respect of private antitrust litigation in certain circumstances. Sections 14(1) and 14A(1) of the Competition Act provide for the grant of interim injunctions, interlocutory injunctions and injunctions of definite or indefinite duration. Interim injunctions can be granted for very limited periods of time and may be granted on an *ex parte* basis while interlocutory injunctions can last until the full hearing of a case. Applicants are required to provide an undertaking to ensure that the defendant will be properly compensated should they lose their case.

The grant of injunctions is at the discretion of the court. An injunction may be granted by the courts where:

- there is a fair question to be tried;
- damages would not be an adequate remedy; and
- the balance of convenience favours the award of the injunction.

The types of interim/interlocutory injunction available in Ireland include:

- prohibitory injunctions restraining a person from carrying out an act;
- mandatory injunctions to require a person to carry out an act; and
- *quia timet* injunctions which are granted to prevent an anticipated breach of legal rights.

It is more difficult to secure a mandatory injunction at an interlocutory stage than a prohibitory injunction. In *Lingham v Health Service Executive* [2005] IESC 89, [2006] 17 E.L.R. 137, which concerned an application for an interlocutory mandatory injunction, the Supreme Court stated that in such a case it is necessary for the applicant to show at least that he has a strong case and that he is likely to succeed at the hearing of the action.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Section 14 of the Competition Act provides for the following possible remedies:

- declarations;
- injunctions;
- damages (for aggrieved persons but not for the CCPC/ComReg);
- orders requiring a dominant position to be discontinued; and
- orders requiring the undertaking to adopt such measures for the purpose of it ceasing to be in a dominant position or securing an adjustment of that position including the sale of assets.

In addition, section 14B of the Competition Act, which was introduced by the Competition (Amendment) Act 2012, enables the CCPC or ComReg, following an investigation, to apply to the High Court to have commitments entered into by an undertaking made an order of court. A breach of those commitments would then constitute contempt of court by the undertaking. This provides the CCPC and ComReg with the option of bringing an investigation to a close by agreeing not to issue proceedings in consideration of the undertakings involved agreeing to do, or refrain from doing, such things as are specified in the commitments.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Regulation 4 of the Damages Regulations provides that persons who have suffered harm caused by an infringement of competition law have a right to full compensation for that harm, including the right to compensation for actual loss and for loss of profit, plus the payment of interest. The Damages Regulations deleted references to an entitlement to claim exemplary damages from Section 14 of the Competition Act. We are not aware of any Irish competition cases in the public domain where exemplary damages were previously awarded under Section 14.

The general principle underlying the award of ordinary damages is to compensate the injured party for the loss suffered as a result of the breach of competition law in question. As regards the intention of the defendant, in *Donovan v ESB* [1997] 3 IR 573 (SC), the Supreme Court held that “[the court] is not concerned with the motives or the intention of the party in default unless the question of exemplary damages arises”.

Section 14(4) of the Competition Act provides that, where an action is brought in the Circuit Court, any relief by way of damages, shall not, except by consent of the necessary parties in such form as may be provided for by rules of court, be in excess of the limit of the jurisdiction of the Circuit Court in an action founded on tort. This arises because the Circuit Court’s maximum jurisdiction in terms of damages to be awarded is €75,000. The jurisdiction of the High Court is unlimited.

Regulation 15 of the Damages Regulations provides that, if it proves practically impossible or excessively difficult to quantify the harm suffered on the basis of the evidence available, a court may estimate the amount of such harm. A national competition authority may, upon request of the court, assist that court in determining the quantum of damages. Regulation 15 also introduces a rebuttable presumption that cartel infringements cause harm for the purpose of actions for damages.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The CCPC does not have the power to impose fines.

The calculation of damages is based on the loss suffered by a plaintiff. Therefore, an Irish court is unlikely to take into account fines imposed by other competition authorities in the calculation of ordinary damages.

We are not aware of an Irish competition case in which a redress scheme was offered by the defendant to the plaintiff in respect of the infringement concerned in advance of determination of the proceedings. However, given that the general principle applicable to the calculation of damages is one of compensation for loss suffered, it is conceivable that a court could take into account if a redress scheme had been offered by the defendant and accepted by the plaintiff in determining the damages to be awarded in respect of the same matter.

4 Evidence

4.1 What is the standard of proof?

The standard of proof in civil competition actions in Ireland, whether brought by a private party or by the CCPC, is on the “balance of probabilities”. This means that the plaintiff is required to prove that his/her version of events is, on balance, more credible than that of the defendant. This is lower than the standard of proof applied in criminal cases which is “beyond a reasonable doubt”.

The Competition Act provides for a number of rebuttable presumptions which have an impact on the standard of proof in certain respects. The presumptions include:

- where a document purports to have been created by a person, it shall be presumed, unless the contrary is shown, that the document was created by that person and that any statement contained therein, unless the document expressly attributes its making to some other person, was made by that person;
- where a document purports to have been created by a person and addressed and sent to a second person, it shall be presumed, unless the contrary is shown, that the document was created and sent by the first person and received by the second person, and that any statement contained therein:
 - (a) unless the document expressly attributes its making to some other person, was made by the first person; and
 - (b) came to the notice of the second person;
- where a document is retrieved from an electronic storage and retrieval system, it shall be presumed, unless the contrary is shown, that the author of the document is the person who ordinarily uses that electronic storage and retrieval system in the course of his or her business;
- where an authorised officer who, in the exercise of ‘dawn raid’ powers has removed one or more documents from any place, gives evidence in any proceedings under the Competition Act that, to the best of the authorised officer’s knowledge and belief, the material is the property of any person, then the material shall be presumed, unless the contrary is shown, to be the property of that person; and
- where, in accordance with the above, material is presumed in proceedings to be the property of a person and the authorised officer concerned gives evidence that, to the best of the authorised officer’s knowledge and belief, the material is

material which relates to any trade, profession, or, as the case may be, other activity, carried on by that person, the material shall be presumed, unless the contrary is proved, to be material which relates to that trade, profession, or, as the case may be, other activity, carried on by that person.

In addition, in the context of criminal proceedings, the following presumption applies in respect of directors, managers or other similar officers, or persons who purport to act in any such capacity:

- where an offence under section 6 or 7 of the Competition Act has been committed by an undertaking and the doing of the acts that constituted the offence has been authorised, or consented to, by a person, being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person as well as the undertaking shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence. Where a person is proceeded against for such an offence and it is proved that, at the material time, he or she was a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, it shall be presumed, until the contrary is proved, that that person consented to the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under sections 6 or 7.

4.2 Who bears the evidential burden of proof?

The plaintiff bears the evidential burden of proof. The plaintiff must establish that he has suffered harm by reason of the wrong complained of. The courts favour the “but for” test in determining factual causation.

See question 5.2 below for a discussion of the burden of proof in the context of passing on.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Competition Act provides for a number of rebuttable presumptions in relation to evidence that apply in proceedings brought under the Competition Act. Please see question 4.1 above for further details.

Regulation 15(3) of the Damages Regulations provides for a rebuttable presumption that cartel infringements cause harm for the purpose of an action for damages. We are not aware of the concept of presumption of loss being raised in cartel cases in Ireland before the introduction of the Damages Regulations.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The following forms of evidence are generally accepted by the courts:

- oral evidence: the primary form of evidence in trials in Ireland is oral evidence where witnesses are examined by their own lawyers and cross-examined by the opposing party’s lawyers;
- written evidence: evidence may also be admissible in the form of sworn affidavits;
- documentary evidence: documents must be proved through witnesses to be admissible as evidence, unless otherwise agreed by the parties; and
- expert evidence.

An expert witness is entitled to give an opinion on facts which are admitted or proven by himself/herself or other witnesses, or matters of common knowledge, or upon a hypothesis based upon assumed facts. An expert is entitled to refer to materials such as reference works, studies and other information acquired in the course of his or her profession. The weight that is given to expert evidence is ultimately a matter for the judge to decide on. Expert witnesses have been involved in a number of competition cases to date, including in *Mars v HB Ice Cream Limited*, which was a follow-on action for damages relating to the European Commission’s freezer exclusivity decision. In *Competition Authority v Beef Industry Development Society Limited*, in addition to the parties using expert witnesses, the High Court appointed an expert witness to assist it with economics issues arising in the case.

SI 130/2005, which establishes the High Court Competition List, provides that the competition judge may, at an initial directions hearing, give any of a number of listed directions to facilitate the determination of the proceedings, including directing any expert witnesses to consult with each other for the purposes of:

- (a) identifying the issues in respect of which they intend to give evidence;
- (b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues; and
- (c) considering any matter which the judge may direct them to consider, and requiring that such witnesses record in a memorandum to be jointly submitted by them to the registrar and delivered by them to the parties, particulars of the outcome of their consultations provided that any such outcome shall not be in any way binding on the parties.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The rules on disclosure in competition law cases in Ireland are founded on the traditional rules of discovery, a process whereby a litigant in civil proceedings may obtain prior to the trial disclosure of documents in the possession, custody or power of another party, or occasionally from a non-party, which are both relevant to the matters in dispute and necessary to dispose fairly of the case or to save costs. While there is no definition of ‘document’ set out in court rules, the term “document” is broadly defined in case law as meaning anything which contains information; see *McCarthy v O’Flynn* [1979] IR 127.

The Damages Regulations introduced a principle of proportionality in relation to the disclosure of evidence in follow-on actions for damages. “Evidence” is defined in this context as “all types of means of proof admissible before the court seized and, in particular, documents and all other objects containing information, irrespective of the medium on which the information is stored”.

The discovery process takes place pre-trial and will usually commence after the close of the exchange of pleadings. Discovery can be made on a voluntary basis where the parties consent or by order of the court where a party refuses the other party’s request and the requesting party makes an application for an order for discovery. Requests for discovery in High Court cases must list the precise categories of documents sought and in each case the reasons why discovery of the category of documents are relevant to the matters in dispute and necessary to dispose fairly of the case or to save costs. At Circuit Court level, documents may be requested in more general terms. Discovery can be sought from non-parties (including

competition authorities), although additional criteria apply in such a case, including that the documents in question are not otherwise available to the applicant. The Damages Regulations place certain limitations on access to and use of material in competition authority files and prohibit the disclosure of leniency statements and settlement submissions in follow-on actions for damages. Legal privilege may be asserted over certain types of documents including confidential communications passing between a lawyer and client created for the purpose of providing legal advice and documents produced in contemplation of or during legal proceedings for the sole or dominant purpose of those proceedings. In Ireland, the concept of legal privilege is broader than the concept under EU law as defined by the General Court in *C-550/07 P Akzo Nobel Chemicals Ltd and Akcross Chemicals Ltd v The European Commission*. In particular, under Irish law, legal privilege applies to in-house legal counsel as well as external legal counsel.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Where a witness is present in Ireland, he or she may be forced to appear to give evidence at trial by service of a subpoena by either party. Any witness, properly served with a subpoena, who fails to attend, can be attached for contempt of court, since a subpoena is an order from the court to attend the hearing for the purpose of giving evidence.

There are two types of subpoena:

- one which requires a witness to attend court to give oral evidence; and
- one which requires a witness not only to attend for the purpose of giving evidence, but also to bring certain documents specified in the subpoena.

Cross-examination of witnesses is a normal part of the trial process in Ireland.

Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters provides for rules governing the calling of witnesses located in other EU Member States.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The case law of the Court of Justice of the European Union (“CJEU”) and Council Regulation (EC) 1/2003 (“**Regulation 1/2003**”) confirms that in proceedings before EU national courts, including in Ireland, a European Commission decision finding an infringement of EU competition law constitutes proof that the behaviour took place and was illegal.

As noted in response to question 1.5 above, the Damages Regulations provide that an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be irrefutably established for the purposes of an action for damages. A “final decision” means a decision which cannot, or that can no longer, be appealed. The final decision of a competition authority in another Member State may be presented as at least *prima facie* evidence that an infringement has occurred. Follow-on damages actions in Ireland are also facilitated by a provision in the Competition (Amendment) Act 2012 whereby a finding by an Irish court of a breach of section 4 or 5 of the Competition Act, or Articles 101 or 102 TFEU, will be regarded as *res judicata* (i.e.

already adjudicated and unnecessary to be considered again) in any subsequent civil proceedings. Accordingly, a plaintiff in a follow-on action does not have to prove the infringement of competition law occurred and only has to prove causation, loss and the quantum of damages that they are entitled to if successful.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Article 34.1 of the Constitution of Ireland provides justice shall be administered in courts established by law by judges appointed in the manner provided by the Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public. As a result, Irish civil proceedings are generally heard in public. In certain limited circumstances, such as in family law cases, cases can be heard *in camera*, i.e. in private.

Third parties do not have access to documents used in a case. The issue of commercial confidentiality of documents used in a case is largely covered by the rules on discovery. In particular, there is an implied undertaking that discovered documents can only be used for the purpose of the proceedings in which they were discovered. Courts may refuse requests for discovery if, as a result of producing them, the person requested to produce documents would be prejudiced in a manner that could not be adequately compensated in monetary terms as a result of producing them. However, Regulation 5(2) of the Damages Regulations provides that a court may order the disclosure of evidence containing confidential information where it considers it relevant to an action for damages.

An application can be made to court for directions to maintain the confidentiality of commercially sensitive information in affidavits, exhibits to affidavits or other documents. For example, such directions may provide for the use of redacted versions of affidavits and exhibits to affidavits or may provide for procedures to be followed for the handling of evidence in open court in a manner that protects the confidentiality of commercially sensitive information.

In *Competition Authority v O'Regan & Others* [2007] IESC 22, which involved input from the European Commission pursuant to Article 11(4) of Regulation 1/2003, the High Court required an undertaking from the European Commission regarding confidentiality.

In *Goode Concrete v CRH plc & ors* [2017] IEHC 534, the High Court held that it has an inherent jurisdiction to order a confidentiality ring in appropriate circumstances. The court ordered that discovery in the proceedings would be the subject of a confidentiality ring comprising the legal advisors to the plaintiff and its independent expert advisors. The court noted that confidentiality rings are increasingly becoming standard practice in competition proceedings in the UK because of the increased costs of discovery and the manner in which discovery in such proceedings is prone to being used as a commercial weapon.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Part III of SI 130 of 2005 implements Article 15(3) of Regulation 1/2003 by enabling the CCPC and/or the European Commission to make observations on matters that are before the High Court. The CCPC and the European Commission can make written observations to the court. However, if they wish to submit oral observations, they

must seek leave of the court to do so. The rules also provide that the CCPC may be invited to make written or oral submissions on the judge's own motion or on the application of any of the parties to the proceedings. The rules provide that parties have an opportunity to review and respond to observations made by the CCPC or the European Commission.

In the context of follow-on actions for damages, Regulation 15(4) of the Damages Regulations provides that a national competition authority may, upon request of the court, assist the court with respect to the determination of the quantum of damages where the national competition authority considers such assistance to be appropriate. If disclosure is sought of evidence included in the file of a national competition authority, Regulation 6(9) of the Damages Regulations provides that, to the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to a court before which a disclosure order is sought.

The Competition Authority made an application to appear as *amicus curiae* in *Calor Teoranta v Tervas Limited and others*, High Court Record 2003 No. 5034 P. However, before the application could be heard, the parties agreed to a stay of the proceedings pending the outcome of the Competition Authority's review of competition in the market for bulk liquid petroleum gas. The case did not subsequently go to trial.

In 2010, the European Commission submitted *amicus curiae* observations to the High Court in *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*, which was a case that concerned a rationalisation plan for the Irish beef processor sector to address structural long-term overcapacity. The observations related to the European Commission's views on the application of Article 101(3) TFEU.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

A public interest defence arising from the general principles of law may be raised, but there have been no cases to date in which this has been successful.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Part 4 of the Damages Regulations makes specific provision, for the first time in Irish competition law, for the concept of passing on. Regulation 12 provides that a defendant in an action for damages can invoke the passing on defence. It is for the defendant to prove that an overcharge was passed on.

Regulation 11 of the Damages Regulations provides that indirect purchasers are entitled to claim compensation. Compensation for actual loss shall not exceed the overcharge harm suffered at the relevant level of the supply chain. This is without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing on of the overcharge. It is for the court to decide the share of any overcharge that was passed on.

Regulation 13 provides that, in the case of an indirect purchaser, it is for the claimant to prove whether and the extent to which an overcharge was passed on to them. However, there is a rebuttable presumption that an indirect purchaser has proven that passing on occurred if the indirect purchaser 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 goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Under Part III of the Civil Liability Act 1961, where two or more people are responsible to a plaintiff for the same injury or damage, they are considered to be "concurrent wrongdoers" and are each liable for the whole of the damage in respect of which they are concurrent wrongdoers. Section 27(1)(b) of the Civil Liability Act 1961 allows for the joinder of relevant third parties to existing Irish court proceedings "as soon as is reasonably possible" via the third party procedure.

The third party procedure is governed by Order 7 of the Rules of the Circuit Court or Order 16 of the Rules of the Superior Courts. A court may grant leave to a defendant to issue and serve a third party notice where the defendant claims that:

- (a) he/she is entitled to contribution or indemnity;
- (b) he/she is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them.

Regulation 10 of the Damages Regulations contains a saver for SMEs whereby they may be shielded from the full effect of the principle of joint and several liability provided that certain conditions are met.

Regulation 10 also provides that an infringer of competition law may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement. However, the amount of contribution of an infringer who has been granted immunity 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 caused 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.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The applicable limitation period in Ireland is six years from the date of accrual of the cause of action.

In the case of follow-on actions for damages, the Damages Regulations amend the Statute of Limitations 1957 by introducing a new section specifically on competition damages actions, which

provides that the six-year limitation period shall not begin to run before the latest of the following:

- the date on which the infringement ceased; and
- the date on which the claimant knows, or can reasonably be expected to know of: (a) the behaviour and the fact that it constitutes an infringement; (b) the fact that the behaviour caused harm; and (c) the identity of the infringer.

In practice, a potential claimant may only become aware of all of these aspects after a finding of infringement by a competition authority.

For the purpose of the limitation period, time does not run during the following periods:

- periods during which an investigation is being conducted by the Competition and Consumer Protection Commission, the Commission for Communications Regulation or the European Commission;
- periods during which domestic or European court proceedings relating to an infringement of competition law are pending; and
- periods during which a consensual dispute resolution process relating to an infringement of competition law is being conducted.

The effect of these suspensory provisions is that the window for issuing competition damages actions in Ireland is longer than is generally the case for other types of actions.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

A civil claim typically takes between one and three years, but timing will vary depending on the complexity of the case.

As noted above, SI 130/2005 introduced a High Court Competition List and has provided for procedures that are intended to expedite the hearing of competition proceedings and enhance the case management of such a case.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No such permission is required.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Representative bodies may bring representative actions on behalf of their members. Representative bodies may seek injunctions or declaratory relief but may not sue for damages on behalf of their members, since damages must be assessed from the point of view of the loss of the plaintiff.

Settlement agreements may be reached between parties to a competition action. Permission from the court is not required to reach such an agreement.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Parties initially bear their own legal costs for proceedings, but may obtain a court order for costs subsequently. The general principle is that “*costs follow the event*”, which means that a successful party is usually awarded its reasonable costs, although the courts have a level of discretion in determining the award of costs.

Costs are recoverable pursuant to an order for costs measured under either one of three categories:

- (a) “*party to party*” (payable by one party to an action to another);
- (b) “*solicitor and client*” (payable by one party to an action to another but on a more generous scale); and
- (c) “*solicitor and own client*” (payable to the client’s own solicitor as a matter of contract).

There may be certain elements of costs which are not recoverable by a successful party.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are not permitted to act on a contingency fee basis.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

As a general rule, third party funding of litigation is currently not permitted in Ireland due to the prohibition under Irish law of the practices known as “*maintenance*” and “*champerty*”. Maintenance is the funding of litigation by someone with no legitimate interest in the litigation. Champerty is the funding of litigation in return for a share in the proceeds of the litigation. It is therefore unlawful for a party without a legitimate interest to fund the litigation of another, or to fund litigation in return for a share of the proceeds. This position was recently confirmed by the Supreme Court in *Persona Digital Telephony Ltd v The Minister for Public Enterprise* [2017] IESC 27.

9 Appeal

9.1 Can decisions of the court be appealed?

District Court decisions may be appealed to the Circuit Court or, on a point of law, to the High Court.

Circuit Court decisions may be appealed to the High Court or, on a point of law, to the Court of Appeal.

High Court decisions about whether or not a law is constitutional may be appealed to the Court of Appeal. High Court decisions may be appealed on a point of law to the Supreme Court if it is satisfied that there are exceptional circumstances warranting a direct or “*leapfrog*” appeal to it.

Decisions of the Court of Appeal may be appealed to the Supreme Court if it is satisfied that the decision involves a matter of general public importance or in the interests of justice it is necessary that there be an appeal to the Supreme Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The Irish Cartel Immunity Programme (“**Immunity Programme**”) outlines the policy of both the CCPC and the DPP in considering applications for immunity from prosecution for criminal cartel offences under the Competition Act. The latest version of the Immunity Programme came into force on 22 January 2015.

The CCPC and the DPP both play a role in considering applications for immunity under the Immunity Programme. The CCPC manages immunity applications and makes recommendations on granting conditional immunity to applicants to the DPP in appropriate cases. If the DPP grants conditional immunity, the CCPC will remain as the intermediary between the applicant and the DPP.

The Immunity Programme offers full immunity from prosecution to the first successful applicant to provide the CCPC with sufficient evidence of the cartel on condition that the applicant fulfils all the requirements of the Immunity Programme. There is no leniency available to any individual or undertaking under the Immunity Programme other than full immunity for the first successful applicant only.

The key requirements that must be satisfied if immunity is to be granted are the following:

- the applicant must not have coerced any other party to participate in the illegal cartel activity;
- the applicant must do nothing to alert its associates in the cartel that it has applied for immunity and must not comment publicly on the activities of the cartel;
- the applicant must not have destroyed, hidden, made unusable or falsified any evidence from the time it first considered applying for immunity;
- an applicant in an ongoing cartel must take effective steps, to be agreed with the CCPC, to ensure it does not engage in any further cartel activity after making its application for immunity;
- the applicant must provide comprehensive, prompt and continuous co-operation throughout the investigation and any subsequent prosecution; and
- the applicant (including any individuals who require personal immunity) has a positive duty to:
 - reveal any and all cartel offences under the Competition Act in which the applicant was involved and of which it is aware;
 - provide full, frank and truthful disclosure of all evidence and information relating to the offences in the possession, control or knowledge of the applicant, including all electronic records;
 - preserve and not tamper with any evidence that is capable of being under the applicant’s control;
 - ensure that current and former directors, officers and employees fully co-operate with the investigation and any subsequent prosecution;
 - not disclose to third parties any dealings with the CCPC without the CCPC’s prior written consent, except where required to do so by law (except where such disclosure is made to another competition authority, or to an external lawyer for the purposes of obtaining legal advice);

- disclose to the CCPC, unless otherwise prohibited, all applications for immunity made in other jurisdictions;
- co-operate fully with the CCPC on a continuing basis, expeditiously and at no expense to the CCPC; and
- provide individuals to give clear and comprehensive statements of evidence that will be recorded by the CCPC and used in any ensuing prosecutions.

If the applicant fails to comply with the requirements set out in the Immunity Programme, the DPP can revoke the grant of conditional immunity.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An immunity applicant’s identity will be kept confidential as long as is permissible under Irish and EU law.

Information disclosed under the Immunity Programme will not be disclosed by the CCPC to any third party other than in accordance with normal practices and procedures relating to criminal investigations and prosecutions. In particular, information may be disclosed under the Immunity Programme where:

- disclosure is required by law;
- disclosure is used to administer and enforce the Competition Act;
- disclosure is necessary to prevent the commission of a criminal offence;
- disclosure is required as part of an investigation or prosecution; or
- an applicant signs a waiver on disclosure permitting the CCPC to share information with another competition authority in a jurisdiction where the applicant has also applied for immunity.

The initial contact with the CCPC and the information required to perfect the marker can be communicated orally through a legal representative in an attempt to preserve the anonymity of the applicant and the confidentiality of the information provided.

Regulation 6(4) of the Damages Regulations provides that, for the purpose of actions for damages, a court cannot at any time order a party or a third party involved in an action for damages to disclose leniency statements.

The question of whether information submitted in an immunity application could be made subject to discovery orders in foreign courts has not arisen (to our knowledge) but would likely be resisted by the CCPC and DPP on the basis that disclosure could undermine the effectiveness of the Immunity Programme by discouraging future use of the programme.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The EU Directive on Antitrust Damages Actions was implemented into Irish law by Statutory Instrument in the form of the Damages Regulations. The Damages Regulations also contain a number of amendments to primary legislation relating to competition law.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The EU Directive on Antitrust Damages Actions was implemented into Irish law by the Damages Regulations.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The Damages Regulations came into operation on 27 December 2016. The Damages Regulations do not apply to infringements of competition law that occurred before that date.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

As far as we are aware, no other proposed reforms are currently under consideration.



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ARTHUR COX

Arthur Cox is one of Ireland's leading law firms. For over 90 years, it has been at the forefront of developments in the legal profession in Ireland. An international firm encompassing all aspects of corporate and business law, the firm has 350 lawyers and a total staff of almost 750 in offices in Dublin, Belfast, London, New York and Silicon Valley.

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The firm's highly regarded Competition and Regulated Markets Group is widely recognised as one of Ireland's leading competition law practices and has been involved in a large proportion of the high-profile competition, merger control and State aid cases in Ireland in recent years. The Group advises on all aspects of EU and Irish competition law, including investigations, litigation, merger control, compliance and EU State aid law. The Group also advises on regulated markets, including telecommunications and broadcasting, energy and aviation.

Arthur Cox received the Ireland Client Service Law Firm of the Year Award for excellent client service at the Chambers Europe Awards 2018 and was named Ireland Law Firm of the Year 2018 at the annual International Financial Law Review (IFLR) Europe Awards. The firm received four awards at the 2018 Euromoney LMG Europe Women in Business Law Awards and was also named Ireland Law Firm of the Year at the 2017 Chambers Europe Awards.

Italy

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Competition law breaches may result in both administrative and civil law claims before the Italian Competition Authority (“ICA”) and civil courts, respectively. Italian and EU competition law provisions can be invoked or applied in parallel, such as Law No. 287 of 10 October 1990 (“**Law 287/90**”) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (“**TFEU**”).

Administrative claims

Law 287/90 and/or Articles 101/102 TFEU are applied by the ICA on its own motion or following a complaint relating to possible competition law infringements.

The proceedings may result in a decision, which can later be used as evidence in follow-on actions before civil courts (see the answer to question 4.3). Decisions of the ICA can be appealed before the Administrative Tribunal of Latium (“**TAR Latium**”).

Civil claims

The main claims that may be brought before Italian courts for breaches of competition law are as follows:

- i. **Damages actions.** Generally claimants must demonstrate that the defendant(s) breached competition law (unless the action is based on a final decision of the ICA), that there is a direct causation between the breach and the loss suffered (this is presumed in the case of cartels), that the breach was the defendant’s fault, and the claimant must also evidence the amount of loss suffered. Class actions are also available pursuant to Article 140-*bis* of Legislative Decree No. 206 of 6 September 2005 (“**Consumer Code**”).
- ii. **Actions for nullity.** Any agreement between enterprises or a resolution of associations of enterprises, consortia or similar entities that breach the competition rules is invalid. Therefore, any natural or legal person may prompt the court to declare it null and void. In principle, downstream contracts, e.g. agreements between a cartel and its customers, may also be declared null and void.
- iii. **Negative declaratory actions.** Such claims are somewhat particular to the Italian legal system (and are known as “Italian torpedoes”). A party to an agreement may ask the court to issue a judgment establishing that certain conduct is not in breach of the competition rules.
- iv. **Injunctive remedies.** Such an action mandates for the imposition of an injunction on another party; for example, that a company must supply certain products.

There are no criminal law sanctions under Law 287/90. However, certain infringements linked to public procurement (namely, bid-rigging) are subject to criminal law sanctions, regardless of their possible anticompetitive profiles, which may be investigated in parallel by the ICA.

1.2 What is the legal basis for bringing an action for breach of competition law?

Any action relating to a competition law breach would be based on Articles 2 and 3 of Law 287/90, and/or Articles 101 and 102 TFEU, which respectively prohibit anticompetitive agreements and the abuse of dominance.

From a procedural standpoint, the application of competition rules by the ICA is governed by Law 287/90, as well as Law No. 689 of 24 November 1981 in relation to fines (“**Law 689/1981**”). The rules of the Code of Administrative Procedure apply to the appeals of ICA decisions before the TAR Latium.

Legislative Decree No. 3 of 19 January 2017 (“**Legislative Decree 3/2017**”) specifically regulates antitrust damages actions. All other actions are governed by the general rules of the Italian Civil Code and the Rules on Civil Procedure.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Articles 2 and 3 of Law 287/90 are national provisions which, pursuant to Article 1 of Law 287/90, must be interpreted consistently with EU law (due to the primacy of EU law).

Legislative Decree 3/2017 concerning damages claims has implemented Directive 2014/104/EU into the Italian legal system.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Actions for the annulment of ICA decisions are brought before the administrative courts, namely TAR Latium (at first instance), and the Council of State (on appeal). Both courts have exclusive jurisdiction.

Article 18 of Legislative Decree 3/2017 has reshuffled the territorial jurisdiction of the previous specialised chambers competent for civil litigation. Today, all antitrust claims must be brought before the Court of Appeals of Milan, Rome or Naples.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Administrative proceedings

Any natural or legal person, including associations of undertakings or consumers’ associations, can submit a complaint before the ICA and may also have standing to appeal decisions of the ICA before the TAR Latium.

Civil proceedings

Pursuant to Article 1 of Legislative Decree 3/2017, any natural or legal person who has suffered harm by an infringement of competition law may bring a damages action before the competent civil court. Moreover, class actions provided for by Article 140-*bis* of the Italian Consumer Code are also available based on the opt-in mechanism. Such collective action must relate to the protection of the rights of multiple consumers or users affected by antitrust behaviour and may also be brought through consumers’ associations (only those registered with the Ministry for Productive Activities have legal standing to do so). Any affected party willing to join the collective action has to submit a declaration to “opt in”, i.e. to consent to be a part of the class.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

See the answer to question 1.4 regarding administrative proceedings and damages actions.

As regards other civil actions, e.g. an action for nullity, the jurisdiction is established in light of the criteria set by the Rules on Civil Procedure, namely the subject matter of the claim (*ratione materiae*) and the territorial criteria (*ratione loci*).

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

With regards to civil law claims, including damages actions, Italy may be considered a favourable jurisdiction for defendants. This is in light of both the fact that no punitive damages can currently be awarded and of the relatively slow speed of proceedings (despite the new specialised courts). However, this may change if punitive damages are introduced for competition law breaches in the future (see the answers in section 11).

Moreover, the ability to seek a (preliminary) negative declaratory ruling may be used, for instance, to preclude defendants from raising potential antitrust damages actions in other jurisdictions.

Otherwise, the ICA is one of the top competition enforcement authorities with fast and transparent procedures which also safeguard an undertaking’s rights of defence. For example, if the ICA decides to open proceedings in relation to the alleged infringement, it will provide a detailed description of the preliminary assessment that it has undertaken.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process in Italy is mainly adversarial. The judge has an

impartial role and there is no prosecutor “bringing the case” before him.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies may be granted by the ICA as well as the courts.

2.2 What interim remedies are available and under what conditions will a court grant them?

Pursuant to Article 14-*bis* of Law 287/90, in urgent cases the ICA has the power to issue *ex officio* interim measures where, on the basis of a summary analysis: there is a risk of serious and irreparable damage to competition; and the ICA considers it probable that an infringement exists. The risk to competition would arise where a material change in the market structure may occur and such a change would not be reversible or easily reversible. Interim measures are generally adopted after the parties have been able to exercise their right to be heard.

Also, the TAR Latium may issue interim measures on appeal against a decision by the ICA, pursuant to Article 55 of the Code of Administrative Procedure.

Civil courts also have the power to issue interim measures (Article 700 of the Rules of Civil Procedure) where, following a cursory assessment of the case, the claim appears grounded (*fumus boni iuris*), and there is the actual risk of a serious and irreparable damage pending a decision on the merits (*periculum in mora*).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The following remedies are available in competition law cases: i) a declaration that annuls an anticompetitive agreement; ii) an award of damages; and iii) a negative declaratory ruling.

Ruling declaring the nullity of an anticompetitive agreement. Any agreement between enterprises or a resolution of associations of enterprises, consortia or similar entities that breaches the competition rules is invalid. Therefore, the civil court may be prompted to declare that an anticompetitive agreement is null and void, provided that the claimant is able to prove that the agreement is anticompetitive. Moreover, any party, including consumers, may seek the nullity of downstream contracts, e.g. agreements between a cartel and its customers.

Award of damages. Damages claims are available to anyone who has suffered a damage caused by competition law. Currently, damages are only compensatory in nature as punitive damages are not available. Claimants must demonstrate that the defendant(s) breached competition law (unless the action is based on a final decision of the ICA), that there is direct causation between the breach and the loss suffered (this is presumed in the case of cartels), that the breach was the defendant’s fault, and the claimant must also evidence the amount of loss suffered. Damages can also be awarded as a result of class actions.

Negative declaratory actions. A party to an agreement may ask the court to issue a judgment establishing that certain conduct is not in breach of the competition rules.

The administrative courts (TAR Latium or Council of State) may annul ICA decisions in full or in part.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

According to Article 1.2 of Legislative Decree 3/2017, damages caused by competition infringements are limited to the actual damage and the loss of profits and interest. Claimants must be returned to the position in which he/she would have been had the breach not occurred. Any form of overcompensation (“punitive damages”) stemming from the award of damages is currently prohibited. However, a recent ruling by Italy’s Supreme Court may pave the way for reforming Legislative Decree 3/2017 by introducing punitive damages for competition law violations (see also the answers in section 11).

Italian courts can quantify damages based on counterfactuals which take into account what would have happened had the infringement not occurred (for instance, by referring to the year prior to the occurrence of the infringement or by assessing the difference between the company’s EBITDA after the infringement and the EBITDA that would have been gained in the absence of an infringement). Such evidence can be provided by a technical expert appointed by the court and the causal link between the unlawful behaviour and the harm may be proven based on presumptions (see, e.g., Milan Court of Appeal 7 January 2016).

Damages may also be awarded on an equity basis. For example, in the case concerning a cartel in the motor insurance market, the damages were set as a percentage of the insurance premium paid by consumers (see Italy’s Supreme Court No. 11904/2014).

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Fines imposed by competition authorities are not taken into account by the courts when calculating the amount of possible damages.

4 Evidence

4.1 What is the standard of proof?

The court’s decision to uphold a claim or any objections against it must be based purely on the fully proven facts, either directly or by way of presumptions. According to the case law, for the standard of proof to be met, the court must find that it is reasonably likely that the alleged facts happened.

4.2 Who bears the evidential burden of proof?

Pursuant to Article 2697 of the Civil Code, the burden of proof falls on the party who is making the allegation of fact (normally the plaintiff).

Article 11 of Legislative Decree 3/2017 provides that, in the case of a passing on defence, the defendant shall bear the burden to prove that the direct customer (plaintiff) has passed on the overcharge by requiring disclosure of evidence from the claimant or third parties.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Legislative Decree 3/2017 introduces a number of presumptions for a damages claim in competition law.

First, pursuant to Article 7 of Legislative Decree 3/2017, the final decision of the ICA (a decision is final when the term for the appeal has expired, or because it has ultimately been upheld by the courts, i.e. it is *res judicata*) constitutes legal evidence of the existence of the infringement, notably as regard its nature and scope. The plaintiff shall still prove causation between the breach and the damages suffered (this is presumed in case of cartels), and the amount of damages suffered. (Similarly, the decisions by the European Commission in competition law cases are generally binding for national courts in the light of Article 16 of Regulation 1/2003.) Final decisions (as indicated above) by national competition authorities do not constitute legal evidence (i.e. are not legally binding) but are *prima facie* evidence of the infringement (as regards its nature and scope) that may be assessed with other evidence.

Secondly, as per Article 14 of Legislative Decree 3/2017, where a cartel exists there is a presumption that damage has been caused, unless the defendant can prove otherwise.

Thirdly, Article 12 of Legislative Decree 3/2017 provides that, in the context of damages claims by indirect purchasers, the passing on of overcharges (from the direct purchaser to its customers) can be presumed (subject to rebuttal by the defendant) when the indirect purchaser proves the following: a) the defendant has committed the infringement; b) such infringement has caused an overcharge for the direct purchaser; and c) the indirect purchaser has bought 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.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Evidence provided by the Rules of Civil Procedure is allowed, including witness hearings and the appointment of technical experts. Courts appoint technical experts particularly in relation to complex technical issues, including for the assessment of damages.

Legislative Decree 3/2017 provides additional rules on evidence (see the answer to question 4.5).

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Articles 3–6 of Legislative Decree 3/2017 provide rules on the disclosure of evidence aimed at enabling both parties to gain access to evidence in the context of damages actions, subject to proportionality, confidentiality, legal professional privilege and other limits. General rules of procedure (Article 210-213 of the Rules of Civil Procedure) would still apply in all other actions.

Article 3 of Legislative Decree 3/2017 provides that, upon reasonable request, the court can order the disclosure of the relevant

evidence held by the other parties or by third parties, to the extent that such disclosure is necessary to make a final decision. Disclosure of confidential information may be ordered by taking specific measures, including imposing confidentiality obligations, redacting sensitive passages in documents, holding closed-door hearings and requesting experts to produce non-confidential summaries of the relevant information. Client-attorney correspondence is in any case covered by legal privilege.

Article 4 of Legislative Decree 3/2017 provides that the court may also order disclosure of evidence included in the file of a competition authority (yet only after the conclusion of the relevant proceedings) where no party or third party is reasonably able to provide that evidence. In particular, the court can order the disclosure/production of: (i) information provided in the context of a competition authority investigation; (ii) information that a competition authority has drawn up and sent to the parties in the course of its proceedings; and (iii) settlement submissions that have been withdrawn (“grey list” documents).

Evidence relating to leniency statements or settlement submissions cannot be disclosed (“black list” documents).

Article 6 of Legislative Decree 3/2017 provides for penalties for failure to comply with the rules on disclosure of evidence.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses can be forced to appear under Article 255 of the Rules of Civil Procedure and a penalty for failure to comply with the request to appear is also applicable.

The judge alone can lead the witness examination and ask questions, whereas the parties are prevented from examining or cross-examining witnesses.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

See the answer to question 4.3.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Parties to the proceedings have access to all documents in the court’s file. The court can, however, take measures to protect confidential information, including imposing confidentiality obligations, redacting sensitive passages in documents, holding closed-door hearings and requesting experts to produce non-confidential summaries of the relevant information.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Courts may indeed seek the assistance of the European Commission concerning the application of the EU competition rules, pursuant to Article 15 of Regulation 1/2003.

Legislative Decree 3/2017 also provides that courts may seek assistance from the ICA in relation to the disclosure of evidence (Article 4.7) and the quantification of damages (Article 15.3). However, in principle, nothing prevents courts from seeking the technical expertise of the ICA in relation to the application of the competition rules.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

In principle, a defendant may justify the legitimacy of an agreement to which he/she is a party, in light of Article 101(3) TFEU (which is directly applicable by Italian courts), showing that: (i) the conduct has pro-competitive effects (improving production or distribution of goods or promoting technical or economic progress); (ii) benefits are shared with the consumers; (iii) the restrictions to competition are indispensable to obtain these benefits; and (iv) competition is not eliminated in a substantial part of the market. Clearly, a similar defence would not be possible where the case before the court is a follow-on action based on a final decision of the ICA.

It is not possible to adduce a public interest justification. Article 8 of Law 287/1990 provides that Articles 2 and 3 do not apply to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly as linked to the specific duties with which they are entrusted.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Defendants may rely on the passing on defence and indirect purchasers have legal standing to sue.

Article 10 of Legislative Decree 3/2017 expressly grants legal standing to indirect purchasers: “*antitrust damage can be claimed by anyone having suffered it, irrespective of whether it is a direct or indirect purchaser of the infringer*”. In such instances, the passing on of overcharges (from the direct purchaser to his customers) can be presumed (subject to rebuttal by the defendant) under the conditions of Article 12 of Legislative Decree 3/2017 (see the answer to question 4.3). Moreover, the Italian Supreme Court, in its Observations to the *EU Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, stated that there is a presumption of passing-on when the overcharge is paid by an intermediate company, i.e. a company that has the possibility to transfer this overcharge downstream to its own clients. In these cases, there is a “*rebuttable presumption of passing-on of the overcharge downstream in the distribution chain up to the final consumer*”.

In turn, Article 11 of Legislative Decree 3/2017 provides that the defendant, i.e. the alleged infringer of the antitrust rules, is still allowed to rebut the claim by proving that the plaintiff (direct purchaser) passed on, in full or in part, the overcharge resulting from the infringement of competition law.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Subject to the exceptions provided by Article 9 of Legislative Decree 3/2017, the (co-)infringers (e.g. the parties to a cartel) are jointly and severally liable for the damages arising from their violation of the competition rules.

As a consequence of the general principle established by Article 2055 of the Italian Civil Code, a defendant may serve a notice to the other co-cartelists to join the proceedings, pursuant to Articles 106 and 269 of the Rules of Civil Procedure. The co-infringers can also voluntarily join the proceedings pursuant to Articles 105 and 267 of the Rules of Civil Procedure.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The limitation period for bringing a claim for breach of competition law is five years. This limitation period applies to both administrative and civil proceedings.

Administrative proceedings

As regards administrative proceedings, pursuant to Law 689/1981 to which Law 287/90 makes reference, the ICA can levy administrative fines for competition law infringements within five years from the day of the violation (or when the violation has ended, in case of continuous infringements such as cartels). The Council of State has clarified that the limitation period starts once the violation ends. However, since this moment is not easy to identify, the five-year limitation period is not strictly applied (see Ruling of the Council of State No. 3291/2015).

Civil proceedings

Pursuant to Article 8 of Legislative Decree 3/2017, antitrust damages actions based on tort must be brought within five years from the violation.

In such cases, the limitation starts running after the infringement has ended and the claimant has knowledge of, or can reasonably be expected to have knowledge of, all the following elements: (a) the conduct and the facts constituting the infringement; (b) that the infringement caused him harm; and (c) the identity of the infringer. Before Legislative Decree 3/2017 came into force, the courts sometimes interpreted the rules on the limitation period in such a way that the knowledge of the anticompetitive conduct could arise from the decision opening the investigation.

If, pending the damages action, the ICA opens an investigation into the same anticompetitive conduct to which the action for damages relates, the limitation period is suspended until: (a) one year after the infringement decision is finalised; or (b) after the administrative proceedings are otherwise terminated.

There is no limitation period in respect of actions for nullity of anticompetitive agreements.

Competition law damages actions based on breaches of contract are subject to a limitation period of 10 years (Article 2946 of the Italian Civil Code).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Administrative proceedings

The ICA usually adopts its decision within one or two years of proceedings having been opened. Appeals before the TAR Latium can take one or two years, while appeals before the Council of State may last longer. In principle, the infringer can ask for an interim measure, i.e. for the suspension of payment of a fine, but

the administrative court rarely upholds these requests. The related procedure is swift and can take between two and four weeks.

Civil proceedings

Damages actions can last several years, between two and five years, because this commonly requires the involvement of experts in assessing complex issues, such as the quantification of damages or passing-on.

Expedites proceedings are available, such as actions for interim measures pursuant to Article 700 of the Rules of Civil Procedure. These may be granted within as little as four weeks, although this period can be longer in the case of general interim measures, as provided for by Article 702-bis of the Italian Civil Procedure Code.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Parties may discontinue a claim for breach of a competition law without having to obtain prior approval from the court.

However, pursuant to Article 15 of Legislative Decree 3/2017, parties may ask the court to suspend proceedings for up to two years if they are trying to settle their dispute out of court.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Class actions for damages based on an opt-in model (including damages caused by anticompetitive practices) were introduced in Italy in 2010 by Article 140-bis of the Consumer Code (as amended by Article 1 of Legislative Decree 3/2017) (see also the answer to question 1.5). Collective settlements are not binding on those class action participants that have not expressly agreed on the settlement.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

As a general rule (Article 91 of the Rules of Civil Procedure), judicial costs (including attorneys' fees) are borne entirely by the unsuccessful party or parties.

However, pursuant to Article 92 of the Rules of Civil Procedure, the court may decide that each party bears its own costs (in full or in part) when, *inter alia*, the legal issues are complex and unusual, as may be the case in antitrust actions such as damages claims.

8.2 Are lawyers permitted to act on a contingency fee basis?

While alternative fee arrangements are becoming increasingly common in Italy, particularly in competition litigation, it is forbidden for legal fees to be determined as part of a property that is the point of contention.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There are no specific provisions in the Italian legal system dealing with third party funding, and no specific prohibitions against third party funding as such. There is at least one known case where a third party is funding the claim brought against the parties of the “trucks cartel” by CNA Fita on behalf of some 3,000 companies.

9 Appeal

9.1 Can decisions of the court be appealed?

Civil proceedings

An appeal of judgments issued by lower courts can be brought within 30 days from the earliest of: (a) the notification of the ruling; or (b) six months from publication of the ruling. Judgments by the courts of appeal may be challenged, on points of law only, before the Supreme Court within 60 days from the earliest of: (a) the notification of the ruling; or (b) six months from publication.

Administrative proceedings

ICA decisions can be appealed before the TAR Latium within 60 days from the notification of the ruling to the parties. TAR Latium rulings may be appealed to the Council of State within 30 days from the notification to the party of, or three months from publication of, the decision.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Pursuant to Article 15.2-*bis* of Law 287/90, the ICA may grant full or partial immunity to fines on companies that may have breached the Italian or EU prohibition of secret cartels.

In derogation from the general principle of joint and several liability (under Article 2055 of the Italian Civil Code and Article 9 of Legislative Decree 3/2017), an infringer who has been granted (full) immunity from fines is only jointly and severally liable *vis-à-vis*: (a) its own direct or indirect purchasers or providers; and (b) to other injured parties only if the compensation cannot be obtained from any other co-infringers. A similar derogation is granted to SMEs, provided they did not act as ring-leaders or instigators, and are not repeat offenders.

In any case, the contribution a successful immunity applicant can possibly make to co-infringers cannot exceed the amount of harm caused to its direct and indirect purchasers or providers.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Article 4 of Legislative Decree 3/2017 provides that the court cannot order a party or a third party to disclose leniency statements and settlement submissions. This prohibition applies to both successful and unsuccessful applicants for leniency and applies in relation to

leniency or settlement submissions before competition authorities other than the ICA (taking into account that the settlement procedure has not yet been introduced for antitrust proceedings before the ICA).

However, if requested by the applicant, the court may check (with the assistance of the relevant competition authority) whether the evidence in issue concerns a leniency statement or a settlement submission, as defined by Article 2 of Legislative Decree 3/2017. If it does not, the court may order the exhibition of that evidence.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Directive 2014/104/EU on Antitrust Damages Actions has been implemented into national law by Legislative Decree 3/2017, which entered into force on 3 February 2017.

The changes brought about in the Italian legal system by this legislation primarily concern: disclosure of evidence; the binding effect of decisions of the competition authorities; limitations periods; and the scope of joint and several liability.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

Legislative Decree 3/2017 entered into force on 3 February 2017, slightly after the deadline provided for in the Directive.

The Italian Legislator sought to provide a legal framework capable of granting the same level of protection in relation to competition law violations as in other EU Member States. The new rules on evidence disclosure have been highlighted as particularly important; these should help overcome the information asymmetry typical of such cases, which may have prevented those suffering harm from seeking full compensation.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Article 19 of Legislative Decree 3/2017 provides that the following procedural rules apply retroactively only to actions for damages prompted after 26 December 2014:

- disclosure of evidence held by the defendant or a third party (Article 3);
- disclosure of evidence in the file of a competition authority (Article 4);
- use of evidence obtained solely through access to the file of a competition authority (Article 5); and
- stay of proceedings while the parties are negotiating a possible settlement (Article 15.2).

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

There are currently no other proposed reforms relating to competition

litigation. However, a recent development in the case law of Italy's Supreme Court could pave the way for an amendment of Legislative Decree 3/2017, in relation to the nature of the damages that can be awarded as a result of competition law breaches.

In fact, Article 1 of Legislative Decree 3/2017 currently states that the award of damages cannot entail any "overcompensation".

With Ruling No. 16601/2017 of 5 July 2017, Italy's Supreme Court held that punitive damages are legitimate under the Italian legal system, reversing an established principle in case law. In order for punitive damages to be allowed in the context of antitrust litigation, Legislative Decree 3/2017 shall arguably need to be amended, by removing the express reference to the prohibition of any overcompensation.



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Our competition and EU law team advises clients on every aspect of Italian and EU Competition law in all economic sectors. With regard to M&A transactions and joint ventures, we assist companies on all aspects and phases of notification procedures of transactions which give rise to concentrations, and represent companies in investigation proceedings before the European Commission or the Italian Competition Authority.

Our lawyers also provide assistance to companies in investigation proceedings involving cartels or abuse of a dominant position before the European Commission, the Italian Competition Authority and civil and administrative courts at a national and EU level.

Our strengths are:

- The sophisticated Italian and EU law combined advice and the strong presence in Brussels which is perceived by our clients as a plus, as Brussels is the administrative centre of the European Union with the EU Commission and other EU institutions. Denis Fosselard, Head of Practice, shares his time between Brussels (50%) and Milan (50%). Our clients definitively appreciate our presence in Brussels and 360 degrees knowledge of the Italian market, as well as the high level of service and advice provided by the team.
- The experience of the lawyers of the team in dealing with proceedings before both the European Commission and the Italian Competition Authority in all sectors of competition and EU law, and namely merger control, cartels and abuse of dominance cases, deserves a specific mention.

Japan

Nagashima Ohno & Tsunematsu

Koki Yanagisawa



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

In Japan, the scope of private actions that may be brought for breach of competition law includes (i) claims for compensation of damage arising from breach of competition law, and (ii) petitions for injunction to demand suspension or prevention of actions in breach of completion law.

In addition, an addressee of a cease and desist order or an administrative surcharge payment order rendered by the Japan Fair Trade Commission (the “JFTC”) may file a complaint with the Tokyo District Court to challenge such JFTC order. Prior to the amendment to the Antimonopoly Act which became effective as of April 1, 2015 (“2015 Amendment”), complaints to challenge JFTC orders were examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of the JFTC.

1.2 What is the legal basis for bringing an action for breach of competition law?

(i) Actions for compensation for damage

Any person who suffered damage by conduct that constitutes a private monopolisation, an unreasonable restraint of trade or an unfair trade practice in violation of the Antimonopoly Act is entitled to bring an action seeking compensation for damage to the court on the grounds of either (i) strict liability under Article 25 of the Antimonopoly Act, or (ii) general tort under Article 709 of the Civil Code. Even indirect purchasers have legal standing to file a lawsuit to claim damages arising from a cartel in violation of the Antimonopoly Act.

A private action to recover unjust enrichment based on Articles 703 and 704 of the Civil Code may be available, depending on the circumstances.

(ii) Actions for injunction

Under Article 24 of the Antimonopoly Act, any person whose interests are infringed or are likely to be infringed by violation of Article 8, Item 5 (i.e., activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (i.e., unfair trade practices by an entrepreneur) is entitled to demand suspension or prevention of such infringement from an entrepreneur or a business association if such person suffers or is likely to suffer material damages by such conducts.

In the event that an action for the aforementioned injunction is filed pursuant to Article 24 of the Antimonopoly Act, the court shall send a notice to the JFTC and may request the JFTC to provide its opinion on the application of the Antimonopoly Act and other necessary matters. In order to avoid an abuse of right to injunction, the court may order the plaintiff to furnish an adequate security deposit at the request of the defendant.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from Japanese law in principle.

Under Japanese choice-of-law rules, competition law claims can be brought to Japanese courts based on foreign law if the court determines that the result of the relevant tortious act has occurred in the foreign jurisdiction. However, if facts to which the foreign law should be applied do not constitute a tort under Japanese law, no claim under the foreign law may be made for damages or any other remedies. Even if facts to which the foreign law should be applied constitute a tort both under the foreign law and Japanese law, the victim may make a claim only for damages or any other remedies that may be permitted under Japanese law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Private actions may be brought in district courts in accordance with the Code of Civil Procedure in principle, while the Tokyo District Court is the court of first instance that has the exclusive jurisdiction on claims for compensation for damage under Article 25 of the Antimonopoly Act. The Tokyo District Court also has the exclusive jurisdiction as the court of first instance over a complaint to challenge a cease and desist order or an administrative surcharge payment order rendered by the JFTC.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Any person who suffered damages due to a defendant’s conduct in violation of the Antimonopoly Act (e.g., competitors and customers) may file a complaint for compensation for damage.

Any person whose interests are infringed or are likely to be infringed by violation of Article 8, Item 5 (i.e., activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (i.e., unfair trade practices by an entrepreneur) of the Antimonopoly Act may file a petition for an injunction pursuant to Article 24 of the Antimonopoly Act.

Neither collective claims nor class actions are permitted under Japanese law with regard to the violation of the Antimonopoly Act. Under the Code of Civil Procedure, if rights or obligations, which are the subject matter of the lawsuits, are common to two or more persons or are based on the same factual or statutory cause, these persons may sue as co-plaintiffs. The same shall apply where rights or obligations, which are the subject matter of the lawsuits, are of the same kind and based on the same kind of factual or statutory causes. These schemes can be used by multiple claimants in bringing competition law claims before the civil court proceedings.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Code of Civil Procedure provides the basic jurisdictional rules. For instance, a court having jurisdiction over the location of a defendant's principal office/domicile has jurisdiction over claims brought against the defendant. A court having jurisdiction over the place of violation of the Antimonopoly Act also has jurisdiction over claims based on such violation. Furthermore, the Antimonopoly Act provides that if an action for injunction under Article 24 thereof is brought in a local district court, the case may be transferred to the Tokyo District Court or one of the other seven major district courts, and that the Tokyo District Court has the exclusive jurisdiction on claims for compensation for damage under Article 25 of the Antimonopoly Act. If more than one court has jurisdiction, the claimant may choose the court where the claims are heard, in principle.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

We are of the view that Japan does not have a system that attracts claimants or defendant applications to seize jurisdiction over civil cases. First, Japanese law does not provide claimants with a favourable judicial system such as class actions, discovery, treble damages or exemplary damages against defendant(s) who violated the Antimonopoly Act. Secondly, while the Code of Civil Procedure regulates the jurisdiction of Japanese courts over cases with foreign elements, it does not tend to provide broad jurisdiction, in that the law relatively strictly requires a close relationship between the venue (i.e., Japan) and the key factor(s) involved in each case (such as the domicile of the defendant or the place where the tort is committed) in order for the case to be covered by the jurisdiction of Japanese courts. Furthermore, a Japanese court can deny its jurisdiction over cases with foreign elements if it considers, taking into account the nature of the case, the defendant's burden of responding to the complaint and location of the evidence, that there are special circumstances which impede fairness of the parties' or fair and prompt hearing procedures. The foregoing circumstances do not allow Japanese courts to attract claimants and defendant applications to seize jurisdiction.

Having said that, there are certain provisions under the Antimonopoly Act that assist plaintiffs in their civil actions seeking the recovery of damages or injunction and plaintiffs may consider using such assistance. For instance, the JFTC provides its opinion regarding the amount of damage to the court that handles damage claims based

on Article 25 of the Antimonopoly Act, and also provides its opinion with respect to the application of the Antimonopoly Act and other necessary matters if a lawsuit for an injunction has been filed under Article 24 of the Antimonopoly Act.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial for civil actions for compensation for damages or injunctive relief. The court judges will hold hearings where both parties attend and submit their factual and legal arguments and evidence supporting the arguments before the court. While the facts admitted by the opposing party require no evidence and shall bind the court and both parties, the facts denied by the opposing party must be proved by evidence submitted by the parties. The court then holds examination of witnesses where, in general, witnesses are subject to direct examination plus cross-examination in relation to the matters raised during direct examination. After concluding the examination of witnesses, the court closes the hearing procedures and then moves to rendition of judgment.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

A claimant may file with a competent district court a petition for preliminary injunction to suspend or prevent the conducts that violate or are likely to violate the Antimonopoly Act pursuant to the Civil Code and the Civil Preservation Act.

In addition, when an addressee of a cease and desist order or an administrative surcharge payment order rendered by the JFTC files a complaint to challenge such JFTC order, the addressee may file a petition to suspend the enforcement of the JFTC order in accordance with the Administrative Case Litigation Act.

2.2 What interim remedies are available and under what conditions will a court grant them?

As mentioned in question 2.1, preliminary injunction is a possible interim remedy for competition law claims. Generally, a petitioner must show that (i) there is a "necessity" for the preliminary injunction, in addition to that (ii) there are causes of actions for the claims to be protected, based on *prima facie* evidence. Furthermore, the court will require that the petitioner furnish a security deposit in advance of the rendition of an order of preliminary injunction.

In order to obtain the court order of suspension of enforcement of the JFTC order under the Administrative Case Litigation Act, the petitioner is required to demonstrate that there is an urgent necessity to avoid grave damage to be caused by the enforcement of the JFTC order. However, it is considered practically difficult to obtain such order, since the aforementioned requirement of "urgent necessity" would hardly be fulfilled.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The final remedies available for private claimants are compensation

for damage and injunction. In order to obtain a final judgment in favour, private claimants must at least prove the facts consisting of the causes of action. It is not necessary to prove the facts which have been admitted by the defendant.

For damage claims based on the violation of the Antimonopoly Act, plaintiffs must prove: (i) the illegality of the defendant's conduct; (ii) damages; (iii) causal relationship between the damage and the illegal conduct; and (iv) negligence or wilfulness of the defendant. It is not necessary to prove negligence or wilfulness of the defendant when claiming damages based on Article 25 of the Antimonopoly Act.

For claims for injunction based on Article 24 of the Antimonopoly Act, plaintiffs must prove that: (i) the defendant's conduct falls under certain types of unfair trade practices in violation of Article 8, Item 5 or Article 19; (ii) the plaintiffs' interests are infringed or are likely to be infringed; and (iii) the plaintiffs suffer or are likely to suffer "material" damages by such conduct.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In general, the court determines the amount of award based on the amount of actual damage suffered by a plaintiff. Neither treble damages nor exemplary damages are available under Japanese law.

With respect to the amount of damage arising from cartel conducts, the Supreme Court decision of December 8, 1989 held that the damages shall be the difference between the actual sales price and the sales price that would have been formed but for the cartel in question ("expected sales price") and that the sales price immediately before the cartel can be presumed to be the expected sales price unless significant changes in economic factors such as economic conditions and market structures occur between the time of the cartel and the time when customers purchase the goods at issue.

The Supreme Court decision also held that plaintiffs must prove that there is no such significant change and, if such proof is not possible, the presumption shall not be available and plaintiffs (indirect purchasers) must prove the expected sales price based on factors of price formation such as specific features of formation of sales price. The decision was sharply criticised in that plaintiffs must bear the burden of almost impossible proof.

Article 248 of the Code of Civil Procedure, which came into force in 1998, allows the court to determine a reasonable amount of damage if it is extremely difficult to prove the amount thereof from the nature of the damage, and such provision plays an important role in damage claims in general. Under Article 248, recent court decisions tend to find that the amount of damage shall be equivalent to 5 to 10 per cent of the actual contract price in bid-rigging cases.

One of the recent Tokyo High Court decisions held that the amount of damage caused by bid-rigging shall be the difference between the actual contract price and the expected contract price and that the expected contract price shall be presumed to be the aggregate amount of (i) one-fifth of the contract price immediately after the end of the bid-rigging, and (ii) four-fifths of the total amount of manufacturing cost and expenses as well as expected profits.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Neither the administrative surcharges imposed by the JFTC nor

criminal fines imposed by the criminal court are to be considered by the courts in calculating the amount of the award. Under Japanese law, there is no special redress scheme offered to those harmed by the infringement.

4 Evidence

4.1 What is the standard of proof?

As to the standard of proof, the party with the burden of proof must prove that the alleged facts are "highly probable" in order to obtain a court judgment in favour through the civil court proceedings.

4.2 Who bears the evidential burden of proof?

As is the case with other tort cases, the plaintiff alleging the defendant's violation of the Antimonopoly Act bears the burden of proof to demonstrate: (i) the illegal conduct of the defendant; (ii) damages; (iii) a causal relationship between the damages and the violation; and (iv) negligence or wilfulness of the defendant.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Antimonopoly Act does not provide presumptions of loss in cartel cases. Article 248 of the Code of Civil Procedure allows the court to determine a reasonable amount of damage if it is extremely difficult to prove the precise amount thereof due to the nature of the damage. Please see question 3.2.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Evidence must be submitted by the parties to the court and no evidence that is not submitted to the hearing procedures may be the basis of the judgment to be rendered by the court. Authenticity of documentary evidence must be attested in order for the evidence to be admissible as the basis of the judgment. There are no particular limitations on the forms of evidence that may be admissible, and no hearsay rules are applied to evidence in Japanese civil proceedings.

Expert opinions are sometimes used in private competition litigation in order to prove the amount of damage arising from price cartels and bid-rigging. For instance, plaintiffs sometimes choose economists or economic consultants as experts and obtain their opinions providing analysis on how and to what extent the cartel or bid-rigging had an impact on the price of the relevant product so that they can submit such opinion to the court as evidence. Experts can testify before the court.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Unlike common law jurisdictions, there is no comprehensive discovery scheme available under Japanese law.

(i) Pre-action disclosure of evidence

Under the Code of Civil Procedure, a potential plaintiff may obtain

a court order of preservation of evidence before filing a lawsuit if there are circumstances in which it would become difficult to use evidence unless such evidence is reviewed in advance, such order essentially serves as an order of pre-action disclosure of evidence.

(ii) Petition for order of document production

While the civil court proceedings are pending, a party may request the court to order the other party or a third party to produce particular documents, with certain limitations. For instance, under the Code of Civil Procedure, there is no obligation to disclose (i) a document relating to matters for which the holder or a certain related person is likely to be subject to criminal prosecution or conviction, (ii) a document concerning a secret in relation to a public officer's duties, which is, if submitted, likely to harm the public interest or substantially hinder the performance of public duties, (iii) a document containing any fact which certain professionals (e.g., a doctor, an attorney at law, a registered foreign lawyer) have learnt in the course of their duties and which should be kept secret, (iv) a document containing matters concerning technical or professional secrets, or (v) a document prepared exclusively for use by the holder.

In an action for injunction under Article 24 of the Antimonopoly Act, a plaintiff may request the court to order the defendant to produce documents even including trade secrets for the purpose of proving the infringement unless there is any justifiable reason to refuse such production. On the other hand, a party may request the court to render an order of protection of trade secrets in the aforementioned proceedings.

(iii) Petition for perusal of case record of JFTC administrative hearing procedures

Under the Antimonopoly Act, plaintiffs, as victims of alleged violation of the Antimonopoly Act, may request the JFTC for a review and reproduction of the documents submitted to the JFTC's administrative hearing procedures where an entrepreneur disputes the validity of a cease and desist order and/or an administrative surcharge payment order. Such documents include legal briefs and evidentiary documents submitted by the JFTC administrative investigator as well as the entrepreneur, but do not include documents within the files of JFTC investigators which were obtained or created during the course of their investigations. Having said that, the JFTC may provide plaintiffs with access to certain collected documents, including those collected from third parties, during their investigations, through a request by the court if a damage claim is filed in the court, except for certain information such as trade secrets and privacy information. Even attorney-client privileged documents, which would be subject to protection in other jurisdictions but are not protected in Japan, may be produced for judicial review.

(iv) Petition for perusal of case record of civil court proceedings

Furthermore, any person is allowed to review the case record of the civil court proceedings where the validity of the JFTC's cease and desist orders and administrative surcharge payment orders are challenged by entrepreneurs and any person who has legal "interests" is allowed to obtain copy of the case record including briefs and evidence submitted by the JFTC, which may include documents that the JFTC collected during their investigations. Plaintiffs or potential plaintiffs for private competition claims are likely to be included in such person who has legal interests and may have access to the documents collected during the JFTC's investigations. While the entrepreneur, as a party to the said civil court proceedings, is entitled to file a petition requesting the court not to disclose the documents to the third parties, the scope of documents subject to such petition is limited to personal information and trade secrets.

(v) Petition for perusal of case record of criminal court proceedings

In addition, plaintiffs, as victims of crimes for violation of the Antimonopoly Act, could also have access to the documents

submitted to the pending criminal proceedings if certain requirements are fulfilled. Any person may access the documents submitted to the criminal proceedings once the proceedings are finalised. However, they do not have access to the documents within the files of public prosecutors that were obtained and created during the course of their investigations.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In Japanese civil court proceedings, the court may order a subpoena of witnesses who do not voluntarily appear before the court, without justifiable reason, by which such witnesses would be forcibly taken before the court. Penalties may also be imposed on witnesses who have failed, or refused, to appear before the court, although such penalties are not severe. In practice, however, it is not common in the civil proceedings that the court orders a subpoena or imposes penalties even if a witness does not appear.

In general, witnesses are subject to cross-examination in relation to the matters raised during questioning in the examination. Even judges may supplementarily examine witnesses.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

In cases where a plaintiff brings a damage claim based on Article 25 of the Antimonopoly Act, which may only be filed after the JFTC's cease and desist order or an administrative surcharge payment order becomes irrevocable, the Antimonopoly Act does not allow the defendant to deny their wilfulness or negligence for the violation of the Antimonopoly Act found by those JFTC orders or the court judgment affirming such orders.

Furthermore, it is generally considered that the findings of violation of the Antimonopoly Act by the JFTC orders which became irrevocable through administrative hearing procedures or civil court proceedings create a rebuttable presumption that the Antimonopoly Act was violated.

As a matter of practice, even foreign enforcers' decisions could be taken into account by the court in charge of private competition cases to some extent in determining whether the Antimonopoly Act was violated, particularly when the facts and evidence are common to both the foreign case and the Japanese case. Private claimants may use decisions by sector-specific regulators in order to support their arguments.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As discussed in question 4.5, certain types of confidential document are excluded from the documents subject to the court order to produce documents under the Code of Civil Procedure.

Furthermore, while any person is allowed to review the case record of the civil proceedings, including the documents (briefs and evidence) submitted by the parties, the parties are entitled to file a petition requesting the court not to disclose personal information and trade secrets to any third party. Under such scheme, in a case where documents including personal information or trade secrets of third parties collected during the course of investigations are submitted by the JFTC to the civil court proceedings where the

validity of the JFTC's cease and desist orders and administrative surcharge payment orders are challenged by entrepreneurs, the parties to such proceedings are entitled to file a petition requesting the court not to disclose the personal information and trade secrets to any third parties.

The JFTC restricts access to documents that include trade secrets or privacy information in response to the plaintiffs' request for review and reproduction of documents submitted to the JFTC administrative hearing procedures and the court's request for access to the documents as explained in question 4.5. Furthermore, the JFTC may also impose conditions that are deemed proper in response to a plaintiff's request for review and reproduction of documents submitted to the JFTC administrative hearing procedures. For instance, the JFTC blacks out confidential information to the extent necessary before disclosure of the documents.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

There is no explicit provision under the Antimonopoly Act by which the JFTC is obligated to make its findings and analysis for a particular case public. However, the Antimonopoly Act provides that the JFTC may make the matters public to the extent necessary for the operation of the Antimonopoly Act (excluding business secrets), and the JFTC usually makes a public announcement of the conclusion of its investigation. Specifically, the JFTC makes public the order, fact findings and application of the Antimonopoly Act for almost all cases for which the JFTC has conducted formal investigations.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

A private monopolisation and an unreasonable restraint of trade prohibited by the Antimonopoly Act may, theoretically, be justified if they are not "contrary to the public interest". While plaintiffs bear the burden of proving such requirement, the court usually find that the "contrary to the public interest" requirement is fulfilled as long as the plaintiff proves that the defendant's acts in question have caused a "substantial restraint of competition".

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

While the "passing on defence" itself is not recognised in Japan, passing on value (i.e., the amount that direct purchasers have collected from indirect purchasers) will theoretically be taken into account when calculating the amount of damage suffered by direct purchasers. Even indirect purchasers have legal standing to file a lawsuit to claim civil damages arising from a violation of the Antimonopoly Act. However, in cases involving both direct and indirect purchaser(s), it will not be easy in practice to prove the amount of damages as well as any causal relationship between the violation at issue and the alleged damages. Article 248 of the Code of Civil Procedure could be of assistance in overcoming the practical obstacle involved in determining the amount of damage, as it allows the court to determine a reasonable amount of damage if it

is extremely difficult to prove the amount thereof due to the nature of the damage.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Under the Code of Civil Procedure, a person who has legal interests in the result of a lawsuit is allowed to intervene in such lawsuit in order to assist one of the parties thereof. Under such scheme, the court judgment on the merits in the lawsuit will not directly apply to the intervener, but the intervener is not allowed to raise objections to the facts found by the judgment in a potential subsequent lawsuit between the defendant and the intervener. It would theoretically be possible for a cartel participant to join a lawsuit involving other cartel participants as an intervener, as opposed to a co-defendant, under the aforementioned scheme. However, in most cases, there are no advantages for a cartel participant to intervene in such lawsuit and we do not see any specific case where such intervention occurred in cartel cases.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Damage claims for breach of competition law must be initiated within (i) 20 years from the date on which the alleged violation first occurred, or (ii) three years from the date when the plaintiff first became aware of the alleged violation, whichever period elapses earlier. Even after the expiration of the three-year period, the court may uphold damage claims if the defendant does not bring the defence of such expiration.

Damage claims under Article 25 of the Antimonopoly Act must be initiated within three years from the date when the relevant cease and desist order or administrative surcharge payment order became irrevocable.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

While the Law on Expediting Trials provides that a period of two years is a target period for the completion of the first instance of the judicial proceedings, the duration of any given court proceeding may well depend on the complexity of each case. While a minimum of one year is usually required for the court to render the judgment for the first instance in ordinary civil cases, private competition cases could last for more than two years because the judges are not necessarily familiar with the competition laws/regulations and the issues to be examined by the court, including the issue of damages, tend to be complicated.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Permission of the court is not required to discontinue claims based on breach of competition law. It is possible for a plaintiff

to withdraw the claims until the judgment becomes final. When the defendant already submitted a response to the claims on the merits, it is necessary to obtain consent from the defendant in order to withdraw the claims. As such, if a settlement is reached between the parties outside the civil court proceedings, a plaintiff usually agrees to withdraw the claim with the consent of the defendant.

As an additional note, during the course of civil court proceedings, Japanese courts tend to seek an opportunity to recommend amicable settlement of disputes before the court (judicial settlement). It is common for the court to confirm with the parties whether there is any chance of judicial settlement immediately before moving to witness examinations or immediately after completing witness examinations (i.e., before concluding the proceedings to start preparing a judgment). Once the court considers that there is a chance of reaching judicial settlement, the judge tends to have a discussion with a plaintiff and a defendant respectively, and make an attempt to form terms and conditions agreeable by both plaintiff and defendant, persuading the parties to make concessions. When an agreement is reached, it is put into the court record and the record has the same effect as a final and binding judgment. Many civil cases are resolved by judicial settlements in Japan.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

No collective claims, class actions and representative actions are permitted in Japan.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In general, a successful party can recover the court costs, which include filing fees, fees and travel expenses paid to witnesses and interpreters, from the unsuccessful party.

As to attorneys' fees, Japanese courts do not grant successful parties a right to recover such fee, in principle. However, in cases where compensation for damage is sought based on tort, the court tends to allow a successful party to recover 10 per cent of the attorneys' fees as part of the damages. Also, there is a scholarly discussion that attorneys' fees should be recovered by successful parties even in injunction cases.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are permitted to act for claimants on a contingency fee basis in Japan. Although 100 per cent of contingency arrangements are not specifically prohibited under Japanese law, the rules of ethics for lawyers may be interpreted to prevent such arrangements from being adopted and such arrangements are rarely used in Japanese practice.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There is no legislation prohibiting or specifically restricting third

party funding in Japan. As such, a plaintiff may file a competition law claim with third party funding; however, it will be considered as a violation of the Attorneys Act if the third party provides legal advice to the plaintiff and takes a share of any proceeds from the lawsuit. We are not aware whether or not the arrangement has been used to date.

9 Appeal

9.1 Can decisions of the court be appealed?

A claimant has a right to file an appeal against a district court judgment with a high court having jurisdiction over the case (*koso* appeal), and it is possible to further file an appeal against a high court judgment with the Supreme Court (*jokoku* appeal). A *jokoku* appeal to the Supreme Court can be made for limited reasons under the Code of Civil Procedure.

No specific grounds for an appeal to a high court (*koso* appeal) are provided under the Code of Civil Procedure and the grounds include error in fact-findings and application of law in the judgment. An appeal to the Supreme Court (*jokoku* appeal) can be made on the ground that the high court judgment contains a violation of the Constitution or on the ground that the procedures in the lower court contains any of the material illegalities set forth in the Code of Civil Procedure. In addition, parties may file a "petition for admission of a *jokoku* appeal" and the Supreme Court may accept the petition as a *jokoku* appeal if it deems that the case involves an important issue.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is offered by the JFTC for its cartel investigations for administrative surcharge payment orders pursuant to the relevant provisions of the Antimonopoly Act. The first in may enjoy 100 per cent immunity, the second in may enjoy a 50 per cent reduction of the administrative surcharges and the third through the fifth in may enjoy a 30 per cent reduction thereof. The 2010 Amendment to the Antimonopoly Act increased the number of leniency applicants up to five applicants: (i) up to five applicants before a dawn raid; and (ii) up to three applicants after a dawn raid if there are fewer than five applicants before the dawn raid. The leniency applicants must provide the information and evidence valuable to the JFTC.

Regardless of whether successful or unsuccessful, leniency applicants in cartel investigations are not entitled to receive immunity from civil claims or any other beneficial treatment in follow-on private competition cases.

While the recent amendment to the Code of Criminal Procedure will introduce the immunity application programme for criminal violation of the Antimonopoly Act, immunity applicants will not be entitled to receive any beneficial treatment in follow-on private competition cases.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Evidence disclosed to the JFTC by a leniency applicant could be

disclosed to the subsequent court proceedings through the procedures discussed in question 4.5. However, the JFTC has a policy under which it will not disclose information submitted by leniency applicants unless the applicant wishes to disclose such information. Such information may be excluded from the information subject to the plaintiffs' request for review and reproduction of documents submitted to JFTC administrative hearing procedures and may also be excluded from the information subject to the court's request for access to the documents explained in question 4.5.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

We do not anticipate any direct impact of the Directive on competition litigation in Japan.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable in Japan.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable in Japan.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The commitment procedure, which is a system to resolve alleged violations of the Antimonopoly Act voluntarily by consent, will be introduced pursuant to a partial amendment to the Antimonopoly Act included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws, which was passed into a law on December 9 and promulgated on December 16, 2016. The effective date was set on the day when the Trans-Pacific Partnership agreement will come into effect in Japan. The government established related laws and regulations including the Rules on the Commitment Procedure of the JFTC. Under the commitment procedure, an entrepreneur that received a notice from the JFTC regarding alleged violation of the Antimonopoly Act may devise a plan to take necessary measures to cease the conduct allegedly violating the Antimonopoly Act and file a petition for approval of such plan with the JFTC. In response to such petition, the JFTC determines whether to approve such plan and, if such plan is approved, determines not to render a cease and desist order and administrative surcharge payment order against the petitioner.


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Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, associated local law firms in Jakarta and Beijing where our lawyers are on-site, and collaborative relationships with prominent local law firms throughout Asia and other regions.

In representing our leading domestic and international clients, we have successfully structured and negotiated many of the largest and most significant corporate, finance and real estate transactions related to Japan. The firm has extensive corporate and litigation capabilities spanning key commercial areas such as antitrust, intellectual property, labour and taxation, and is known for path-breaking domestic and cross-border risk management/corporate governance cases and large-scale corporate reorganisations.

The over 400 lawyers of the firm, including over 20 experienced foreign attorneys from various jurisdictions, work together in customised teams to provide clients with the expertise and experience specifically required for each client matter.

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Three categories of litigation may be brought regarding the violation of the competition laws in Korea such as the Monopoly Regulation and Fair Trade Act, the Fair Transactions in Subcontracting Act, the Franchise Business Promotion Act, etc., which are the primary governing laws related to competition in Korea (hereinafter collectively referred to as the “competition law”).

First, one may bring administrative litigation to the court to cancel an order made by the Korea Fair Trade Commission (the “KFTC”). Once the KFTC’s sanction measures (corrective measures, fine, etc.) are issued, the parties that received the sanctions may bring administrative litigations to the court seeking for cancellation of the KFTC’s measures. Since about 90 per cent of the enforcement of the competition law in Korea consists of KFTC actions, this is the most common type of litigation related to the competition law in Korea.

Second, there can be criminal litigation. The KFTC can report firms (usually corporations) and individuals (firm executives) that committed significant violations of the competition law to the prosecutor’s office. The Korean competition law adopts the “exclusive complaint system” which requires a criminal complaint filed by the KFTC in order for the prosecutor’s office to prosecute competition law violations. Thus, the process of the criminal litigation relating to the competition law in Korea is that the KFTC investigates the cases, issues the corrective measures, and then files criminal complaints with the prosecutor’s office in the case of significant violations, based on which the prosecutor’s office may prosecute. However, the gradual abolishment of the exclusive complaint system is currently being promoted, and it is expected that the prosecutors’ office will be able to independently prosecute competition law violation cases in the future.

Third, there can be civil litigation between private parties. Civil litigation takes place in various forms. For example, a plaintiff may initiate civil litigation claiming damages caused by the defendant’s violation of the competition law. There also can be civil litigation for an invalid contract claim based on the fact that particular contract provisions violate the competition law. Plus, one may seek a court injunction on the opposite party’s violation of the competition law (e.g., abusive advertisement). Since these private enforcements are less frequent than the public enforcement (by the KFTC) in

Korea, there have not been many major civil cases which involved violations of the competition law. However, the number of private competition law litigations has been increasing recently.

1.2 What is the legal basis for bringing an action for breach of competition law?

As mentioned above, the Korean competition law authorises the KFTC to impose administrative sanctions.

Due to the exclusive complaint system, the prosecutor’s office has not been authorised to prosecute competition cases independently until now. However, it is expected that other investigative agencies, including the prosecutor’s office, will soon be able to investigate and prosecute competition law cases independently after the abolishment or reform of the exclusive complaint system.

The right to claim for damages of private parties are stipulated in the competition law. Although the right to request for an injunction is not stipulated in the competition law, it is acknowledged by general legal principles, especially in the fields where the necessity of strong preventative measures is recognised (e.g., defamation).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for the competition law claims discussed above is derived from the national law enacted by the National Assembly of South Korea. The Executive Branch, in addition to the members of the National Assembly, also has the right to introduce bills, and the government-introduced bills for specialised areas such as the competition law are frequently adopted at the National Assembly.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The KFTC corrective measures substitute the first trial. The Seoul High Court has the exclusive jurisdiction for administrative litigation for cancellation of the KFTC measures. In case the judgment of the Seoul High Court is appealed, the case is transferred straight to the Supreme Court of Korea. For criminal litigations and civil litigations, there is no court with exclusive jurisdiction or specialty. The first trial proceeds at a district court with general jurisdiction, the second trial proceeds at a high court, and the third trial proceeds at the Supreme Court of Korea.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

There is no class action system in Korea. Each and all of the plaintiffs seeking claims for damages must participate in the litigation. If multiple plaintiffs initiate separate litigations on the same issue, such litigations can sometimes be merged and proceed as if they are a one-trial process, although they are practically separate and independent litigations for each plaintiff.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

A victim of the breach of the competition law may choose to report to the KFTC or to file a civil litigation (there is no court of exclusive jurisdiction for a civil litigation regarding the competition law). Both proceedings are independent in the aspects of jurisdiction. In other words, it does not matter which one of the two proceedings is brought up first, and the victim may initiate both proceedings simultaneously. In practice, when the civil litigation is pending, the KFTC sometimes waits and investigates after the civil litigation is completed, and *vice versa*.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

This issue does not have an important meaning as administrative litigations that seek the cancellation of KFTC measures is the mainstream in Korea. Even if a follow-up civil litigation is raised, usually this is after the KFTC’s measures are issued.

1.8 Is the judicial process adversarial or inquisitorial?

Fundamentally, the Korean litigation structure follows the adversarial process. Although an inquisitorial nature is partially included in the case of criminal litigation, in practice, it is rare for an inquisitorial process to be brought up in a criminal trial involving the breach of the competition law.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The preliminary court injunction is widely used in Korea, and a plaintiff who has the rights which must be preserved until trial may petition for a preliminary injunction.

However, in the case of competition litigation, there are not many cases where a victim of the violation of the competition law has petitioned for a preliminary injunction, because public enforcement by the KFTC is much more common than private litigation in Korea. In reality, usually the violating firm suspends the violating by itself when the KFTC beings to investigate to reduce the risk of KFTC sanctions.

2.2 What interim remedies are available and under what conditions will a court grant them?

The requirements for obtaining a preliminary injunction order are substantially identical to those for obtaining a court judgment through trial. Therefore, it is ordinary for the court to hear the case for the petition for a preliminary injunction in accordance with the regular trial hearing standard, although it is faster than the trial process.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

- (i) As an administrative remedy, the KFTC may issue corrective measures or impose a fine. The corrective measures include not only a suspension order on the acts that violate the competition law but also an order to take corrective actions. For example, if the KFTC determines that a business combination (i.e., merger, stock acquisitions, etc.) violates the competition law, it can order the acquiring company to sell a certain amount of stocks in the target company. The KFTC fine is an administrative penalty which functions as retribution for acts that violate the competition law and as the redemption of unjust enrichment. The fine belongs to the government and is not distributed to the victim.
- (ii) As a civil remedy, a victim can bring a civil action claiming for damages or petition for injunctive relief. In practice, the injunction is not used much, and most victims choose to report to the KFTC.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In principle, the damages that can be awarded are limited to actual damages, and exemplary damages are not awarded unless it is specifically allowed in a statute. Although a small number of statutes, such as the Fair Transactions in Subcontracting Act, the Franchise Business Promotion Act, etc., allow treble damages, it is currently difficult to find cases where the court has actually awarded treble damages.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

In principle, the fine imposed by the KFTC or the criminal court is not considered in assessing damages in civil litigation. This is because of the distinction between a administrative matter, a criminal matter, and a civil matter.

Exceptionally, when calculating treble damages allowed under the Fair Transactions in Subcontracting Act and the Franchise Business Promotion Act, the court considers the amount of fines already imposed by the KFTC. It is interpreted that one of the reasons why

there has been no case where the court awarded treble damages is because the defendants who faced the civil litigation were already fined by the KFTC.

4 Evidence

4.1 What is the standard of proof?

In the case of civil or administrative litigation, the standard of proof is that a fact must be proven to the extent of high probability about which a reasonable man would not doubt. The standard of proof in criminal litigation is higher, and the famous beyond reasonable doubt standard applies in criminal cases.

4.2 Who bears the evidential burden of proof?

In administrative litigations for the cancellation of KFTC measures, the KFTC must prove the legality of the measures. That is, the KFTC has the burden of proof.

Likewise, in criminal litigations, the prosecutor's office has the burden of proof.

In civil litigations, a plaintiff who files a claim for damages has the burden of proof. The reason why most victims in Korea choose to report to the KFTC is because of the burden of proof in civil litigations.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Under the Korean competition law, the amount of damage is not presumed, and the damage amount must be calculated by a valuation method in individual cases. For this reason, the evidence that may be used as a valuation standard (i.e., comparative data before and after the price-fixing period) is important.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There is no restriction on the format of evidence submitted to courts. Expert testimony is also allowed, and courts hear evidence with judicial discretion.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

- (i) There is no pre-litigation discovery process in Korea.
- (ii) Once civil and administrative litigations have commenced, parties can file a motion for an order to submit documents, specifying the types and contents of the requested documents. If the court accepts the motion, the other party has the obligation to submit the requested documents. If the other party does not comply with the order, the contents of the requested documents claimed by the requesting party are deemed true in the litigation. There is no other disadvantage or fine for not following the court's order.
- (iii) During the litigation, it is also possible for a court to request third party agencies to verify the facts and submit such

verification to the court. However, the court's verification request is non-binding, and the third party agency often does not answer to the court's request.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In litigations, if the witness does not appear in court, the court can impose fines or issue a warrant and force the witness to appear in court. The right to cross-examination by the other party is guaranteed.

On the other hand, during the KFTC's investigations, there is no administrative procedure to force a witness to appear. Instead, there is a system in which the KFTC can reduce the amount of the fine imposed on a subject of the investigation who actively cooperates during the investigation process. The KFTC does not allow the fine reduction to a subject of the investigation who does not cooperate with bringing witnesses to the KFTC, which is an indirect method to secure witness attendance. In the KFTC's investigation, the right to cross-examine the witness is not guaranteed.

4.7 Does an infringement decision by a national or international competition authority, or authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Although a KFTC corrective measure or a decision made by a foreign competition authority does not bind Korean courts, such measure or decision might function as important evidence. There are opportunities to dispute the KFTC measures or decision made by a foreign competition authority, but it is not easy to do so in practice.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Since court records other than the court opinion are not disclosed to third parties in Korea, the evidence submitted in the process of litigation can remain confidential in some degree. In the case of confidential information that cannot be disclosed even to interested parties, parties to the litigation and the court can review the information by themselves without leaving the information on the court record. If the KFTC investigation involves confidential information, the KFTC may maintain the information confidential upon the request of the relevant parties.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The KFTC publicly announces most of the contents of the imposed sanction measures or the suspect of suspicion to the press.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

It is possible up to a certain point. There are two types of regulations

by the Korean competition law: (i) regulations that protect competition itself (i.e., antitrust, prohibition of anti-competitive business combination, cartel); and (ii) regulations that protect a particular competing party (i.e., unfair trade practices). The act that violates regulation type (i) is illegal only when the competition is limited or there is concern that it is limited. Thus, it is possible to raise a defence that the competition is not being limited or that the act promotes the public interest or consumers even though it is anti-competitive. However, it is rare in practice that such defence is accepted in court.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Korean courts do not recognise the passing on defence. For example, in the case where baking companies claimed for damages due to price-fixing of flour manufacturers, the defendants, flour manufacturers, raised the passing on defence. Their defence was that there was no damage on plaintiffs, the baking companies, because the price of bread was also increased due to the increased price of flour. However, the court did not accept this defence.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

This situation is not common in Korea because price-fixing victims (usually agencies that placed bids) generally raise claims for damages against all members of a cartel. As a joint tort-feasor, each member of the cartel is jointly liable. Therefore, based on the plaintiff’s decision, he or she (i) can choose to be compensated equally by each member of the cartel, or (ii) can choose to claim total damages against one member of the cartel, letting the members of the cartel sort out their respective share of the damages later.

If a plaintiff sues only some members of a cartel, the plaintiff may want to notify the other members of the cartel who were not sued of the lawsuit so that the effect of the court judgment can reach those notified members. The notified members can choose to join the lawsuit as a supplementary participant.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The statute of limitation for the KFTC to issue a corrective measure is stipulated in the law. For example, in cases of violation of the Monopoly Regulation and Fair Trade Act, the KFTC must start the investigation within seven (7) years from the date the violation has ended and impose corrective measures within five (5) years from the date of the commencement of the investigation. In cases of a violation of the Subcontract Act, the violation must be reported within three (3) years from the date of the termination of a subcontract, and the KFTC must issue corrective measures within three (3) years from the reporting date.

There is also a statute of limitation on filing a civil lawsuit. The statute of limitation ends after three (3) years from the date when the plaintiff has acknowledged the existence of the violation of law or the illegality of an activity. The statute of limitations also ends after ten (10) years from the date of the violation.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The timescale of a KFTC investigation varies depending on the type of violation. For price-fixing cases, it takes roughly two (2) years for the KFTC from the beginning of the investigation. For unfair trade cases, it takes roughly one (1) year from the filing date. The period can be longer based on the complexity of the case.

In the case of administrative litigation for the cancellation of KFTC measures, it usually takes one (1) to two (2) years to get the court judgment.

Civil litigations are expected to take about a year for each instance. The litigation period can be extended to several years if the hearing date is set after waiting for the KFTC measure first or it involves complex economic analysis such as a calculation of damages.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

- (i) In a KFTC investigation on an unfair trade activity where such activity was reported to the KFTC by a third party, it is common for the KFTC to drop the investigation if the parties reached an agreement and withdrew the report. However, if the investigation reached the point where only the determination of the degree of sanctions remains, the KFTC may proceed with the investigation and order corrective measures even if the report was withdrawn by the reporting party, if the KFTC determines that the degree of illegality is high.
- (ii) In other types of KFTC investigations such as antitrust, the prohibition on the anti-competitive business combination, price-fixing, etc., the KFTC does not drop the investigation even if the parties reached a settlement agreement.
- (iii) In civil litigations, the case can, of course, be dropped by a settlement between the parties.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As explained above, collective claims, class actions or representative actions are not permitted in Korea.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

- (i) In the case of a KFTC investigation, the subject of the investigation cannot recover its legal costs from the KFTC even if it is determined that there was no violation of the competition law.
- (ii) In the case of litigation, the prevailing party may recover its legal costs up to a certain amount from the non-prevailing party.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, the lawyers are permitted to act on a contingency fee basis. Currently, however, there is a controversy about a contingency fee for criminal lawyers.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Although there is no provision in the Korean laws that explicitly prohibit third party funding of competition law claims, it must not constitute illegal activity under other laws such as breach of fiduciary duty, etc.

9 Appeal

9.1 Can decisions of the court be appealed?

The decisions of the courts can be appealed to the higher courts (please refer to the answer to question 1.4 above).

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The Korean competition law allows the leniency system in price-fixing cases, in which the KFTC provides a penalty reduction to a party that voluntarily discloses its price-fixing activities. The disclosing party eligible for primary leniency enjoys a 100 per cent reduction of a fine and immunity from a criminal charge. The disclosing party eligible for secondary leniency enjoys a 50 per cent reduction of a fine and immunity from a criminal charge. There are no guaranteed advantages for the disclosing party eligible for tertiary leniency, although an up to 20 per cent reduction of a fine may be allowed if the party diligently cooperates with the KFTC's investigation.

The leniency system only applies to the administrative sanctions imposed by the KFTC, and it does not exempt any civil or criminal liabilities of the parties.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The principle is that the evidence disclosed to the KFTC by a party to obtain leniency is treated in the same way as the other general evidence.

However, when there is a risk that the identities of the parties who obtained primary or secondary leniency by voluntarily disclosing the price-fixing-activities might be revealed, the KFTC may maintain the confidentiality of the evidence.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable in Korea.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable in Korea.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable in Korea.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The KFTC has been working on reforming the Monopoly Regulation and Fair Trade Act and improving the enforcement system since 2017. Several plans, such as easing the KFTC's investigative burden, reforming the exclusive complaint system, increasing fines, promoting private enforcement, etc., are under discussion. Overall, it is expected that the execution of the Monopoly Regulation and Fair Trade Act will become stricter.

Acknowledgment

The authors would like to thank their colleague In Hyuk Yoo for his assistance in the preparation of this chapter.

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법무법인(유한) 바른

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GANADO Advocates

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

For the purposes of this chapter, we shall be focusing on claims of breaches of competition law brought in private actions before the courts of civil jurisdiction. It should be noted that allegations of infringement of the competition rules may also be the subject of administrative proceedings (public enforcement action) before the Office for Competition ('OC') within the Malta Competition and Consumer Affairs Authority. The OC has investigatory and decision-making powers under the Competition Act ('CA', Chapter 379 of the Laws of Malta). Apart from a few references that have been made to it, the administrative procedure will not be discussed as it falls outside the scope of this chapter.

A plaintiff may bring an action before any court of civil jurisdiction alleging that an agreement is anticompetitive in terms of Article 5 CA and/or Article 101 of the Treaty on the Functioning of the European Union ('TFEU') or alleging an abuse of a dominant position under Article 9 CA and/or Article 102 TFEU. A defendant may rely on the said articles (referred to in this text collectively as 'the competition rules') as a defence (commonly referred to as a 'shield') by holding that the plaintiff's claim is unenforceable as the agreement or conduct breaches the competition rules.

Damages claims (whether follow-on or stand-alone) arising from an infringement of the competition rules may be made before the courts either in individual or class actions.

Plaintiffs may also request interim measures before or during the pendency of proceedings, including freezing orders and prohibitory injunctions.

1.2 What is the legal basis for bringing an action for breach of competition law?

The substantive articles on which an action for breach of competition law can be based are Articles 5 and 9 CA (the national competition rules referred to above) and Articles 101 and 102 TFEU.

Both Articles 5 and 9 are modelled on Articles 101 and 102 TFEU respectively, except that they concern conduct affecting competition in Malta and do not require an effect on trade between Member States.

Article 5(1) CA prohibits any agreement between undertakings, any decision by an association of undertakings and any concerted

practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta. A non-exhaustive list of the types of agreements, decisions and practices covered by the prohibition (like that found in Article 101(1) TFEU) is provided.

Such agreements and decisions are *ipso jure* null and unenforceable (Article 5(2) CA) unless their impact on the market is minimal (Article 6 CA) or they satisfy the conditions for exemption under Article 5(3) CA.

Article 9 CA prohibits any abuse by one or more undertakings of a dominant position within Malta or any part of Malta. Again, an indicative list of the conduct covered by the prohibition similar to that found in Article 102 TFEU is provided.

The legal bases for actions for damages arising from a breach of the competition rules are:

- (i) the new Article 27A CA and the Schedule to the CA containing the Competition Law Infringements (Action for Damages) Regulations ('the Regulations') for any such actions arising from infringements committed on or after 27 December 2014;
- (ii) the old Article 27A CA for infringements occurring as from 23 May 2011 to 26 December 2014; and
- (iii) the tort provisions in the Civil Code for infringements occurring before 23 May 2011 (see *Hompesch Station Limited v Enemalta Corporation, Malta Resources Authority, Minister for Energy and Rural Affairs and the General Retailers and Traders Union* (23 November 2015) currently pending appeal, explained in the reply to question 3.2).

Except where otherwise stated, this chapter shall focus on the legal regime introduced by the new Article 27A and the Regulations. The provisions referred to henceforth as a 'regulation' and 'sub-regulation' are found in the said Regulations.

Apart from the Regulations (the definition of action for damages in regulation 3 includes an action "by someone acting on behalf of one or more alleged injured parties"), Article 3 of the Collective Proceedings Act ('CPA') also provides the legal basis for a class action.

Precautionary warrants for interim relief are issued in terms of the Code of Organization and Civil Procedure ('COCP') which provides the rules of procedure applicable to civil actions in general.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The right to file an action based solely on Articles 5 and 9 CA is derived from national law. These two articles are interpreted in

line with the case law of the Court of Justice of the EU ('CJEU') and the decisions and guidelines of the European Commission ('Commission').

The right to file an action for breach of Articles 101(1) and 102 TFEU (which have direct effect) is derived from EU law, although provision to this effect is also made in national law. *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* ('Regulation 1/2003') conferred upon the national courts and the national competition authorities jurisdiction to apply Articles 101 and 102 TFEU.

Articles 5(5) and 9(4) CA provide that Articles 101 and 102 TFEU apply where the agreement or conduct in question affects trade between Malta and any one or more Member States. Moreover, in terms of Article 4(1) of the European Union Act (Chapter 460 of the Laws of Malta) all rights, powers, liabilities, obligations and restrictions emanating from the TFEU, which in accordance with EU law are without further enactment to be given legal effect in Malta, shall be recognised and enforced in Malta.

The legal bases for an action for damages or for interim relief outlined in the reply to question 1.2 are derived from national law, but the Regulations were introduced to implement *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* ('the EU Damages Directive').

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The courts of civil jurisdiction seized of private actions are not specialist competition law courts, but are generally presided by judges who are familiar with the competition rules.

The Competition and Consumer Appeals Tribunal ('CCAT'), which is a specialist tribunal, hears appeals from decisions of the OC, but does not have jurisdiction to hear private actions and to award damages. The CCAT is presided by a judge sitting with two other members selected by him from a panel of ordinary members, consisting of two economists, preferably one specialised in industrial organisation economics and the other in behavioural economics, a certified public accountant and three other persons with recognised competence and knowledge in competition law matters, consumer protection, industry and commerce.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Any person (natural or legal) who can prove a juridical interest can bring an action for breach of competition law. Thus, any person who can show that he/it has suffered harm may file an action. This could be an undertaking or a consumer.

Under Article 3 CPA, collective proceedings may be instituted to seek the cessation of an infringement of competition law, the rectification of the consequences of an infringement and/or compensation for

harm. Collective proceedings may be instituted as a group action or a representative action. A group action is brought on behalf of the class members by a class representative who has a claim which falls within the proposed collective proceedings. A representative action is brought on behalf of the class members by a registered consumer association or a constituted body.

Class actions may be instituted as stand-alone or follow-on actions. Collective proceedings are permitted on an opt-in basis, so that in order to be represented, a claimant must himself choose to be included as a member of the class by registering his claim with the class representative.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Jurisdiction before the EU Member State courts, as from 10 January 2015, is regulated by *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast)* (Brussels Recast Regulation).

Where the Brussels Recast Regulation does not apply, the rules in the COCP apply. In principle, the courts have jurisdiction with respect to actions concerning:

- citizens of Malta, provided they have not fixed their domicile elsewhere;
- any person as long as he is either domiciled or resident or present in Malta;
- any person, in matters relating to property situated in Malta;
- any person who has contracted an obligation in Malta in regard to actions affecting such obligation and provided such person is present in Malta;
- any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta;
- any person, in regard to any obligation contracted in favour of a citizen or resident of Malta or of a body incorporated or operating in Malta, if the judgment can be enforced in Malta; and
- any person who voluntarily submits to the jurisdiction of the court.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

We have observed so far only a few private competition law claims with a cross-border element filed in Malta, where the plaintiff is an association representing travel agents in Malta (see the reply to question 3.2). On the other hand, there is an increase in private proceedings (unrelated to the competition rules) with a cross-border element in Malta and, based on our experience, plaintiffs are generally comfortable with initiating proceedings here.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial. However, it is still possible for the judge to put questions to witnesses, order inspections *in faciem loci* and order expert opinions.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes. Interim measures may be awarded by the court in the form of precautionary warrants under the COCP in private competition law cases independently of whether they are follow-on or stand-alone cases.

By way of comparison, it may be observed that interim measures may also be ordered by the Director General of the OC in public enforcement proceedings in cases of urgency due to the risk of serious and irreparable damage to competition on the basis of a *prima facie* finding of a breach of the competition rules (Article 15 CA). Interim measures were ordered by the OC against four insurance companies in Case COMP-MCCAA 4/2017 (decided on 18 September 2017; these interim measures were renewed on 16 March 2018 for a further six months).

2.2 What interim remedies are available and under what conditions will a court grant them?

The following precautionary warrants may be obtained before or pending proceedings:

- (a) Warrant of description. This is issued to secure a right over movable things when the applicant has an interest that such movable things remain in their actual place or condition. A court official draws up an inventory describing in detail the things forming the subject matter of the warrant by stating their quantity and quality. The things forming the subject matter of the warrant remain in the custody of the person in whose possession they are found.
- (b) Warrant of seizure of movables. This warrant of seizure orders the removal of property of the debtor, which is subsequently seized under court authority with a view to it being sold by means of a court-approved public auction (i.e. after an executive title is obtained, such as a judgment on the merits).
- (c) Warrant of seizure of a commercial going concern. This may only be issued to secure a claim which could be frustrated by the sale in part or in whole of the said going concern. Thus, it is issued to preserve the totality of the assets of the going concern. The court must be satisfied that there is no other way to safeguard the amount due and that the warrant is necessary to protect the rights belonging to the applicant who, *prima facie*, appears to have such rights.
- (d) Garnishee order. A garnishee order would require that money or movable property held by third parties for a debtor are attached and deposited in court.
- (e) Warrant of prohibitory injunction. An application for a warrant of prohibitory injunction must demand that a person is restrained from doing anything (both acts and omissions) which might be prejudicial to the person filing the application. The court will issue such warrant if it is satisfied that it is necessary to preserve any right of the person suing out the warrant, and that *prima facie* such person appears to possess such right.
- (f) Warrant of arrest of sea vessels/aircraft. Such warrants order that the sea vessel or aircraft in question is seized and attached under the control and power of the Authority for Transport in Malta to secure a claim which could be frustrated by the departure of the ship or aircraft.

The precautionary warrants mentioned above may only be issued if the essential requisites particular to each warrant are satisfied.

Each warrant is subject to the procedural formalities and exceptions provided by law. Once issued, the applicant must, within 20 days, file an action in respect of the right stated in the warrant. The court may order the party suing out the warrant to provide sufficient security for the payment of the penalty that may be imposed, and of damages and interest in favour of the person against whom the warrant was sought.

The Brussels Recast Regulation allows a party who has initiated judicial proceedings (of a civil and commercial nature) in another EU Member State to apply for the precautionary warrants mentioned above in Malta, in support of the judicial proceedings (without the need for initiating judicial proceedings in Malta).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

In a private action, the court may declare the (full or partial) nullity of the agreement, order the cessation of an infringement, order specific performance or rectification of the consequences and award compensation. In principle, the court assesses all the circumstances of the case and whether the remedy would be proportionate.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In terms of regulation 4, the claimant is entitled to full compensation for any and all damages caused by an infringement of competition law so that the claimant is placed in the position he would have been had the infringement not been committed. Full compensation covers actual loss, loss of profit and interest from the time the damage occurred until the capital sum awarded is actually paid.

No over-compensation is allowed, in particular, by way of punitive, multiple or exemplary damages.

In terms of regulation 16, it is up to the claimant to prove the extent of the harm and for this purpose the claimant may produce his own expert witnesses. However, once it is established that the claimant suffered harm and it is impossible or excessively difficult to quantify precisely the harm suffered on the basis of the evidence available, the court may estimate the amount of harm. The court in this case may opt to rely on the concept of *arbitrio boni viri*. In estimating the amount of harm suffered by the claimant or the share of any overcharge that was passed on to the claimant, the court may also appoint an expert to assist it (regulation 12(3)).

The court may also seek the assistance of a competition authority in the determination of the quantum of damages (regulation 16(3)). The court must also consider the guidance provided by the Commission on quantification of harm in competition cases (regulation 12(3)).

In establishing the quantum of damages, the court must take into account the counterfactual scenario.

The only case where damages have been awarded for anticompetitive conduct so far is the *Hompesch Station* case. This case originated from an agreement between Enemalta (the exclusive distributor of fuel at the time of the agreement) and the General Retailers and

Traders Union ('GRTU') representing service stations, which provided for an increase in the commission on sales of fuel to service stations.

The OC found that the overall arrangement, consisting of collusion between the members of GRTU, the individual agreements between Enemalta and the petrol station owners and the agreements between GRTU and Enemalta, infringed Article 5(1) CA. Furthermore, the OC recommended that the law on opening hours should be amended as it was restricting competition. This decision was confirmed by the then Commission for Fair Trading ('CFT', today replaced by the CCAT).

In a separate action for damages, the civil court, relying on responsibility in tort (non-contractual responsibility for damages occurring through fault) and relying on the CFT infringement decision, confirmed that the conduct of the defendants caused harm to the plaintiff. The value of the damages liquidated, representing the difference between the full commission and the commission actually paid to the plaintiff, as well as the loss of commission from reduced sales in the period that it started to adhere to the opening hours, amounted to €242,837. It considered the defendants to be jointly liable to pay the damages, on the basis that in terms of Article 115(1) of the Commercial Code, in commercial obligations, co-debtors are, saving any stipulation to the contrary, presumed to be jointly and severally liable. An appeal from this judgment is pending.

We are aware that another follow-on damages case for breach of competition law, in the name of *Alfred Spiteri et v Malta Transport Authority* (Reference 369/09 LM), is currently pending at first instance. The cases *Federated Association of Travel and Tourism Agents (Fatta) v Brussels Airlines et, Federated Association of Travel and Tourism Agents (Fatta) v Austrian Airlines AG et, Federated Association of Travel and Tourism Agents (Fatta) v Swiss International Air Lines Ltd et and Federated Association of Travel and Tourism Agents (Fatta) v Deutsche Lufthansa Aktiengesellschaft et* (together 'the Fatta cases') are stand-alone cases also pending at first instance (Joined Cases 609-612/2017).

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

We are not aware of any cases involving damages for breach of the competition rules before the Maltese courts where a fine had previously been imposed on the defendant. However, considering that a fine is intended to punish and deter undertakings from breaching the law, whilst damages are intended to compensate victims for harm suffered, it is probably unlikely that the courts would take into account fines imposed when calculating damages. On the other hand, in the context of public enforcement, regulation 17(3) provides that the national competition authority may consider compensation paid as a result of a consensual settlement as a mitigating factor when deciding to impose a penalty.

We are not aware of any cases where a redress scheme has been devised by a party infringing the competition rules. However, since damages actions in Malta are restorative in nature, the courts, when calculating damages, will take into account any compensation already offered and accepted by those harmed.

Regulation 18 provides that, following a consensual settlement, the claim of the settling injured party must be reduced by the settling co-infringer's share of the harm that the infringement caused to the injured party. Any remaining claim must be exercised by the settling injured party only against non-settling co-infringers. However, if

the latter cannot pay the damages that correspond to the remaining claim, the settling injured party may recover the remaining claim from the settling co-infringer, unless such an option has been expressly excluded under the terms of the consensual settlement.

Under the CPA, a compromise approved by the court in collective proceedings binds all the represented persons apart from those who obtained the permission of the court to be omitted from it or who have notified the class representative to be omitted from it (see the reply to question 7.2).

4 Evidence

4.1 What is the standard of proof?

The standard of proof in civil proceedings is 'on a balance of probabilities'. Regulation 5(1), which adopts faithfully the text of the EU Damages Directive, requires that the claimant presents a reasoned justification containing reasonably available facts and evidence sufficient to support the 'plausibility' of the claim for damages. Although this threshold still needs to be interpreted by the courts, it appears to us that the standard of proof under the regulations is oriented towards 'probability'.

4.2 Who bears the evidential burden of proof?

The general procedural rule is that the burden of proving a fact rests on the party alleging it. Where evidential presumptions apply, the burden of proof is reversed.

In a stand-alone action for damages, the plaintiff will have to show that there was an infringement of the competition rules and that he suffered harm (including the extent of the harm in terms of regulation 16, although certain mechanisms are included to make it easier for the claimant in cases where it is difficult to quantify the harm – see the reply to question 3.2), as well as a causal link between the breach and the harm suffered. However, the burden on the plaintiff to show that there was a breach of the competition rules is alleviated as, in terms of the CA, when a breach of the competition rules is alleged, the court must stay the proceedings and request the Director General of the OC to submit a report on the competition questions raised before it. The court will take into consideration such report and any submissions made thereon by the parties and the Director General before deciding the case (Article 27 CA). In drawing up such a report, the Director General may use the investigatory powers conferred upon him under the CA.

In follow-on actions for damages, the court is bound by a final infringement decision of the Commission and by a final infringement decision adopted under the CA. Hence, in a follow-on action, the plaintiff will have to prove only the harm he suffered and the link between the infringement and the harm arising therefrom. Final infringement decisions of national competition authorities in other Member States do not bind the court and are treated as *prima facie* evidence of an infringement of competition law.

Harm is presumed in cartel infringements. Thus, the burden of proof is shifted onto the infringer who can bring evidence to show that the plaintiff did not in fact suffer harm.

Where the defendant is trying to defend its conduct, the burden of showing any justification for that conduct is on the defendant (see the reply to question 5.1). Where the defendant raises the passing on defence, the onus of proving that the plaintiff passed on the overcharge or a part thereof to his customers is on the defendant, who may reasonably require disclosure from the claimant or from third parties.

Where a claim is made by an indirect purchaser, the indirect purchaser bears the burden of showing that an overcharge was passed on to him. However, the burden is facilitated in this case by a rebuttable presumption that a passing on to the indirect purchaser has occurred where he shows that:

- (a) the defendant has committed an infringement of competition law;
- (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them (regulation 14(2)).

The latter presumption may be rebutted by the defendant upon demonstrating credibly to the satisfaction of the court that the overcharge was not or was not entirely passed on to the indirect purchaser (regulation 14(3)).

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Evidential presumptions such as the presumptions that cartels cause harm and that overcharges have been passed on to indirect purchasers will inevitably play an important role in future actions for damages, although at this stage it is still too early to gauge their importance.

Evidential presumptions that apply in civil proceedings generally should also apply to competition cases.

Moreover, under Article 723 COCP, a party may be admitted to the oath *in litem*:

- (i) if he has proved his case generally and is unable to prove the amount or the quantity, in whole or in part, due to him through the negligence or fraud of the opposite party; or
- (ii) if there are sufficient inferences in support of the alleged amount or quantity, irrespective of any negligence or fraud of the opposite party.

The party applying to be admitted to the oath *in litem* must produce a list showing distinctly the sums or things due to him and the amount or quantity in regard to which the oath is to be taken, together with a declaration to the effect that he is prepared to verify on oath the contents of such list. The amount or quantity shown on the list will be accepted by the court insofar as, having regard to all the circumstances of the case, it deems it just. The court remains free to appoint an expert should it require further clarifications.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

So long as the evidence is relevant to the matter in issue between the parties and constitutes the best evidence that a party is able to produce, there is in principle no limitation on the form of evidence. The court will disallow any evidence which it considers to be irrelevant or superfluous, or which it does not consider to be the best which the party can produce. The court may require the party tendering the evidence to state the object of the evidence.

Evidence can be documentary, written or oral. Witnesses are examined *viva voce* in open court at the trial of the action. Hearsay evidence is accepted exceptionally in limited circumstances.

Expert evidence on economic and technical matters is accepted by the courts. Experts may be appointed by the court on its own motion or on the demand of the parties or brought as witnesses by the parties.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

There are no rules on discovery before the proceedings have been instituted under Maltese law.

Regulations 5 and 6 contain provisions on access to evidence during proceedings once the claimant has presented “a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of the claim for damages”. Regulation 5 allows the court, upon the request of the claimant or of the defendant, to order the disclosure of relevant evidence by the defendant, the claimant or a third party (including public authorities) where such evidence lies in their control according to the provisions of the COCP or as may be provided in any special law subject to the conditions set in the Regulations. The court may, if it considers it appropriate in the circumstances, “order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification presented by the claimant”.

The court must limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, the court will consider the legitimate interests of all parties and third parties concerned and it will take into account a number of factors, including: the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; the scope and cost of disclosure; the confidentiality of the evidence sought to be disclosed and the existing arrangements for protecting confidential information.

Without prejudice to the duty of professional secrecy and subject to the need to adopt effective measures to protect confidential information, the court has the power to order the disclosure of evidence containing confidential information if it considers it relevant to the action for damages.

Prior to ordering the disclosure of any evidence, the court must give the person concerned the opportunity to present any submissions or objections concerning such disclosure.

The COCP provides for the documentary evidence that may be demanded during proceedings. Article 637(1) COCP provides that it is lawful to demand the production of documents which are in the possession of other persons:

- (a) if such documents are the property of the party demanding the production thereof;
- (b) if such documents belong in common to the party demanding their production and to the party against whom the demand is made;
- (c) if the party demanding the production of the documents, although he is not the owner or a co-owner thereof, shows that he has an interest that such documents be produced by the other party to the suit;
- (d) if the person possessing the documents, not being a party to the suit, does not declare on oath that, independently of any favour for either side, he has special reasons not to produce the documents; or
- (e) if the documents are public acts, or acts intended to constitute evidence in the interest of the public in general.

These documents may be demanded at any stage in the proceedings during which evidence may still be provided. The documents must constitute evidence relevant to the case. It rests with the court to decide as to the interest of the party demanding the production, regard being had to the nature of the case and to the nature of the document the production of which is demanded. The demand for the production of documents must state the nature of the documents and all the particulars which may be known to the party making the demand. The party demanding the production of the document must prove that the document is in the possession of the person from whom the production is demanded.

According to regulation 6, the court also has the power to order the disclosure of evidence included in the file of a competition authority. In considering the proportionality of the disclosure, the court in this case will also consider, in particular, whether the request is specific or is simply a fishing expedition, whether the party requesting disclosure is doing so in relation to an action for damages pending before it and the need to safeguard the effectiveness of the public enforcement of competition law. Subject to the requirements of proportionality and the limitations on disclosure described in the next paragraph, the disclosure of evidence in the file of a competition authority may be ordered at any time. However, the court shall only request the disclosure of evidence included in the file of a competition authority where no party or third party is reasonably able to provide that evidence. A competition authority has a right to be heard on a request for disclosure.

Regulation 6(5) expressly prohibits the disclosure of leniency statements and settlement submissions in an action for damages at any time (even after the competition authority has closed its proceedings). Furthermore, such evidence will be considered inadmissible if presented by a person who obtained it following access to the file of a competition authority (regulation 7(1)). Under regulation 6(4), the court may order disclosure of the following evidence only after a competition authority has closed its proceedings:

- (a) information that was prepared by a natural or legal person specifically for the proceedings of that 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.

Where such evidence was obtained following access to the file of a competition authority, such evidence would be inadmissible until the competition authority has closed its proceedings (regulation 7(2)).

Any other evidence not falling in the exceptions provided in regulations 6(4) and 6(5) obtained by a person solely through access to the file of a competition authority can be used in an action for damages only by that person or its successor (regulation 7(3)).

The provisions in the Regulations relating to the disclosure of evidence included in the file of a competition authority are without prejudice to the rules and practices on public access to documents pursuant to Regulation (EC) No 1049/2001, and to the rules and practices under Maltese or EU law on the protection of internal documents of national competition authorities and of correspondence between competition authorities.

Article 637(3) COCP specifies that the production of any document which is held by a public authority and which is an exempt document under certain provisions of the Freedom of Information Act ('FOIA') or the disclosure of which is prohibited by any other law may not be demanded. The list of exempt documents includes, *inter alia*, documents the disclosure of which:

- would divulge any information or matter communicated in confidence between a public authority in Malta and a public authority in a foreign country or an international organisation;

- could prejudice the conduct of an investigation of a breach of the law or prejudice the enforcement of the law;
- could disclose the existence or identity of a confidential source of information in relation to the enforcement of the law;
- could prejudice the fair trial of a person or the impartial adjudication of a particular case;
- could prejudice the effectiveness of lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law;
- could prejudice the maintenance or enforcement of lawful methods for the protection of public safety; or
- would divulge internal information, such as opinions, advice or recommendations, relating to the deliberative processes of a public authority.

Trade secrets, although considered as exempt for the purposes of the FOIA, are not considered as exempt for litigation purposes, so the plaintiff may demand their production.

Article 588 COCP provides for a seemingly narrow legal professional privilege covering communications between lawyer and client, but only in relation to advice given in the context of legal proceedings. This privilege is absolute and may not be lifted by any court or authority, unless the client gives his express consent. As to other communications between lawyer and client, these are also protected by professional secrecy and confidentiality obligations and may only be lifted in very limited circumstances within the ambit of criminal law enforcement (for example, prevention of money laundering).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In terms of the COCP, a witness is bound to appear in court if he has been summoned according to the procedure prescribed. If any witness duly summoned fails to appear when called on, he will be considered guilty of contempt of court and will be punished accordingly. The court can also, by means of a warrant of escort or arrest, compel such witness to attend for the purpose of giving evidence. Furthermore, any person being present in the court may, upon the oral demand of either of the contending parties, be called upon forthwith to give evidence, as if he had been summoned to attend by means of a subpoena. A witness is bound to answer the questions allowed by the court. However, a witness cannot be compelled to answer incriminating questions. It is within the discretion of the court to determine whether a witness cannot be compelled to give evidence as to facts the disclosure of which will be prejudicial to the public interest. No witness may be compelled to disclose any information derived from or relating to any document to which Article 637(3) COCP applies (see the reply to question 4.5). An advocate may not, without the consent of the client, be questioned on circumstances stated by the client to him in professional confidence in relation to the cause.

Pursuant to the Regulations, the court in an action for damages can impose penalties on any of the parties, a third party or a legal representative for failure or refusal to comply with a disclosure order of the court or for destroying relevant evidence (regulation 8(1)). The penalties imposed by the court include drawing adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part. Any penalty imposed must be effective, proportionate and dissuasive, having regard to the gravity of the offence.

Witnesses may be cross-examined and re-examined *viva voce* in open court at the trial of the action. Leading or suggestive

questions are allowed in a cross-examination. On the other hand, leading or suggestive questions may not, without special permission of the court, be put on an examination-in-chief. In a cross-examination, a witness may only be questioned on the facts deposed in his examination or on matters calculated to impeach his credit. Should the party cross-examining wish to prove by the same witness any circumstance not connected with the facts deposed in the examination, he must produce the witness and examine him as his own witness. At any stage during examination and cross-examination, the court may ask the witness questions.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

In follow-on actions for damages, the court is bound by a final infringement decision of the Commission and by a final infringement decision adopted under the CA. Final infringement decisions of national competition authorities in other Member States will be treated as *prima facie* evidence of an infringement of competition law and may be assessed along with any other evidence adduced by the parties.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As noted in the reply to question 4.5, the courts may order the disclosure of confidential information, but they are bound to protect confidential information. The judge will assess whether the information is truly confidential. The documents may be sealed and deposited in the registry of the court and allowed to be viewed only by legal counsel or technical/financial advisors (by way of a confidentiality ring). A request may be made for evidence to be heard *in camera*. The court must adhere to the principle of fair hearing and thus can rely only on documents that have been made available to both parties.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Whenever a breach of the competition rules is alleged before a civil court, Article 27 CA requires the court to stay proceedings and request the Director General to submit a report on the competition questions raised before it. This report is not binding on the court. This procedure was applied in, for instance, *St George's Park Co Ltd et v Enemalta plc* (this case has since been withdrawn) and the FATTA cases (referred to in the reply to question 3.2). The Director General must also request this procedure to be applied when he becomes aware of a case involving the competition rules.

The OC or a competition authority in another Member State may assist the court, at the court's request, to determine the quantum of damages, if the competition authority considers such assistance to be appropriate (regulation 16(3)).

A competition authority may also assist the court to determine whether the evidence in question amounts to a leniency statement or a settlement submission (regulation 6(6)).

Under Article 960 COCP, the Commission may, on its own motion, intervene during the pendency of proceedings (*in statu et terminis*), if it shows to the satisfaction of the court that it is interested in the suit.

Furthermore, under Article 15(1) of Regulation 1/2003, the court may ask the Commission for its opinion on questions concerning the application of the EU competition rules and, under Article 15(3), the Commission, acting on its own initiative, may submit written observations to the court and, with the permission of the court, may also make oral observations. We are not aware of a case where the Commission has intervened in a competition case before the national courts.

Although falling outside the scope of this chapter, it may be pointed out that in the case of proceedings before the CCAT, the law explicitly states that the European Commission is entitled to make submissions in all cases involving the application of Articles 101 and 102 TFEU (Malta Competition and Consumer Affairs Authority Act, Second Schedule, paragraph 6).

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Article 5(3) CA, which is modelled on Article 101(3) TFEU, provides that the prohibition in Article 5(1) CA will not apply to any agreement between undertakings, any decision by an association of undertakings or any concerted practice, which:

- contributes towards the objective of improving the production or distribution of goods or services or promoting technical or economic progress;
- allows consumers a fair share of the resultant benefit;
- does not impose on the undertakings concerned any restriction which is not indispensable to the attainment of the said objective; and
- does not give the undertakings concerned the possibility of eliminating or significantly reducing competition in respect of a substantial part of the products to which the agreement, decision or concerted practice refers.

This provision is interpreted in line with the case law of the CJEU and the Commission's *Guidelines on the application of Article 81(3) of the Treaty*. The undertaking seeking to rely on Article 5(3) CA and/or Article 101(3) TFEU has the burden of proving that the four conditions laid therein are fulfilled.

Agreements, decisions or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) TFEU or which fulfil the conditions of Article 101(3) TFEU, or which are covered by a Block Exemption Regulation, cannot be prohibited under national competition law (Article 3(2) Regulation 1/2003; Article 5(6) CA).

Like Article 102 TFEU, Article 9 CA does not explicitly provide for the grounds on the basis of which the alleged abusive conduct may be defended. Nevertheless, it is still possible for a dominant undertaking to attempt to justify its behaviour by showing that the conduct is objectively necessary and proportionate or by showing that its conduct produces substantial efficiencies which outweigh any anti-competitive effects.

The defendant can also invoke the state compulsion defence in cases where the anti-competitive conduct is required by law, so that the infringement is not the result of its own autonomous conduct.

The above defences can be invoked where the infringement has not yet been established by a final decision under the CA or by the Commission.

Once an infringement has been established, it would be very difficult for a justification or public interest defence against the award of damages to be successful. Under the tort provisions in the Civil Code, the defendant may argue that the damage was the result of *force majeure*.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

The passing on defence is available under regulation 13 (see the reply to question 4.2). The defendant must show that the claimant passed on the whole or at least part of the increase in price to his customers.

In terms of regulation 12(1), a person who is not the immediate customer of the defendant is entitled to sue for damages. For the burden of proof in case of a claim by an indirect purchaser, see the reply to question 4.2.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Under Article 961 COCP, a third party may by decree of the court be joined in any suit pending between other parties in a court of first instance, whether upon the demand of either of such parties, or without any such demand, at any stage of the proceedings before the judgment. In terms of Article 962 COCP, the third party joined in the suit is considered as a defendant, so that he will be served with the application of the plaintiff and he will be entitled to file any written pleading, raise any plea and avail himself of any other benefit which the law allows to a defendant. The claim may be allowed or disallowed in his regard as if he were an original defendant.

Furthermore, under Article 960 COCP, a cartel participant or interested party may intervene during pending proceedings (*in statu et terminis*) whether in first instance or appeal, if he satisfies the court that he has a juridical interest in the suit as required under Maltese procedural law. As an intervenor he is able to make submissions before the court. An intervenor can never be bound by the judgment since the proceedings are not addressed to the intervenor, but to the defendant/co-defendants.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

An action for damages pursuant to the regulations is prescribed by the lapse of five years (regulation 10(1)). This period commences from the date when the infringement of competition law ceases and the claimant becomes aware (or could reasonably be expected to become aware) of the conduct and the fact that it is unlawful, the harm suffered as a result of the infringement and the identity of the perpetrator. Moreover, the period of prescription is suspended where a competition authority takes action (investigation/proceedings for the infringement of competition law). This suspension ends one year after the infringement decision has become final and definitive or after the proceedings are terminated. The period of prescription is suspended for the duration of any consensual dispute resolution process, exclusively with regard to those parties taking part in the consensual dispute resolution (regulation 17(1)).

Under Article 22 CPA, the period of prescription applicable to a claim for damages is interrupted in favour of a class member on the commencement of the collective proceedings, but that interruption is deemed inoperative if the class member withdraws from the collective proceedings.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

It is difficult to estimate the duration of civil proceedings since this depends on a number of factors particular to each case (for example, complexity of the case, nature of the breach, availability of evidence and the need for experts to assist in the quantification of damages). Broadly speaking, we estimate that proceedings at first instance may take between two to three years in a follow-on claim. However, we have observed that presiding judges are increasingly willing to manage proceedings expeditiously in cases of commercial disputes, particularly those which are sensitive and/or complex.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No permission is required. Any of the parties may, by means of a note, at any stage of the trial before definitive judgment is given, withdraw the acts filed by him (Article 906(1) COCP).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

In terms of Article 6(b) CPA, the court may at the pre-trial stage stay proceedings if the parties agree during the hearing to attempt to compromise the lawsuit by alternative dispute resolution or other means. Articles 19 and 20 CPA also make provision for the possibility of the class representative to compromise or discontinue all or part of a claim with the permission of the court. A compromise approved by the court binds every represented person, unless a represented person has obtained permission from the court or has notified the class representative to be omitted from the compromise.

Where one or more of the represented persons are to be omitted from the compromise, the court will give directions for the future conduct of the proceedings, which may include a provision that the proceedings will continue as one or more proceedings between different parties.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In its judgment, the court will determine who is to bear the judicial costs. These are generally awarded against the unsuccessful party. Judicial costs can be recovered in accordance with the judgment.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are not permitted to act on a contingency fee basis. Article 83 COCP prohibits advocates from entering into an agreement or making a stipulation *quotae litis*.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

In principle, third party funding of claims governed by Maltese law is permitted, unless the funding is characterised as champerty (stipulations *quotae litis* are deemed void). Regulatory clearance may be required if funding is made on an ongoing basis. There are operators based in Malta which do engage in third party litigation funding, but we are unaware of such operators funding claims filed in Malta, whether in the commercial realm, or specifically in competition law cases.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the court of first instance are subject to appeal to the Court of Appeal. An appeal may be entered not only by the contending parties, but also by any person interested. The appeal must be filed within 20 days from the judgment, although in urgent cases the court may abridge this period upon the demand of the parties. No further appeal lies from the decision of the Court of Appeal.

Under the CPA, an appeal from a judgment of the court on behalf of the class or sub-class may only be filed by a class representative. However, if a class representative does not appeal, any class member may file an application to the Court of Appeal, either during the time-limit allowed for the appeal or within 10 days following the lapse of the said time-limit, for leave to act as the class representative to file an appeal.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

There is no leniency programme in Malta. The draft leniency regulations published in June 2013 have not been brought into force and no time-frame has been established for their coming into force.

Under the Regulations, an immunity recipient (therefore a successful leniency applicant) is still liable for harm caused, although it is conferred some advantages when compared to other infringers. Thus, an immunity recipient is jointly and severally liable only to its direct or indirect purchasers or providers, unlike other infringers which remain liable for the harm caused in full (unless they are SMEs, in which case, subject to the fulfilment of certain conditions, may also only be liable to their direct or indirect purchasers or providers – regulation 11(2) and (3)). It is only when full compensation cannot be obtained from the other infringers that

an immunity recipient is jointly and severally liable to other injured parties (regulation 11(4)). Furthermore, the amount of contribution due by an immunity recipient to a co-infringer cannot exceed the amount of the harm it caused to its own direct or indirect purchasers or providers (regulation 11(6)). Where the infringement has caused harm to persons other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to the other infringers must be determined in the light of its relative responsibility for that harm (regulation 11(7)).

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The provisions on disclosure described in the reply to question 4.5 should apply.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Regulations implemented the EU Damages Directive into Maltese law. We are of the view that the Regulations' impact was not very significant, since the previous Article 27A CA already provided for a tailor-made action for damages in case of a breach of the competition rules. Thus, a claimant was already entitled under the old Article 27A CA to compensation for actual loss and for loss of profit, together with interest from the time the damage occurred until compensation was actually paid as provided by the EU Damages Directive. From a procedural aspect, some of the principles found in the Regulations already existed under Maltese procedural law or were followed by the courts.

Nevertheless, we expect that the following (which were already referred to above in our replies) might facilitate actions for damages filed under the Regulations:

- new disclosure obligations and the use of evidence included in the file of a competition authority;
- final infringement decision by a competition authority in another Member State to constitute at least *prima facie* evidence of an infringement before the Maltese civil courts;
- the rebuttable presumption that cartels cause harm;
- the rebuttable presumption in favour of indirect purchasers that they suffered overcharge harm; and
- the extension of the limitation period within which an injured party may bring an action for damages from two to five years.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

By virtue of Act XXV of 2017, Article 27A CA was amended and the Regulations were annexed in a Schedule to the CA in order to implement the EU Damages Directive. Act XXV of 2017 repealed the *Competition Law Infringements (Action for Damages) Regulations, 2017* (Subsidiary Legislation 379.09 of the Laws of Malta) which had transposed the Directive only limitedly as they did not bring into force the respective article on prescription.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The triggering factor is when the competition law infringement took place. Thus, the key aspects of the Directive, through its implementation in the CA, will apply to actions for damages in respect of infringements of competition law committed on or after 27 December 2014 (Article 27A(1) CA). However, with respect to infringements committed before 27 December 2016, the CA as amended does not have the effect of extending the period of prescription (that is, of two years) applicable at the time of the infringement or of reviving a period of prescription which had already expired (Article 27A(3) CA). Moreover, the new Article 27A CA (and therefore the Regulations implementing the Directive) are without prejudice to any decision which has become *res judicata* or to an action which is still pending when the new Article 27A came into force on 13 October 2017 (Article 27A(4) CA).

Actions for damages in respect of infringements of competition law committed before 27 December 2014 continue to be governed by the CA as it stood at the time of the infringement.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Apart from leniency, which may still be on the proposed reforms agenda, no other proposed reform relating to or affecting competition litigation between private parties has been published.

In the light of the case *Federation of Estate Agents v Director General (Competition) et* (decided 3 May 2016), amendments to the CA, which can have a substantial impact on the public enforcement domain of competition law, are expected. In this case, the Constitutional Court considered that the provisions in the CA enabling the Director General to decide upon competition infringements and impose fines and providing for the CCAT to hear appeals from the decisions of the Director General are in breach of Article 39(1) of the Constitution of Malta, although they are not in breach of Article 6 of the European Convention on Human Rights (ECHR). Article 39(1) of the Constitution requires that a person charged with a criminal offence must be afforded a fair hearing by an independent and impartial court established by law. The Court reached its conclusion after considering that public enforcement proceedings by the OC under the CA are criminal in nature and that the OC and the CCAT are not courts for the purposes of Maltese law.



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Antoine lectures on commercial arbitration at the University of Malta and participates regularly in practice groups relating to dispute resolution, public procurement and energy law. He is a Member of the Chartered Institute of Arbitrators (CIArb) and of the International Bar Association.

GANADO ADVOCATES

GANADO Advocates is a leading law firm based in Malta, widely recognised for its financial services and commercial law practices. The firm traces its roots back to the early 1900s, and is today one of Malta's foremost law practices that is consistently ranked as a top-tier law firm in all its core sectors.

For over 15 years, the Competition practice at GANADO Advocates has been active in the areas of antitrust, State aid, concentrations, public procurement, joint ventures, intellectual property and privatisations. The firm's competition law experts:

- draft and review agreements and assist market participants in complying with competition law and regulatory requirements;
- represent complainants and assist undertakings concerned in investigations regarding alleged abuse of dominance and anti-competitive agreements carried out by the Office for Competition within the Malta Competition and Consumer Affairs Authority;
- represent clients in cases before the Competition and Consumer Appeals Tribunal and before the ordinary courts;
- assist clients with merger notifications; and
- are regularly resorted to for providing advice relating to EU State aid law.

Mexico

Claudia de los Ríos Olascoaga



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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The Mexican Federal Economic Competition Law (“LFCE”) has the purpose of investigating, combatting, prosecuting, punishing and eliminating monopolies, monopolistic practices, unlawful concentrations, barriers to economic competition and free markets.

In this sense, the scope of claims that may be brought to the Federal Economic Competition Commission (“COFECE”) for breaches of competition law are:

- a) **Monopolistic practices:** The LFCE distinguishes two types of monopolistic practice: absolute; and relative.
 - 1) **Absolute monopolistic practices:** According to article 53 of the LFCE, these practices consist of all contracts, agreements, arrangements or combinations amongst competing Economic Agents, which have as their purpose or effect any of the following: (i) to fix, raise, coordinate or manipulate the sale or purchase price; (ii) to establish an obligation not to produce, process, distribute, market or acquire a restricted or limited amount of goods or services; (iii) to divide, distribute or segment the market; (iv) to establish, arrange or coordinate bids or abstentions from tenders; and (v) to exchange information with any of the purposes or effects mentioned above.
 - 2) **Relative monopolistic practices:** According to articles 54 and 56 of the LFCE, these practices consist of any act carried out by one or more Economic Agents that individually or jointly exert substantial market power in the relevant market and has or may have as its purpose or effect, the undue displacement of other Economic Agents, substantial impediment of their access or establishment of exclusive advantages in favour of one or several Economic Agents. For further examples, please see article 56 of the LFCE.
- b) **Unlawful concentrations:** According to articles 61 and 62 of the LFCE, this consists of any merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts or assets in general are consolidated, which is carried out among any Economic Agent, whose purpose or effect is to hinder, harm or impede competition and free market access.
- c) **Barriers to competition and free market:** The LFCE defines this term as: “*Any structural market characteristic, act or deed performed by Economic Agents with the purpose or effect of impeding access to competitors or limit their ability to compete in the markets; (...)*”.

It should be noted that, according to the Political Constitution of the United Mexican States (hereinafter, the “Mexican Constitution”), the Federal Telecommunications Institute (“IFT”) is the competent authority to apply the LFCE regarding economic competition matters in the radio broadcasting and telecommunications sectors.

1.2 What is the legal basis for bringing an action for breach of competition law?

- 1) The Mexican Constitution, which is the main law in Mexico.
- 2) The LFCE and the Federal Law of Telecommunications and Broadcasting (“LFTyR”), derived from article 28 of the Mexican Constitution.
- 3) Organisational Statutes of COFECE and IFT.
- 4) The Regulatory Provisions.
- 5) The Federal Civil Code and the Federal Code of Civil Procedure.
- 6) The Commerce Code, the General Law of Negotiable Instruments and Credit Operations and the Law of Business Corporations.
- 7) The Federal Administrative Procedure Law.
- 8) The Federal Criminal Code and the National Code of Criminal Procedures.
- 9) The Amparo Trial Law (“*Ley de Amparo*”), derived from articles 103 and 107 of the Mexican Constitution. (Resolutions of COFECE or IFT can be followed only via Amparo trial.)

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Although Mexico must comply with the treaties and its international obligations, the legal basis for competition law claims are derived from the above-mentioned constitutional and national law.

However, for resolutions, Mexico can take into account international criteria.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

In Mexico, there are two specialised administrative district courts for antitrust law and telecommunications (hereinafter, “District Courts”) and two specialised administrative tribunals for antitrust law and telecommunications (hereinafter, “Tribunals”), which hear Amparo trials.

Occasionally, the Mexican Supreme Court of Justice can hear Amparo trials.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

In Mexico, collective claims, class actions, actions by representative bodies and any form of public interest litigation is permitted and can be used by the Federal Attorney’s Office of Consumers (“PROFECO”), NGOs and civil associations, among others.

According to articles 66 and 67 of the LFCE, any person may bring complaints before the Investigative Authority of COFECE or IFT, in connection with absolute or relative monopolistic practices and unlawful concentrations.

Also, investigations shall be initiated *ex officio* or per the request of the Federal Executive Branch, directly or through the Ministry of Economy, PROFECO or upon a private request.

Also, according to article 134 of the LFCE, individuals or entities that may have suffered damages or losses deriving from a monopolistic practice or an unlawful concentration have the right to file judicial actions in defence of their rights before Civil Courts.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

In practice, in Mexico, the following criteria are implemented:

- a) **Territory:** Antitrust matters in Mexico have a “Federal” character, meaning there are no states laws on economic competition.
- b) **Matter:** COFECE is the entity entitled to investigate and combat monopolies, monopolistic practices, concentrations and other restrictions to the efficient functioning of the markets, and IFT is the competent authority for economic competition matters in the radiobroadcasting and telecommunications sectors.

Specialised District Courts, as well as Specialised Tribunals, are entitled to hear a claim against unconstitutional or unlawful acts committed by COFECE or IFT via an Amparo trial, and claims about damages or losses deriving from a monopolistic practice or an unlawful concentration.

- c) **Stage:** The investigation will be followed by the Investigative Authority of COFECE or IFT. Then, a trial-like procedure is followed by COFECE or IFT.

If COFECE or IFT solve and sanction Economic Agents for breaching antitrust law, or during the trial-like procedure there is an unconstitutional or unlawful act, the District Courts are competent.

Finally, if Economic Agents claim that a resolution by the District Courts is unconstitutional or unlawful, a Tribunal will be competent.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Antitrust investigations in Mexico are initiated *ex officio* or via a request. Until June 2018, of 692 investigations before COFECE and the now defunct CFC (Federal Competition Commission), 565 were initiated via a request, and only 123 *ex officio*.

This means that COFECE, at least, has a reputation for attracting claimants.

1.8 Is the judicial process adversarial or inquisitorial?

In Mexico, trial-like procedures before COFECE or IFT are both adversarial and inquisitorial.

The Investigative Authority, an independent organ of COFECE/IFT, is not only responsible for conducting the investigation stage (the inquisitorial phase), but is also party to the trial-like procedure (the adversarial phase). However, if the Investigative Authority closes an investigation, the Board of Commissioners can reopen it.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available in the Mexican legal system.

2.2 What interim remedies are available and under what conditions will a court grant them?

According to articles 135 and 136 of the LFCE, the Investigative Authority may, at any moment, request the Board of Commissioners to issue “*injunctive measures*” concerning the subject matter of a complaint or investigation that it considers necessary to avoid damages that are difficult to redress or to assure efficiency in the investigation’s results and procedure’s resolution. The condition is that there must have been damage caused to free market access and economic competition.

Furthermore, article 100 of the LFCE establishes that, before the statement of probable responsibility is issued in a procedure for a relative monopolistic practice or unlawful concentration, the Economic Agent subject to the investigation may express its intention to attain an “*exemption and fine reduction benefit*”. The conditions to accept this request are: (i) a commitment to suspend, eliminate or correct the corresponding practice or concentration, in order to restore free market access and economic competition; and (ii) the proposed means are legally and economically feasible and appropriate to achieve the purpose.

Additionally, the Mexican Constitution and Amparo Trial Law set out that Economic Agents can claim against unconstitutional or unlawful acts committed by COFECE or IFT through an “*indirect Amparo trial*”, which may be heard by the District Courts. The conditions are established in article 107 of the Amparo Trial Law.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The LFCE establishes the following sanctions as final remedies:

- The correction or suppression of the monopolistic practice or unlawful concentration in question.
- The partial or total divestiture of an unlawful concentration and the termination of control or suppression of the acts thereof, as the case may be.

- Measures to regulate access to essential facilities under the control of one or several Economic Agents, for having exercised the relative monopolistic practice established under article 56, subsection XII of the LFCE.
- Ineligibility to act as an undertaking's board member, manager, director, executive, agent, representative or legal representative for a maximum five-year period.
- Fines of up to 10 per cent of the Economic Agent's annual income.
- Civil or criminal liability. Criminal liability is considered only for horizontal practices, for having rendered false statements or for having submitted false information.
- Divestiture or transfer of the Economic Agent's assets, rights, partnership interest or stock.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Once COFECE's resolution is final and conclusive, individuals that may have suffered damages or losses deriving from a monopolistic practice or an unlawful concentration have the right to ask for compensation before the Civil Courts.

There are currently no examples of damages being awarded by the courts in competition cases, only in some civil claims cases.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Fines are imposed by competition authorities (COFECE/IFT) in the final resolution, taking into account some elements such as the damage caused, indications of intention, share of the offender in the market, size of the affected market, duration of the practice or concentration, as well as economic capacity, among others.

However, the fine can be challenged in an Amparo trial before the District Courts and Tribunals, who can determine and notify COFECE/IFT of the legal factors established by law that must be taken into account to determine the fine if they were not duly applied.

4 Evidence

4.1 What is the standard of proof?

During the investigation, the Investigative Authority may determine elements that indicate the probable responsibility of the Economic Agents under investigation, through direct or indirect evidence; for example: requirements to submit information or documents; interviews; on-site inspections, etc. The determined elements would be considered in a decision to initiate a trial-like procedure.

Then, during the trial-like procedure, they would be used by the Investigative Authority as proof.

The Mexican Supreme Court of Justice has recognised indirect evidence in support of horizontal practices, correlated with other evidence, such as econometric analysis and patterns, price correlations, statements from Economic Agents and private communications.

4.2 Who bears the evidential burden of proof?

Upon conclusion of the Investigation, if the Investigative Authority found objective elements that indicate the probable responsibility of the Economic Agents under investigation, it shall bring before the Board of Commissioners its intention to initiate a trial-like procedure. Therefore, in the trial-like procedure, the Investigative Authority bears the evidential burden of proof.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Evidential presumptions are available in damages or losses claims that are derived from a monopolistic practice or an unlawful concentration before the Civil Courts.

Nonetheless, there are as of yet no examples of this in the Mexican jurisdiction.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

In Mexico, there are no limitations on the forms of evidence that may be presented before COFECE/IFT by the Investigative Authority or Economic Agents.

Expert evidence is accepted by COFECE/IFT, the District Courts and Tribunals.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Rules of disclosure are contained in several Mexican laws, such as articles 124 and 125 of the LFCE. In general terms, one can find the following rules:

- Before proceedings have begun: All the information and documents obtained directly by COFECE during its investigations and on-site inspections shall be considered as Reserved, Confidential Information or Public Information (defined in question 4.8 below) and access to the file is not permitted. Under no circumstances may COFECE grant access to Confidential Information, nor may it publish said information, and it must take the necessary measures to safeguard such information.
- During proceedings involving the other party: In trial-like procedures, only Economic Agents with legal standing may have access to the file, with the exception of Confidential Information.
- From third parties (including competition authorities): Third parties may only obtain Public Information.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Article 119 of the LFCE establishes the obligation to cooperate with COFECE (this includes appearing for interviews) and article 126 of the LFCE provides some enforcement measures (for example: warnings; fines; assistance of the police force or other public authorities; and even arrest). However, article 20, letter B, point II of the Mexican Constitution sets out the right to not declare.

Currently, cross-examination of witnesses in antitrust claims in Mexico is not available; notwithstanding, a witness in an investigation phase could be called by the Board of Commissioners in a trial-like procedure.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Resolutions from international competition authorities or authorities from another country are not binding in Mexico; however, if the sanctioned conduct had effects in the Mexican territory, directly or indirectly, COFECE/IFT could acknowledge decisions by foreign authorities.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

All information and documents are considered as Reserved, Confidential or Public Information:

- **Reserved Information** is a category of information that may only be accessed by the Economic Agents with legal standing in a particular procedure.
- **Confidential Information** is only considered as such at the Economic Agent's request, and upon validation that the information has this characteristic.
- **Public Information** is that which has been disclosed by any means of public dissemination or is found in public registries or publicly accessible sources.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Yes, article 12 of the LFCE, sections XII to XX, establishes that COFECE has the power to issue opinions and provide general orientation in matters related to free market access and economic competition; however, these are not binding.

It is quite common for COFECE/IFT to express their views, but never in relation to a specific case or Economic Agent.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

This defence may be available for certain relative monopolistic practices, if it is proven that these practices produce gains in efficiency and favourably impact upon economic competition and free market access, thus overcoming their possible anticompetitive effects and consequently resulting in an improvement in consumer welfare. However, this is not applicable for horizontal or absolute monopolistic practices, because they are illegal *per se*.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The "passing on defence" is not available in Mexico.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Mexican legislation does not prohibit defendants from one cartel joining another as co-defendants.

As of yet, there have been no cases of this in Mexico.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

According to article 137 of the LFCE, the ability to initiate an investigation expires after 10 years, starting from the date on which the unlawful concentration was executed, or, in other cases, from the moment the unlawful conduct ceased.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

An investigation could take up to 30 months. A trial-like procedure could take up to 10 months. An Amparo trial could take, approximately, between one-and-a-half and three years.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

After COFECE/ IFT has initiated an investigation, it is not possible to discontinue breach of competition law claims, with the exception of a "commitment" (when the parties promise to stop doing the act(s) that is affecting free market access and economic competition).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

After COFECE/IFT has initiated an investigation, it is not possible to discontinue breach of competition law claims.

If a "damages and losses" claim of a representative body is allowed by the Civil Courts, the settlement shall be also approved by those Courts.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes, it is possible to recover legal costs and expenses, but only from "damages and losses" proceedings.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, in Mexico, lawyers are permitted to act on a contingency fee basis.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition law claims is not prohibited; however, there are, as of yet, no examples of this in Mexico.

9 Appeal**9.1 Can decisions of the court be appealed?**

Yes, the Mexican Constitution and the Amparo Trial Law set out that Economic Agents can appeal COFECE or IFT resolutions through Amparo trials, which are heard first by the District Courts. Also, District Court resolutions can be appealed before Tribunals or the Mexican Supreme Court of Justice (“SCJN”), whose final decisions cannot be appealed.

10 Leniency**10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?**

Yes, article 103 of the LFCE establishes a “sanction reduction benefit” for those who have participated directly or indirectly in a horizontal or absolute monopolistic practice. However, under no circumstances can it be applicable for civil claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

“Immunity programmes” are applicable for civil claims. All information and the identity of immunity applicants is considered confidential; therefore, COFECE must take the necessary measures to safeguard such information.

There are no judicial criteria regarding the provision of confidential information by COFECE before other authorities; for example, in criminal proceedings.

11 Anticipated Reforms**11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.**

This does not apply to Mexico.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This does not apply to Mexico.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This does not apply to Mexico.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

This does not apply to Mexico.

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Netherlands

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Any individual may bring claims for compensation for loss caused to them by a breach of national or EU competition law before the civil courts.

In certain circumstances, class actions or mass settlements are possible:

- The Class Action Financial Settlement Act (“WCAM”) allows non-profit organisations and companies that cause large-scale damage to conclude collective settlement agreements, which can be made binding by the Amsterdam Court of Appeal on all injured parties that do not opt out.
- Collective rights organisations have standing to start a collective action to seek “*protection of other persons’ interests that are similar to the ones represented by the collective rights organization*” (Article 3:305a of the Dutch Civil Code; “DCC”). While it is possible to claim declaratory or coercive relief in collective actions, collective rights organisations are not (yet) allowed to claim monetary compensation on behalf of a class. However, a declaratory judgment can be a starting point for negotiations about a (individual or collective) settlement agreement.
- In practice, most mass claims are pursued by private parties, who have purchased and bundled individual claims. These claims are subsequently assigned to a “claim vehicle”, who subsequently attempts to recover these claims in its own name and on its own account.

1.2 What is the legal basis for bringing an action for breach of competition law?

Cartel damages claims are generally tortious liability claims (Article 6:162 DCC). Participation in a cartel is furthermore considered to be a group act, making participants jointly and severally liable for the damages caused by that act (Article 6:166 DCC).

Since the implementation of the Directive on Antitrust Damages Actions, the Dutch Civil Code also contains a special legal basis for antitrust damages actions (Article 6:193m DCC). According to this provision, undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by that infringement.

In some civil cases, claimants have argued that their claims are governed by Article 101 of the Treaty on the Functioning of the

European Union (“TFEU”) alone (*cf.* the judgment of the Court of Justice of the European Union in *Otis*). In theory, liability may also be based on unjust enrichment or breach of contractual obligations.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law is derived from both national and EU law. The majority view is that Article 101 TFEU directly grants victims a right to full compensation, but that national law determines the requirements for the (tortious) liability of cartel participants.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialised courts hearing civil antitrust cases. However, there are a number of judges who specialise in competition law cases, and who rotate among courts.

Recently, the Dutch legislator enacted a law to establish the Netherlands Commercial Court (“NCC”). Parties in large commercial disputes, including antitrust cases, can agree to litigate before the NCC. The NCC will be a new international commercial division of the Amsterdam District Court and the Amsterdam Court of Appeal. A national pool of judges, who have the necessary knowledge of and experience with international commercial disputes, will be created to handle the proceedings as efficiently as possible. An added benefit is that parties may opt to conduct the proceedings in English.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

An action for antitrust damages may be brought by any individual who has incurred a loss as a result of that infringement.

The most commonly used manner to bring class actions is the “assignment model”. This concept denotes to the practice whereby a “claim vehicle” purchases and bundles individual claims in order to recover these in its own name.

As mentioned in our answer to question 1.1, collective rights organisations have standing to commence collective actions and to

issue a request to declare collective settlement agreements binding. An opt-out regime applies in both cases.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

As a main rule, the Dutch courts have international jurisdiction when the defendant is domiciled in the Netherlands (*forum rei*).

There are two special jurisdictional rules which are often invoked in antitrust damages cases:

- The Dutch courts have jurisdiction if “the harmful event” occurred in the Netherlands (*forum loci delicti*).
- The Dutch courts also have jurisdiction to hear claims against foreign defendants when there is a Dutch “anchor defendant”, provided there is a close connection between the claims against them.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The Netherlands is known to be a claimant-friendly jurisdiction. As a result, an increasing number of (follow-on) cartel damages proceedings are pending in the Netherlands. Pending cases include: *Trucks*; *Air Cargo*; *Gas Insulated Switchgear*; *Cathode Ray Tubes*; *Sodium Chlorate*; *Pre-stressing Steel*; *Paraffin Wax*; and *Elevators and Escalators*.

For the following reasons, the Netherlands is considered to be a favourable forum to bring an antitrust claim:

- The Dutch judiciary has the reputation of being professional and efficient. Because of the large number of cases already pending, Dutch courts have ample experience with antitrust damages claims. The NCC is furthermore expected to attract (international) claimants and defendants alike.
- The financial risks of bringing a claim are limited, as adverse cost orders are low.
- It is comparatively easy to bring a class action, as Dutch law allows for the assignment and bundling of tort claims and third-party litigation funding.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available.

2.2 What interim remedies are available and under what conditions will a court grant them?

An interim relief judge may issue any order that is provisional in nature. This includes injunctions, payment of an amount of money, or seizure of evidence. It is not possible to obtain a declaratory judgment in interim relief proceedings.

Normal rules of evidence do not apply in interim relief proceedings. The interim relief judge can grant an interim measure if they consider it likely that the claim will be granted in proceedings on

the merits, and that the claimant cannot await the outcome of these proceedings. When deciding on a request for interim relief, the interim relief judge must furthermore balance the interests of the claimant and the defendant.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

As the Netherlands is a civil law system, there is no predefined set of available remedies. Claimants may seek declaratory relief, compensatory damages, or coercive relief, as they see fit. In order to obtain such relief, the claimant must furnish sufficient facts and, if these are disputed by the defendant, prove that the criteria for tortious liability and/or group liability are met.

In case a collective rights organisation starts a collective action, it cannot claim monetary damages (yet).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under Dutch law, damages are compensatory; punitive damages are considered to be contrary to the public order and are therefore not available.

In principle, damages are calculated on the basis of actual loss. However, if an accurate calculation is very difficult or impossible, a judge has the discretion to estimate damages in the abstract.

The most important precedent, in which monetary damages have been awarded thus far, is *TenneT/ABB*. In that case, the District Court Gelderland accepted TenneT’s argument that the Gas Insulated Switchgear Cartel had caused TenneT to pay an overcharge of 58% for a GIS system it purchased from ABB. The court therefore ordered ABB to pay TenneT an amount of damages in excess of €68 million.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Because a victim has a right to full compensation, fines imposed by national competition authorities are not taken into account. Redress schemes already offered are only taken into account when such a scheme also provided compensation to that particular claimant.

4 Evidence

4.1 What is the standard of proof?

In its writ of summons, the claimant should state their claim and the factual basis of that claim. If the claimant does not furnish sufficient facts to substantiate their claim, the court should reject it. In its judgment in *IATA*, the Supreme Court ruled on the scope of the

obligation to furnish facts in (stand-alone) competition law cases. According to the Supreme Court, the claimant should diligently provide insight into the definition, structure, characteristics and functioning of the relevant market, as well as the effects of the alleged infringements on those markets.

If the claimant furnished sufficient facts to substantiate their claim, they only need to prove those factual allegations that are (sufficiently) disputed by the defendant. In that case, a factual allegation is proven if the court considers it “sufficiently plausible”.

4.2 Who bears the evidential burden of proof?

As a general rule, each party has the burden of proving the submissions and allegations on which they rely (Article 150 of the Dutch Code of Civil Proceedings; “DCCP”). In competition law cases, this means that the claimant has to prove: (i) the existence of the infringement; (ii) that they incurred a loss; (iii) a causal link between the loss and infringement; and (iv) that the damage can be reasonably attributed to the defendant. If the defendant offers an affirmative defence, the defendant carries the burden of proof of those facts.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Since the implementation of the Directive on Antitrust Damages Actions, the Dutch Civil Code contains the rebuttable presumptions (i) that cartel infringements caused harm, and (ii) that overcharges were at least partially passed on to indirect purchasers.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Evidence may be supplied in any appropriate form, including digital files, except where the law provides otherwise or the court decides otherwise. The court is free in its assessment of the evidence provided.

It is common practice for parties in competition law cases to submit expert evidence, in particular economic reports on the quantification of damages. The court may also appoint an independent expert. However, we are not familiar with any (follow-on) antitrust damages cases where this has happened.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

While the Netherlands does not know a common law style discovery, it is possible to obtain disclosure of documents in possession by the other or even a third party. In order for a disclosure request to be granted, three cumulative criteria must be met:

- (i) The documents must be specified in order to prevent “fishing expeditions”.
- (ii) The applicant must have a legitimate interest in obtaining disclosure of those documents.
- (iii) The documents must relate to a legal relationship, to which the applicant is a party.

In antitrust damages cases, a court may reject a disclosure request if there are compelling reasons to do so. Disclosure requests must furthermore be denied if it concerns leniency statements or settlement submissions. Finally, information prepared specifically for infringement proceedings (either by a party or a competition authority), as well as settlement submissions that have been withdrawn, can only be disclosed after those proceedings have closed.

A disclosure request can be made before commencement of proceedings or while proceedings are already pending. However, Dutch courts tend to reject disclosure requests that are made before defendants have submitted their statement of defence. The reason for this is that courts find they will need to know which defences are raised by the defendants in order to assess whether there is a legitimate interest in disclosure.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

If called upon to testify, any person is obliged to appear as a witness. Testimonial privilege can be invoked by close family members of one of the parties, and professionals who are bound by a duty of confidentiality, such as lawyers and doctors.

A witness hearing is led by an examining judge, who questions the witness first. After that, both parties are allowed to ask questions to the witness.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

A decision of the European Commission or the Netherlands Authority for Consumers & Markets (“ACM”) establishing a violation of EU competition law is irrefutable proof of the existence of the infringement.

Decisions in which the ACM finds an infringement of Dutch competition law alone and decisions of other national competition authorities have probative value. However, in such a case, courts are allowed to take into consideration evidence to the contrary.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a general starting point, parties have the obligation to fully and truthfully inform the court. The right to be heard (*audi alteram partem*) also implies that both sides should be able to comment on all available evidence. Moreover, when a party refuses to submit certain documents or disclose certain information, the court may draw adverse inferences as it considers appropriate. There is therefore little room for (commercial) confidentiality claims. This does not mean that they are never granted. Courts may, depending on the facts of the case, reject a disclosure request when the requested documents contain commercially sensitive information or business secrets.

In order to preserve confidentiality, the parties may request the court to issue a “gag order” or order that proceedings are held behind closed doors. While there is little experience with “confidentiality rings”, the court may order that only certain individuals (e.g. the parties’ attorneys) may examine documents containing confidential information.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of EU competition rules. The European Commission and the ACM have the power to intervene as *amicus curiae* in proceedings involving questions relating to EU competition rules. The court may also request the ACM to provide assistance in the quantification of damages. As far as we are aware, there are no cases in the public domain in which either of these possibilities have been used.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

These are available, but have never been raised in competition cases up until now.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Indirect purchasers have standing to sue and the passing-on defence is indeed available (Article 6:193p DCC).

In the *Gas Insulated Switchgear* case, the Supreme Court clarified the legal test to be used to assess the passing-on defence. The case concerns a civil claim by TenneT against ABB. When assessing the passing-on defence, lower courts will have to take into account the benefit that is conferred onto the claimant in connection with the infringement, provided that it is reasonable to do so. The Supreme Court then referred the case back to the District Court Gelderland.

It is particularly interesting how the district court subsequently applied the Supreme Court’s ruling when assessing ABB’s passing-on defence. ABB had pointed out that TenneT’s rates were regulated, which also meant that it could pass on all the costs of the GIS station in question to its customers. The court nevertheless rejected ABB’s passing-on defence. The court considered it unlikely that electricity users themselves would be able to file a (successful) action for damages against ABB. It therefore considered it unreasonable to deduct the amount passed on from the damages claimed by TenneT. The court furthermore found that the damages paid by ABB would ultimately benefit those users anyway, since TenneT is a wholly-owned state enterprise.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

The Dutch Code of Civil Proceedings allows cartel members to join the proceedings on a voluntary basis (Article 217 DCCP). While Dutch law also allows for non-voluntary third party intervention, up until now courts have consistently rejected requests from defendants to summon other cartel members to appear as co-defendants in pending proceedings on the merits.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Following the implementation of the Actions for Antitrust Damages Directive, the Dutch Civil Code contains a special statute of limitations for actions for antitrust damages (Article 6:193s DCC). The subjective limitation period is five years and starts to run the day after the infringement ended, and the victim became aware of: (i) the infringement; (ii) the fact that the infringement caused harm to them; and (iii) the identity of the undertaking that committed the infringement. The absolute statute of limitations is 20 years and starts to run the day after the infringement ended. Both statutes of limitations are suspended when a competition authority starts investigating an alleged infringement until any decision by that competition authority has become final. Mediation is also a cause for suspension.

For tortious liability claims, Dutch law both has an objective and a subjective statute of limitations. These apply to cases started before 26 December 2014. The subjective statute of limitations is five years and starts to run on the date after the day that the victim obtains knowledge of (i) the fact that he incurred a loss, and (ii) the identity of the tortfeasor. This statute of limitation can be interrupted by sending a simple notice letter. The objective statute of limitations is 20 years and starts running on the day the damage was inflicted.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The duration of the proceedings largely depends on the complexity of the case, the workload of the court and the course of action the parties adopt during the proceedings. Very simple cases can take only a year to litigate (e.g. *VvE Het Schip en VvE De Wal/Otis*), while the longest running cases (*Air Cargo*) have already been pending for more than five years.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No, they do not.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As mentioned in our answer to question 1.1, collective rights organisations can start collective actions with an aim of seeking “protection of other persons’ interests that are similar to the ones represented by the collective rights organization”. It is not (yet) allowed to claim monetary compensation in such a collective action. The WCAM furthermore allows non-profit organisations and companies that caused large-scale damage to jointly request the Amsterdam Court of Appeal to make a collective settlement agreement, binding on all injured parties that do not opt out.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In the Netherlands, adverse costs are calculated by multiplying the number of procedural steps in a case, such as court submissions and oral hearings, by a (very low) fictitious tariff. As a result, adverse cost orders only award a fraction of the costs actually incurred. E.g., in 2016, the District Court of the Middle-Netherlands only awarded a total amount of €82,320 to the nine defendants after rejecting the claims in the *Elevators and Escalators* case.

8.2 Are lawyers permitted to act on a contingency fee basis?

While lawyers are not permitted to act on a “no win-no fee” basis, they are allowed to agree on a success fee.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding is permitted and has been used in most follow-on damages actions up to date.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes. Courts of appeal conduct a full review of questions of fact and law of district court judgments. After appeal, it is possible to bring an appeal in cassation before the Supreme Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The ACM runs a leniency programme that is largely similar to that of the European Commission.

Leniency applicants (be they successful or unsuccessful) are not given immunity from civil claims. However, in principle, successful immunity recipients are only (jointly and severally) liable for damages incurred by their own (direct or indirect) purchasers. Only when claimants cannot obtain full compensation from the other cartel members can they claim damages from an immunity recipient.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Dutch courts are barred from ordering the disclosure of leniency statements.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Act implementing the Directive on Antitrust Damages Actions entered into force on 28 January 2017. The most important changes concern the rules on disclosure, the statute of limitation and the rule that decisions of the Netherlands Consumer & Markets Authority are formally binding.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Directive is implemented in Articles 6:193a–6:193t DCC and Articles 161a and 845–850 DCCP.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

In principle, the amendments introduced by the Implementing Act have immediate effect. Article III of the Implementing Act states that the new statutes of limitation for antitrust damages actions, and the new rules on disclosure, only apply in proceedings that commenced after 26 December 2014.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

In the summer of 2017, the legislator submitted a bill to repeal the prohibition for collective rights organisation to claim monetary compensation in a collective action.

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Martijn van de Hel (partner at Maverick Advocaten) is recognised as one of the leading individuals in the Dutch competition law market. Martijn has unique experience with and knowledge of cartel investigations and he is also adept in follow-on damage claims matters. He is currently involved in cartel damages litigation regarding the air cargo cartel and he is assisting in a potential multi-billion claim in the foreign exchange market. He is described as “very knowledgeable, fast and responsive” (*Chambers*, 2018). Clients praise his “in-depth knowledge and very good communication skills”, not just “towards us as a client, but to regulators and other parties as well” (*Chambers*, 2017).



Maverick Advocaten N.V. is a leading Dutch boutique competition law firm with a strong focus on both stand-alone and follow-on competition and regulatory litigation. Founded by three partners who gained substantial experience at the top of the Dutch legal profession, Maverick Advocaten now has one of the largest competition law practices in the Netherlands. Currently, the firm has 11 fee-earners exclusively focusing on (EU) competition law.

As one of the Netherlands’ foremost competition practices, Maverick is regularly involved in complex civil and administrative litigation, both at the Dutch and EU courts. This has provided us with the knowledge and experience to successfully manage and complete projects of the highest complexity.

New Zealand

Oliver Meech



April Payne



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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

New Zealand's principal competition legislation is the Commerce Act 1986 (the Act). The competition provisions are contained in Parts 2 and 3 of the Act, and prohibit anti-competitive conduct affecting trade and commerce in New Zealand.

Claims can be made under any of the following provisions:

- (a) General prohibition (section 27) – The Act prohibits the entering into, and giving effect to, contracts, arrangements or understandings containing provisions that have the purpose, effect or likely effect, of substantially lessening competition in a market.
- (b) Covenants (section 28) – In relation to land, which substantially lessen competition.
- (c) Cartels prohibition (section 30) – The Act prohibits a person from entering into a contract or arrangement, or arriving at an understanding, that contains a cartel provision, and prohibits giving effect to a cartel provision. A cartel provision means a provision in a contract, arrangement or understanding that has the purpose, effect or likely effect of price fixing, restricting output and/or market allocating. The form of conduct prohibited by those specific terms is now, following amendments to the Act that came into force in August 2017, more prescriptively defined.
- (d) Misuse of market power (section 36) – The Act prohibits a person with a substantial degree of power in a market from taking advantage of that power for the purpose of:
 - (i) restricting the entry of a person into a market;
 - (ii) preventing or deterring competitive conduct; or
 - (iii) eliminating a person from a market.
- (e) Mergers (section 47) – The Act prohibits the acquisition of the assets of a business or shares if the acquisition would have the effect, or likely effect, of substantially lessening competition in a New Zealand market.
- (f) Resale price maintenance (sections 37–42) – The Act prohibits suppliers from specifying or enforcing a minimum resale price or restricting the ability of their customers to sell below a specified price.

There are also provisions allowing proceedings in respect of breaches of the regulated goods and services provisions in Part 4 of the Act.

1.2 What is the legal basis for bringing an action for breach of competition law?

The Act confers statutory jurisdiction on the national competition authority, the New Zealand Commerce Commission (NZCC), to bring claims for civil pecuniary penalties and a variety of other remedies, and statutory rights of action for affected parties to sue for damages and other remedies (see question 3.1 below).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

It is derived from national law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

No. There is no specialist competition law tribunal in New Zealand. Claims under the Act are brought predominantly in the High Court. It is common in competition law cases for the presiding High Court judge to sit with a lay member of the court – frequently an economist (section 78).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Standing

The NZCC has standing to bring penalty proceedings for breach of any of the competition provisions of the Act (sections 80, 83 and 85).

Private parties who have suffered loss or damage caused by a breach of the competition provisions of the Act have standing to bring claims for compensatory and exemplary damages against any party involved in the breach (sections 82, 82A, and 84A).

Private parties and the NZCC also have standing to apply for injunctions (sections 81 and 84). Alternatively, the NZCC can apply to designated Cease and Desist Commissioners for ‘cease and desist’ orders (sections 74AA–74C), although this latter power has very seldom been used and repeal of the ‘cease and desist’ regime has been proposed.

Representative actions

New Zealand does not have a codified ‘class actions’ regime. Collective claims via representative actions (brought by a named representative plaintiff or plaintiffs on behalf of, and for the benefit of, others with the “same interest” in the subject matter of the proceeding) are possible under the High Court Rules. Representative actions have featured in certain securities and consumer law litigation, though less in competition litigation to date. Such cases are typically brought on an ‘opt in’ basis.

A draft Class Actions Bill and proposed implementing amendments to the High Court Rules were presented to the Minister of Justice in 2009 but have seen little priority or progress. The New Zealand Law Commission has announced a project to examine class actions and litigation funding in New Zealand, as part of which it would review whether a formal ‘class actions’ framework is now merited.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The New Zealand courts have subject-matter jurisdiction over, and the Act applies to, conduct engaged in within New Zealand.

Section 4(1) extends the Act to conduct engaged in outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

Section 4(1AA) extends the Act to deem an overseas person (A) to have engaged in conduct in New Zealand (and therefore to be subject to the jurisdictional reach of the Act and the New Zealand courts), where the conduct of someone else (B) in New Zealand is deemed to be A’s conduct. That is, the conduct of one person could be deemed to be the conduct of another up the chain of command, in certain circumstances. The conduct of an actor could be attributed to either a specific individual or to an entity.

Section 4(2) extends section 36A (which prohibits taking advantage of market power in a trans-Tasman markets) to conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that the conduct affects a market in New Zealand, not being a market exclusively for services.

Sections 47A and 47B provide the NZCC with the ability to seek declarations and orders (including cessation of business and divestment orders from the High Court) if an overseas person acquires a controlling interest in a New Zealand body corporate through the acquisition of a business outside New Zealand and the acquisition has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.

In recent years, there have been a number of challenges to the NZCC’s jurisdiction to bring competition law cases against overseas defendants (individuals and companies). There is now a complex body of case law on the jurisdictional reach of the Act, which has established that section 4 is an exhaustive statement of the Act’s intended scope in relation to overseas conduct. That said:

- The courts have tended to give broad meaning to what constitutes conduct within New Zealand, including certain conduct by overseas parties.
- The courts have similarly tended to give broad meaning to what constitutes “carrying on business” in New Zealand for the purposes of section 4(1). The direction and operation of a local subsidiary could amount to the carrying on of business (by the overseas parent company) in New Zealand.
- Conduct engaged in within New Zealand can in some circumstances be attributed back to the overseas parent company (under section 90 of the Act). This provision has been utilised by the NZCC to bring proceedings directly against an overseas parent company despite the presence of a local subsidiary company.

Recent reforms to the Act (such as through amendments to section 4) in respect of jurisdictional reach and attributing conduct provisions of the Act have responded in part to such challenges.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The vast majority of competition law cases to date have been NZCC-initiated penalty proceedings. Few private damages claims have proceeded to trial. Some have gone through early interlocutory stages but settled prior to a hearing. The terms of those out-of-court settlements are not publicly available.

1.8 Is the judicial process adversarial or inquisitorial?

It is adversarial.

2 Interim Remedies**2.1 Are interim remedies available in competition law cases?**

Yes, they are.

2.2 What interim remedies are available and under what conditions will a court grant them?

Both the NZCC and private parties can seek interim injunctions in circumstances where a permanent final injunction is also sought as part of the claim.

For the court to grant an interim injunction, it must be satisfied that:

- there is ‘a serious question to be tried’; and
- if so, that the ‘balance of convenience’ favours the granting rather than the refusal of the injunction, pending trial.

The Act also requires the court to consider and give any weight it considers appropriate to the interests of consumers or, as the case may be, acquirers (section 88(3A)).

The NZCC also has the power to seek ‘cease and desist’ orders from independent designated Cease and Desist Commissioners appointed under the Act, though the power has been very seldom used and is to be repealed.

3 Final Remedies**3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.**

Remedies will depend on whether the proceedings are brought by the NZCC or a private party. All remedies and relief in New Zealand are awarded at the direction of the High Court.

The remedies that are available only on the application of the NZCC are:

- pecuniary penalties (civil fines) in relation to breach of the restrictive trade practices provisions (section 80);
- pecuniary penalties in relation to breach of the merger provision (section 83);

- divestiture orders in relation to breach of the merger provision (section 85); and
- management banning orders (section 80C).

The maximum pecuniary penalties per breach are:

- for an individual – NZ\$500,000 for breach of either the restrictive trade practices or merger provision; and
- for a corporation:
 - (i) for breach of the restrictive trade practices provisions, the greater of:
 - (a) NZ\$10 million; or
 - (b) three times the value of any commercial gain resulting from the breach if it can be readily ascertained; or
 - (c) if the commercial gain cannot be readily ascertained, 10 per cent of the annual turnover of the corporation and its related bodies corporate; and
 - (ii) for breach of the merger provisions – NZ\$5 million.

Remedies available to both private parties and the NZCC are:

- injunctions in relation to mergers (section 84);
- injunctions in relation to breach of the restrictive trade practices provisions (section 81);
- exemplary damages in relation to breach of the restrictive trade practices provisions (section 82A);
- declarations that the Crown has breached the Act (section 5);
- declarations that conduct breaches (or proposed conduct would breach) the Act; and
- orders cancelling a contract, varying a contract, requiring restitution or compensation be paid or such other orders as the court thinks appropriate to compensate a person who has suffered, or is likely to suffer loss or damage by a contravention of the Act (section 89).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Any person who has suffered loss or damage by reason of a breach of the competition provisions of the Act may bring a claim for damages against a party involved in the breach.

Damages for breach of the Act are compensatory in nature: a claimant can only recover the amount of loss or damage suffered by them by reason of the offending conduct. The relevant measure is likely to be the tort measure: damages to restore the plaintiff to the position in which it would have been had the conduct not occurred.

There is jurisdiction to award exemplary damages (section 82A), although to date we are not aware of exemplary damages having been awarded for a breach of the Act.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The NZCC does not have the power to determine, in its own right, whether or not the Act has been breached or to impose penalties. Where the NZCC considers that there has been a breach of the Act, and that the case is suitable for prosecution, it must bring civil proceedings before the courts seeking pecuniary penalties and other appropriate remedies. The NZCC can, and frequently does,

negotiate settlements of these cases on the basis of recommended penalties. However, the High Court must ultimately endorse and impose any penalty.

In private damages claims, the court looks at the actual loss or damage suffered by reason of the contravention of the Act. The level of any pecuniary penalty imposed by the court is not relevant to the assessment of compensatory damages.

4 Evidence

4.1 What is the standard of proof?

The jurisdiction is civil only and the standard of proof for civil proceedings, whether initiated by the NZCC or by private parties, is ‘on the balance of probabilities’.

4.2 Who bears the evidential burden of proof?

The party (the NZCC, or a private party) initiating the legal action usually bears the evidential burden of proof. This requires that party to present sufficient evidence as to the existence or non-existence of a fact in issue.

The burden of proof may switch to the defendant in certain circumstances; for example, if a party wishes to rely on a particular exception (under sections 31–33) for entering into, or the giving effect to, a contract, arrangement or understanding containing a cartel provision.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

There is no statutory presumption of loss in cartel cases. To obtain compensatory damages, a plaintiff would be required to establish a breach of the Act and that the breach had caused it loss or damage.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Proceedings in the High Court are governed by the rules of evidence set out in the Evidence Act 2006. The fundamental principle of the Evidence Act is that all relevant evidence is admissible unless there is good reason to exclude it.

The Evidence Act defines relevance and contains detailed rules on the admissibility of:

- (a) hearsay evidence;
- (b) statements of opinion and expert evidence;
- (c) defendants’ statements, including admissions in civil proceedings; and
- (d) privilege and confidentiality, including ‘without prejudice’ settlement discussions.

Relevantly, for present purposes:

- section 50 of the Evidence Act provides that evidence of a judgment or finding of fact in a civil proceeding is not admissible in another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given (although this expressly does not affect the operation of law in relation to *res judicata* or issue estoppel);

- section 34 of the Evidence Act provides that the provisions regarding hearsay evidence, opinion and expert evidence, and the previous consistent statements rule, do not apply to evidence of an admission offered in a civil proceeding that is contained in a document; and
- section 79 of the Commerce Act allows the courts to receive in evidence any statement, document, or information that would not be otherwise admissible that may, in the court's opinion, assist it to deal effectively with the matter. This provision does not apply in pecuniary penalty proceedings.

The interrelationship of these provisions in a damages claim following on from successful NZCC pecuniary penalty proceedings or an administrative settlement is yet to be tested.

Expert evidence is an accepted form of opinion evidence in New Zealand. To give evidence as an 'expert', persons must have the requisite specialised knowledge or skill based on training, study, or experience. Economists and other experts from New Zealand and overseas are commonly engaged by New Zealand litigants (including the NZCC) to give expert evidence in competition law cases.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

(a) Before proceedings have begun

Pre-action discovery is available in New Zealand:

- to a prospective plaintiff who is, or may be, entitled to claim relief against another party, but it is impossible or impracticable for them to formulate the claim without reference to one or more documents or a group of documents; and
- where there are grounds to believe that any person (who may, or may not, be the intended defendant) may be or may have been in control of those documents.

Pre-action discovery is typically only used by private parties, as the NZCC has extensive powers of investigation under the Act (section 98) to compel a party to provide information, produce documents or attend before the NZCC to give evidence, and typically exercises those powers before taking proceedings.

(b) During proceedings from the other party

During proceedings, parties come under obligations under the High Court Rules to provide initial disclosure (of the documents relied on in preparing the pleadings) and either standard or tailored discovery of documents relevant to the matters in issue in the case. Documents subject to legal advice, litigation or other legal privileges need not be discovered. Commercial sensitivity is not a reason for resisting the production of documents, though typically confidentiality regimes are put in place to limit disclosure to solicitors, counsel and experts.

Typically, the NZCC, as the plaintiff in pecuniary penalty proceedings, will discover the documents that were requisitioned from parties in its investigation phase. As a matter of practice, it does not discover leniency proffers and claims privilege or public interest immunity as reasons for non-disclosure.

Plaintiffs and defendants in private damages claims are subject to the normal discovery rules in litigation.

(c) From third parties (including competition authorities)

Non-party discovery is available, but to date has not been successfully used in New Zealand to access either primary documents or leniency materials held by the NZCC.

In *Schenker AG v Commerce Commission* [2013] NZCA 114 in relation to the Air Cargo litigation, the High Court declined the request of a third party potential follow-on claimant, Schenker, to access documents that had been held on the court file. The documents Schenker sought access to include an agreed statement of facts and source documents from the airlines including details of interviews with the NZCC. The Court did not dismiss the possibility of a non-party request. However, in declining Schenker access to the court file, the court placed weight on the fact that allowing access would undermine a party's incentive to co-operate with, and provide commercially sensitive information to, the NZCC.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, witnesses may be forced to appear at a hearing if a party obtains leave of the High Court to issue a subpoena on a party which will compel them to attend court and answer questions.

During the hearing of the proceedings, a party is entitled to cross-examine all witnesses of the other parties to the proceedings, including those subpoenaed by another party. Cross-examination of a party's own witness is not available unless permission is granted by the court. There are no depositions as such. Interrogatories can be issued, requiring that sworn answers be given to specified questions.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The NZCC has no power to make an infringement decision; only a court may make a finding of a breach of the Act (see question 3.3 above).

There is no statutory presumption of loss or damage, nor is there any statutory provision enabling a claimant for damages to rely on a judgment or settlement in a pecuniary penalty case as *prima facie* evidence of a breach. Plaintiffs in a follow-on case must therefore establish both a breach of the Act and loss or damage caused to them.

If a party admits a breach during a settlement with the NZCC, this will not necessarily be probative evidence of liability. The courts recognise the reality that parties can decide to settle litigation for various reasons, and not all settlements are made with admissions of liability.

An infringement decision of an overseas competition authority or court would, for similar reasons, not necessarily be probative evidence of conduct affecting a market in New Zealand.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Courts in competition proceedings are mindful of the need to protect confidential and commercially sensitive information of parties, especially where the proceedings involve competitors. However, confidentiality is not a basis for refusing to provide discovery, produce documents or give evidence in New Zealand.

Typically, confidentiality orders or inter-party confidentiality undertakings are put in place to restrict disclosure of commercially sensitive and confidential information to certain classes of persons involved in the proceedings, such as external counsel and expert witnesses.

In addition to any confidentiality regime ordered by the High Court or agreed between the parties, a party that obtains a document through discovery and inspection is subject to express obligations by operation of the Court's Rules to use the document only for the purpose of the proceeding, and not to make it available to any other person except for the purpose of the proceeding (and once the document has been read in court).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The NZCC has a right to intervene in private competition law proceedings, with the High Court's leave and subject to any conditions imposed by the court. The NZCC's Enforcement Response Guidelines state that it may seek to intervene in private litigation if it considers that its involvement will assist the court and otherwise promote the public interest.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no general defence of justification or public interest available in competition law proceedings in New Zealand, as we understand it has been applied in other jurisdictions.

Within the framework of the Act, there are various exceptions to the application of certain provisions. This includes the new exceptions to the new form of the cartel prohibition. The new exceptions are for:

- (a) collaborative activities;
- (b) vertical supply contracts; and
- (c) joint buying and promotion agreements.

In addition, there are other exceptions to restrictive trade practices provisions that deal with, for example:

- (a) employment contracts or contracts of service (section 44(1)(f));
- (b) provisions obliging compliance with certain prescribed standards (section 44(1)(e)); and
- (c) provisions relating solely to goods for export (section 44(1)(g)).

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The availability of a 'passing-on defence' has not been tested in New Zealand. The requirement that a claimant show loss as part of its cause of action tends to suggest that a passing on defence would have a good prospect of success.

A corollary is that indirect purchasers would likely have standing to bring damages claims under the Act if they could prove they had suffered loss or damage caused by the breach of the competition provisions.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

A defendant can, under the High Court Rules (rule 4.4), issue a third party notice to bring a third party into the proceeding.

Grounds for issuing third party notices include: (i) whether the named defendant is entitled to contribution or indemnity from the third party (where a right to contribution can exist between joint tortfeasors); and (ii) that a question or issue in the proceeding ought to be determined as between the plaintiff, the defendant and the third party.

The High Court Rules prescribe a timeframe for filing third party notices (10 working days after the expiry of time for filing the defendant's statement of defence), which may be extended by leave of the court.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Proceedings for alleged breaches of the:

- restrictive trade practices provisions must be commenced 'within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered' with a 'long-stop' limitation of 10 years; and
- business acquisition provision must be commenced 'within 3 years after the matter giving rise to the contravention arose'. Proceedings seeking a divestiture can be commenced within two years from the date on which the contravention occurred.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

NZCC-initiated pecuniary penalty proceedings have generally taken between 18 months and three years from commencement (post-investigation phase) to bring to hearing and judgment or settlement. Some cartel claims may take much longer. Expedition is available for urgent cases, usually where injunctions are sought.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Generally, the permission of the court is not required for a discontinuance or settlement of a private damages action. Where, however, the NZCC seeks pecuniary penalties as part of a settlement, the court's endorsement to any 'recommended' penalty or penalty range is required.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As mentioned in question 1.5 above, New Zealand does not have a codified 'class actions' regime. Representative actions are possible but have been rare in competition litigation to date. The question posed has yet to be tested.

The draft Class Actions Bill and proposed implementing amendments to the High Court Rules, which have not progressed but which have on occasion been referred to by the courts in

developing principles for the case management of representative actions, would require the court's approval for the settlement or discontinuance of a class action.

The draft Class Actions Bill would also empower the NZCC to bring proceedings for damages as the lead plaintiff in a class action (even though it has not itself suffered loss or damage).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

A court has the power to award costs at its discretion. The general principle is that the unsuccessful party should contribute to the successful party's costs. Costs awards are typically on a 'scale' calculation under the High Court Rules and will be significantly less than the successful party's actual legal costs. The courts are able to consider applications for increased and/or indemnity costs. There is case law on the recoverability of expert witnesses' fees as disbursements.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers may enter into a 'conditional fee agreement' with a client which is payable on the basis of a successful outcome, but the fee arrangement cannot be calculated on a proportion of any amount recovered.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Yes, third party funding of competition law claims is permitted. Several commercial litigation funders are active in New Zealand; however, there have been no instances of third party funding of competition law claims to date.

9 Appeal

9.1 Can decisions of the court be appealed?

Only the High Court may determine whether the competition provisions have been contravened and impose pecuniary penalties. Decisions of the High Court can be appealed to the Court of Appeal and, finally (with leave), to the Supreme Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, the NZCC operates a Leniency Policy for cartel conduct. Full immunity from NZCC-initiated proceedings is available to the first party (whether an individual or a company) to approach the NZCC and secure conditional leniency. Leniency is conditional on the holder continuing to meet the prescribed conditions. Conditions

include full continuing co-operation with the NZCC until any relevant NZCC proceedings have been finalised. If full immunity is not available (e.g. because another party has applied for leniency), co-operation with the NZCC's investigations can still result in significantly reduced fines.

Immunity from NZCC-initiated proceedings does not grant the holder (or unsuccessful applicant) immunity from third party damages claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An applicant for conditional leniency, whether successful or not, cannot withhold documents from discovery in private damages proceedings solely on the basis that they were provided to the NZCC for the purposes of an immunity or leniency application. The standard rules for discovery will apply – see question 4.5 above. It is likely that the party would be obliged to discover the contemporaneous (non-privileged) documents relating to the alleged conduct, but there would be a basis for asserting privilege and/or public interest immunity grounds for withholding discovery of leniency proffers and similar information provided to the NZCC. This has yet to be tested in a follow-on damages case against a leniency holder.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Competition studies power

On 28 March 2018, the Minister of Commerce and Consumer Affairs re-introduced (following a change to a new Labour-led coalition government) the Commerce Amendment Bill (the Bill).

The Bill proposes to:

- (a) introduce a competition studies regime;
- (b) repeal the cease and desist regime;

- (c) update the regulatory regime for airports to improve its effectiveness; and
- (d) introduce an enforceable undertakings regime into the Commerce Act.

In relation to competition studies, the Bill would insert a new Part 3A into the Act, enabling the NZCC to initiate market studies, either where directed to by the Minister or if it chooses to conduct one of its own accord. In either case, the threshold to initiate a study is that the Minister or the NZCC must consider it in the public interest to carry out a competition study.

The Minister has asked officials to fast track the Bill so that it is in place by the end of 2018, likely giving the NZCC competition studies powers from the start of 2019.

As of July 2018, the Bill is before the Select Committee with a report due in early November 2018.

Criminalisation of cartels

The Commerce (Criminalisation of Cartels) Amendment Bill is also before the Select Committee as of July 2018, with a report due on 20 August 2018.

Criminalisation was initially proposed by the former National Government in 2010, but abandoned for fear that it would have a chilling effect on pro-competitive collaborations and due to high costs to businesses and the State. The new Labour-led coalition Government has re-introduced the proposal to criminalise intentional cartel conduct.

As drafted, the Bill targets individual decision-makers for cartels and their corporations, with the key element of the offence being intention to engage in cartel conduct. The Bill proposes the same maximum fines as the maximum pecuniary penalties that may be imposed under the civil cartels regime, with the additional sanction of up to seven years' imprisonment in the case of individuals. The existing exceptions and exemptions to the civil prohibition for cartel conduct in the Act will apply to the new criminal offence and there are new defences in circumstances where a defendant believes that the impugned conduct was reasonably necessary as provided for in one of the exceptions and exemptions. If enacted, the Bill provides for a two-year transitional period before the criminal offences would apply (in addition to the civil prohibitions).



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Oliver regularly advises on mergers and acquisitions, restrictive trade practices, unilateral conduct and regulation. He has provided advice to clients in Commerce and Fair Trading Act investigations and with regard to their interactions with the commercial regulators. Oliver advises on front-end compliance and, in the consumer law area, has represented clients before the courts and before the Advertising Standards Complaints Board.

Chambers Asia-Pacific 2018 describes Oliver as "a well-reputed competition and consumer law specialist, with one client praising his 'expert strategic advice on engagement with competition and consumer regulators'".



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Poland

Wardyński & Partners

Sabina Famirska



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Claims for breach of competition law may stem from a violation of Article 6 or 9 of the Competition and Consumer Protection Act of 16 February 2007 (consolidated text, Journal of Laws, 2018, pos. 798) (“Competition Act”), which bans the conclusion of anticompetitive agreements and abuse of a dominant position.

Furthermore, Polish courts may resolve civil claims stemming from an infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (2013/C 167/07) (“TFEU”).

Claims may be based on a tort, unjust enrichment or on contractual grounds. Additionally, other actions relating to these claims may be taken within the framework of private enforcement, e.g., motion for an interim injunction or disclosure of evidence.

1.2 What is the legal basis for bringing an action for breach of competition law?

The most complex regulation is the Act of 21 April 2007 on claims for compensation for damage caused by an infringement of competition law (consolidated text, Journal of Laws, 2017, pos. 1132) (“Damage Action Act”), which entered into force on 27 June 2017. This act implements the EU Directive on Antitrust Damages Actions in Polish law. It appears that in the present legal state claimants will most frequently cite this law as a basis for claims. It pre-determines, *inter alia*, that the perpetrator of an infringement of competition law is obligated to remedy damage inflicted to any party through the infringement, unless there is no culpability. It also introduces a series of vital presumptions, including the presumption that infringement of competition law causes harm (Article 7) and the overcharge was passed onto an indirect purchaser (Article 4).

Moreover, claims can be constructed on the basis of the Civil Code, particularly Article 415 of the Civil Code *et al.*, which refers to tort liability or Article 405 of the Civil Code pertaining to unjust enrichment.

Another possible basis to raise claims is the Countering of Unfair Competition Act of 16 April 1993 (consolidated text, Journal of Laws, 2018, pos. 419). According to Article 3, any action contrary to the law (also competition law) or good custom is the tort of unfair competition if it threatens or infringes the interests of another undertaking or client. This law constitutes a basis to formulate prohibition claims (ban on a continued anticompetitive practice), which may have significance for stand-alone actions.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

National law includes grounds for pursuing competition-related civil claims. Claims can also be based on an infringement of Articles 101 and 102 TFEU.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

As for private enforcement, normal civil courts examine competition cases. These courts have not had any specialised section dealing with such cases and are not required to seek judges with special knowledge in this area.

Under the public enforcement regime, a specialised court, the Competition and Consumer Protection Court, has sole power to examine appeals of the decisions issued by the Chairman of the Office of Competition and Consumer Protection (“the OCCP Chairman”). However, it is not empowered to hear civil cases.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Each aggrieved individual or entity may file a suit relating to an infringement of competition law.

Moreover, the Damage Action Act states that organisations dealing with consumer protection or affiliating entrepreneurs may file compensation lawsuits on behalf of a claimant with its consent or accede to pending proceedings.

Several aggrieved persons or entities may jointly file a suit on the basis of Article 72 of the Civil Code. According to this provision, several persons may act as claimants or defendants in a single case if the subject of dispute is: (i) rights or duties or those based on the same factual and legal basis (material co-participation); or (ii) claims or obligations of a single type based on the same factual and legal basis if court jurisdiction is justified for each claim or obligations separately as well as for all jointly (formal co-participation).

It is also theoretically possible to file a class-action lawsuit on the basis of the Act of 17 December 2009 on the raising of claims in group proceedings (consolidated text, Journal of Laws, 2018,

pos. 573). Thus far, we are not aware of any case of it serving to raise claims based on an infringement of competition law. The Raising of Claims in Group Proceedings Act provides an opt-in formula. Group proceedings can be initiated by at least 10 individuals or entities. The condition for initiating such proceedings is the raising of claims of a single type based on the same factual basis. Group proceedings in cases with monetary claims are allowed only if the level of claim of each member has been consolidated with consideration of common case circumstances. A lawsuit must be filed by a group representative, who may be a group member or a consumer ombudsman.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Local jurisdiction is set on the basis of the Civil Procedure Code; the main factor determining jurisdiction is seat of the defendant or the location of damage. The Damage Action Act provides for exclusive jurisdiction of regional courts to review damage cases inflicted through an infringement of competition law. Also, regional courts have jurisdiction to rule on lawsuits based on an infringement of the Countering of Unfair Competition Act. Cases triggering unfair enrichment or contractual arguments can also be examined by district courts if the value of a claim does not exceed PLN 75,000.

Under 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, Polish courts will be entitled to adjudicate a case against a foreign entity domiciled in the European Union if anticompetitive practice causing harm occurred in Poland.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Poland is not normally listed among friendly jurisdictions for raising competition claims or attracting defendants, probably due to a lengthy and formal civil procedure.

1.8 Is the judicial process adversarial or inquisitorial?

In general, the process is adversarial. The parties are obliged to present facts and evidence supporting their position. There are, however, certain elements of inquisitorial process such as the possibility for courts to admit evidence *ex officio*.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The interim remedies are available in civil cases, as well as those originating from an infringement of competition law.

2.2 What interim remedies are available and under what conditions will a court grant them?

Pursuant to Article 730 *et al.* of the Civil Procedure Code, the court may grant an interim injunction either before or during proceedings, i.e., after filing a lawsuit. A claimant applying for an interim injunction must demonstrate that its claim is probable (claim substantiation) and its legal interest. A legal interest exists only if lack of such as

a remedy would undermine the goal of proceedings or the ability to enforce a final judgment (e.g., due to defendant insolvency). Interim remedies trigger both pecuniary and non-pecuniary claims. With regard to damage claims with a pecuniary nature, a claimant may opt, e.g., for seizure of movable property or establishment of a mortgage.

In principle, an injunction is not a mechanism to satisfy a claim. Therefore, in damage cases, a defendant cannot be ordered to pay any interim compensation to the claimant during proceedings.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Final remedies depend on the legal basis upon which a lawsuit is based. In the case of claims to remedy damage from infringement of competition law, a court may order an appropriate monetary amount as compensation together with due interest. The Damage Action Act provides a mechanism for interest correction if the basis for determining compensation is prices with a date different than that used to determine compensation. The victim is then entitled to interest from the date when prices used as a basis for compensation were set to the date of due claim.

Similarly, claims based on unjust enrichment provide the ability to award an appropriate monetary amount.

The following can be demanded on the basis of the Countering of Unfair Competition Act: (i) cessation of prohibited actions; (ii) elimination of the effects of prohibited actions; (iii) issue of a single or multiple public statement or return of an unjustly gained benefit; and (iv) the awarding of an appropriate monetary sum to a specific public cause relating to support for Polish culture or protection of the national heritage – if an act of unfair competition was culpable.

The Damage Action Act excludes the ability to seek compensation for infringement of competition law on the basis of the Countering of Unfair Competition Act – they must be formulated on the basis of the new law.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

There are different methods for estimating the level of harm. An interesting solution in this regard is provided by the Damage Action Act. According to its Article 31, a court may be guided, when determining the level of damage caused by an infringement of competition law, by the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU and European Commission guidelines referred to in Article 16 of the EU Directive on Antitrust Damages Actions.

A court may also call on the OCCP Chairman or other foreign authority for assistance in determining the level of damage if allowed by collected evidence and held information.

On the basis of Article 322 of the Civil Procedure Code, civil courts may award an appropriate sum at their own discretion in cases to remedy damage or to return unjust gains, if it finds that specific proof of the level of damage is impossible or excessively difficult.

Exemplary damages are not provided in the Polish legal system.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The level of monetary fines imposed by a competition authority cannot influence the level of compensation awarded by a civil court – both of these measures are separate and independent of each other. However, any sums awarded to a victim through compensation will reduce an awarded amount because compensation, on the basis of Polish law, cannot lead to victim enrichment.

4 Evidence

4.1 What is the standard of proof?

There is no defined standard of proof. A claimant must prove the facts upon which a claim is based.

As for tort liability sought on the basis of Article 415 of the Civil Code, a claimant must prove: (i) the illegality of the action causing damage; (ii) the fault of the party responsible for the damage; (iii) the damage; and (iv) a causal link between the event and the damage.

The Damage Action Act introduces a vital change in distributing the burden of proof with regard to points (i) and (iv) above by presuming fault of the perpetrator, who must demonstrate innocence. Liability may be exempted in such situations when a breach of competition law could not be foreseen or avoided, despite appropriate diligence. Moreover, it is also presumed that the infringement of competition law caused harm.

4.2 Who bears the evidential burden of proof?

Parties are obligated to provide evidence to declare facts from which legal consequences are drawn. A claimant should prove all circumstances from which claims are drawn, unless a given circumstance is subject to legal presumption. In such case the burden of overturning the presumption rests with the defendant.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

As noted in question 4.1, the Damage Action Act has introduced vital changes in legal presumptions. It contains a series of legal presumptions facilitating aggrieved parties to raise compensation claims for a violation of competition law: presumption of perpetrator fault (Article 3); presumption of passing the overcharge onto an indirect purchaser (Article 4); and the presumption of inflicting harm through violation of competition law. The latter presumption is broader than provided in the EU Directive on Antitrust Damages Actions, which is limited to cartels.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The Polish legal system does not provide for limitations on forms of evidence allowed in civil proceedings. It is possible to provide evidence from testimony of witnesses, expert opinions, official and private documents, audio recordings, etc.

The opinion of a private expert commissioned by a party to proceedings does not have the weight of evidence as that of an independent expert appointed by the court. The opinion is treated as a private documents originating from that party and supplementing its position.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The Damage Action Act introduces new principles governing disclosure in compensation cases that were hitherto unknown in Polish law. The Act states that a court may, upon claimant demand, order a defendant or third party to disclose evidence in the possession of the defendant or third party (this primarily, but not only, concerns documents, irrespective of their form). A defendant can also file a motion for disclosure. The applicant must substantiate its claim and undertake to ensure that evidence obtained in such manner will be only used for the purposes of pending proceedings.

An application to disclose evidence can, in principle, also concern evidence at the disposal of a competition authority. In such case a court may order the competition authority to disclose such evidence only if its receipt from the opponent or third party is impossible or excessively hindered.

An application to disclose evidence can be filed together with a lawsuit or during proceedings. The law excludes the ability to submit such an application prior to initiating proceedings.

In other matters relating to infringement of competition law, parties may benefit from the institution set forth in Article 248 of the Civil Procedure Code, whereby each party is obligated upon court demand to file documents in its possession and constitute evidence that is vital to case resolution, unless such document contains confidential information. A party, who as a witness may refuse testimony, can be exempted from this obligation (see question 4.6).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In principle, witnesses are required to appear and testify. Unjustified absence or refusal to testify may result in the courts imposing a fine and, in extreme instances, arrest. A court may also order the forced appearance of a witness.

Each party as well as the court may pose questions to witnesses, whereby the court determines the order of cross-examination. The Civil Procedure Code, however, introduces certain evidence prohibitions, e.g., persons incapable of communicating their perceptions, military service or officials not released from their confidentiality obligation, cannot serve as witnesses. In turn, persons close to parties may refuse testimony as witnesses. A witness may also refuse to answer a specific question if it would expose him to criminal liability, shame or harsh and direct material harm, or if testimony could endanger the revelation of a vital professional secret. A member of the clergy may refuse testimony regarding confessed facts.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Pursuant to Article 30 of the Damage Action Act, establishment of a legally binding decision of the OCCP Chairman on the recognition of a practice as limiting competition or a legally binding judgment

rendered upon appeal of such decision bind a court in proceedings to remedy damage inflicted through violation of competition law as regards a violation of competition law.

Before the Damage Action Act entered into force, the view also prevailed in the Supreme Court adjudication that a legally binding decision of the OCCP Chairman recognising a given practice as violating competition law is binding upon a civil court reviewing a civil case.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

A business secret constitutes a basis to conduct a court session behind closed doors. In such a case only parties, their attorneys and two persons of confidence to each side may appear in court.

Moreover, the Damage Action Act provides for protection of evidence obtained from disclosure of evidence if it includes a business secret or other confidential information subject to legal protection. In such a case a court may upon motion or *ex officio* limit the right of access to such evidence to a necessary degree or specify terms of familiarisation with such evidence for its use; in particular, by limiting the ability to copy or record it.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Yes, according to Article 31d of the Competition Act, the OCCP Chairman presents the court a view significant to a matter in cases concerning the protection of competition and consumers if this is in the public interest.

Yes, until now the OCCP Chairman has repeatedly presented such a position in proceedings mainly to credit granted in Swiss francs that concerned a breach of consumer regulations. It is not excluded that this position will be presented in private enforcement cases pertaining to infringement of competition law.

The European Commission can present a position on a case pertaining to an infringement of Article 101 or Article 102 TFEU upon court demand or *ex officio*.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

A public interest defence is not generally recognised in private enforcement cases. Arguments relating to a social, environmental or industrial background may be possibly raised in damage cases only in the context of the prerequisite of fault.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Passive defence is available under Polish law and indirect purchasers are fully entitled to bring claims against infringers. Indirect purchasers may benefit from the presumption set forth in Article 4 of the Damage Action Act, which states that as long as an infringement caused overcharges passed onto a direct purchaser, it is presumed that the overcharge was also passed onto an indirect purchaser.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Polish law provides for the ability to raise claims against several claimants. If they engaged in a tort, they are jointly and severally liable for damage. Claimants may file a lawsuit at their discretion against one, several or all infringers. If the claimant decided to file a lawsuit only against one or selected defendants, other cartel participants may voluntarily join a case as interveners. If the court accepts their application to join, they are able to present statements, submit evidence and actively participate in a case. Moreover, during proceedings a court at the request of the claimant may summon other cartel participants to join a case.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Pursuant to the Damage Action Act, claims to remedy damage caused by an anticompetitive practice expire five years from the date when a victim learned or could have learned with due diligence about the damage and party obligated to remedy it. This deadline can in no case be longer than 10 years from the date when the event causing the damage took place. The statute of limitations commences from the date of ceased violation.

It is also suspended upon initiation of clarification or antitrust proceedings by the OCCP Chairman or by the European Commission or other competition authority with regard to an infringement of competition law serving as the basis in a civil case. Suspension is listed only after one year from the legal validation of a judgment declaring a violation of competition law or the conclusion of proceedings in another manner.

The Damage Action Act introduces intertemporal provisions aimed at avoiding situations when expiration would take place earlier than according to hitherto rules. Therefore, it is assumed that the general three-year expiration term for claims to remedy damage that stems from the Polish Civil Code and arising prior to the date of the law's entry into force, but not yet expired on this date, commences on the date of its entry into force.

Claims based on unfair competition provisions expire after three years, whereby the statute of limitation commences separately for each infringement.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Private enforcement cases are lengthy in Polish conditions. Even two years may pass between filing a suit and a first-instance court judgment. The entire appeal process may last several years. Essentially, there is no legal ability to accelerate proceedings.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

In principle, yes. In the event of concluding an out-of-court

settlement, a claimant may withdraw a lawsuit. However, a court may find withdrawal of a lawsuit to be invisible if case circumstances show that it is in breach of the law, social norms or aims to bypass the law. Parties may also conclude a settlement before a court or in mediation proceedings before a court mediator; in such case, a settlement is subject to review by the court adjudicating a case and only if admissible, the court will discontinue proceedings.

The parties may also file a joint motion to suspend proceedings; for example, for the duration of settlement talks. A court must discontinue proceedings if the parties file a motion to resume proceedings within one year of a suspension decision – in such a case a court does not determine whether an out-of-court settlement was allowed.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

A settlement is a dispositive action that, in principle, requires consent of all participants to proceedings.

An exception applies to proceedings pending on the basis of the Act on the Raising of Claims in Group Proceedings. A group represented must gain consent of a majority of group members to conclude a settlement. A court may find a settlement as inadmissible, among others, if its substance grossly violates the interests of group members.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The reimbursement of incurred costs of proceedings is regulated by the Civil Procedure Code and provisions concerning the cost of legal representation. The principle applies that the losing party must reimburse the counterparties the necessary costs to pursue its rights or defend itself. As for the cost of professional lawyers, Polish regulations significantly limit the level of costs subject to reimbursement to a counterparty.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, but this cannot constitute the sole basis for professional lawyer remuneration. This stems from codes of ethics binding upon lawyers admitted to Polish bars.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There is such a possibility, but it appears that it is very rarely applied in Polish conditions.

9 Appeal

9.1 Can decisions of the court be appealed?

Judgments of first-instance courts, which most private enforcement

cases will be regional courts, can be appealed at second-instance courts (Courts of Appeals). The Damage Action Act, e.g., reserved the sole jurisdiction of regional courts in damage cases for an infringement of competition law. Appeal court judgments, which are final and binding, can be subject to extraordinary appeal at the Supreme Court under certain conditions. The Supreme Court is a court of law and an appeal filed can only be based on a breach of substantive law or serious procedural error, i.e., which substantially influenced case outcome.

The procedure before the Supreme Court is two-fold: at the first stage, a single-judge panel decides whether to admit an appeal for examination. An appeal can only be admitted if the case triggers an important legal issue, constitutes a precedent or involves discrepancies in case-law. At the second stage, an appeal is examined on merit by a three-judge panel.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is indeed offered by the Competition Act and can bring considerable relief under the public enforcement regime. However, the status of a leniency applicant, either successful or unsuccessful, does not exempt civil claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Leniency statements are covered by protection rules in the Damage Action Act to the effect that they cannot be disclosed in any subsequent court proceedings. If a statement was in a longer document, the remaining part of the document (without the leniency statement) can be disclosed. Other information drafted by a leniency application during leniency proceedings as well as information related to that which originated from the OCCP Chairman will be disclosed only after authority proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

As noted in question 1.2, the EU Directive on Antitrust Damages Actions has been implemented in Polish law by way of the Damage Action Act.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The EU Directive on Antitrust Damages Actions has been implemented in full with an important deviation. Polish legislators decided to introduce a much broader presumption of harm caused by an infringement of competition law than the EU Directive. Pursuant

to Article 7 of the Polish Act, it is presumed that any infringement of competition law causes harm, whereas under the EU Directive such a presumption applies only to cartel infringements. Moreover, the Damage Action Act contains additional mechanisms not regulated in the EU Directive, such as the ability for consumer or entrepreneur organisations to raise claims or intervene in private enforcement proceedings.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Pursuant to Article 36 of the Damage Action Act, the Act applies to claims for compensation for damage caused by an infringement that occurred after the effective date of the Act's implementation (27 June 2017).

Section 3 of the Damage Action Act applies to damage claim proceedings commenced after the date of implementation, regardless of when an infringement occurred. Section 3 refers to important procedural rules such as the ability to apply for disclosure of materials relevant to a damage case (with exceptions relating to leniency statements and settlement proposals) – Articles 17–28,

binding nature of an OCCP Chairman decision declaring a practice as anticompetitive – Article 30, provisions relating to proper jurisdiction of courts, and guidelines for court determination of damage caused by an infringement of competition law – Article 31.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

To our knowledge, no other reforms are currently under consideration.



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**WAR
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Wardyński & Partners was established in 1988. Drawing from the finest traditions of the legal profession in Poland, we focus on our clients' business needs, helping them find effective and practical solutions to their most difficult legal problems.

The firm is particularly noted among clients and competitors for its services in dispute resolution, M&A, intellectual property, real estate and title restitution.

The firm now has over 100 lawyers, providing legal services in Polish, English, French, German, Spanish, Italian, Russian, Czech and Korean. We have offices in Warsaw, Kraków, Poznań and Wrocław.

We share our knowledge and experience through our web portal for legal professionals and businesspeople (inprinciple.pl), the firm *Yearbook*, the new tech law blog (newtech.law), and numerous other publications and reports.

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Portugal

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Most of the claims brought before the Portuguese Courts on the grounds of breach of competition law seek compensation for damages under national and European law for infringements of competition law provisions. However, it is also possible to file a claim for the nullity of agreements or of specific clauses that breach national or European competition law, as well as request interim measures related to conduct which breaches European and national competition law.

1.2 What is the legal basis for bringing an action for breach of competition law?

The legal grounds for bringing an action for breach of competition law are articles 9, 11, 12 and 36 to 59 of the Portuguese Competition Law, approved by Law no. 19/2012, of 8 May (“PCL”), articles 101, 102 and 107 to 109 of the Treaty on the Functioning of the European Union (“TFEU”) and Council Regulation 139/2004 of 20 January 2004, on the control of concentrations between undertakings (“Regulation 139/2004”).

The prohibited competitive practices are basically the following three and are foreseen in articles 9, 11, 12 PCL and 101 and 102 TFEU: (i) collusive practices, including cartels and vertical agreements, as agreements between undertakings, concerted practices or decisions by associations of undertakings; (ii) abuse of a dominant position; and (iii) abuse of economic dependence.

The other legal grounds for bringing actions for breach of competition law are State aid rules, pursuant to articles 107 and 109 TFEU, and potentially the breach of merger control provisions, pursuant to articles 36 to 59 PCL and Regulation 139/2004.

As most of the claims related to breach of competition law are due to the damages caused by anti-competitive practices, we will focus our analysis on these ones, except when otherwise specified.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims are both European and national. As referred to in question 1.2 above, the anti-competitive practices mentioned above are covered and regulated by articles

9, 11 and 12 PCL and by articles 101 and 102 TFEU. The State aid rules are foreseen under articles 107 to 109 TFEU and merger control provisions, pursuant to articles 36 to 59 PCL and Regulation 139/2004.

Additionally, the Portuguese general rules of civil law and civil procedural law are also applicable to competition law claims.

Particular emphasis should be given to Law no. 23/2018, of 5 June (“Law 23/2018”), which transposes into the Portuguese legal framework EU Directive 2014/104, of 26 November, and sets out a new liability regime for damages due to infringements of competition law. The legal regime set out in Law 23/2018 is only applicable to claims for damages under national law brought as a consequence of infringements of competition law provisions related to the anti-competitive practices foreseen in articles 9, 11 and 12 PCL and articles 101 and 102 TFEU.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Pursuant to Law 23/2018, the Competition, Regulation and Supervision Court is competent where regulatory decisions issued under competition law are challenged and, notably, in respect to liability claims grounded on the breach of competition provisions, pursuant to Law 23/2018.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Anyone that claims to have suffered damages following a breach of competition law has procedural standing to file a liability claim before the Portuguese Courts. It is possible to have proceedings with multiple parties, either by decision of the parties to join as co-parties, in the beginning of the proceedings or afterwards, or by decision of the Court to join separate actions with a similar cause of action.

These types of claims can be brought to Courts individually or in collective claims (“ação popular”). As to individual claims, it is admissible under the Portuguese Civil Procedure Code to have third parties joining as co-parties, as mentioned above, on an “opt-in” basis. As to collective actions, an “opt-out” system applies under Portuguese law, as the final decision will bind all potential claimants except for those who formally “opt-out”.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

From the regulatory perspective, Portuguese Courts are competent to decide challenges to decisions issued by the Portuguese Competition Authority. As to the remaining claims, Portuguese Courts may decide a competition law claim if internationally competent under the following criteria: (i) if European regulations or other international instruments so determine; (ii) if a valid choice of forum clause executed by the parties so determines; or (iii) if one of the following cases is verified: (a) the defendant, or one of the defendants, is domiciled, registered, has an effective office, branch, agency subsidiary or delegation in Portugal; (b) the legal proceedings should be initiated in Portugal according to any criteria of territorial jurisdiction; (c) the cause of action of some of the relevant facts was carried out in Portugal; or (d) if the right underlying the claim may only be effective through legal proceedings initiated in Portugal or if it is too burdensome for the claimant to initiate the legal proceedings abroad, provided that there is a decisive link between the subject of proceedings and the Portuguese jurisdiction.

As mentioned above, where Portuguese Courts are internationally competent, the Competition, Regulation and Supervision Court is competent to rule in respect to (i) decisions issued by the Portuguese Competition Authority, (ii) private enforcement (liability claims) based exclusively on breach of competition law, and the eventual right of recourse between the defendants, or (iii) requests for access to evidence relating to such actions.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Portugal does not have a specific reputation in this regard. Please note that the implementation of the Private Enforcement Directive was just recently concluded and Law 23/2018 is due to enter into force on 4 August 2018. This means that additional time is necessary in order to distinguish how Courts will apply this new regime.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim proceedings are admissible in competition litigation in the general terms foreseen in the Portuguese Civil Procedure Code. In addition to that and in the event that a breach of competition law is likely to occur, the damaged party may request an injunction for evidence protection in relation to such breach.

2.2 What interim remedies are available and under what conditions will a court grant them?

Please see question 2.1. In addition, under Portuguese law, specified interim proceedings also include seizure, or enrolment, as well as non-specified interim proceedings.

While each specified interim proceeding has its own procedural requirements, in a case of a non-specified interim proceeding (the

most common in breach of competition law cases), the claimant shall demonstrate that a grounded risk exists that a third party may cause serious and difficult harm to the claimant's legal rights and that damages are likely to result therefrom.

The interim injunction is granted if the Court decides that there is a relevant probability of the claimant being entitled to the legal right invoked, that the risk of violation of such right does exist and that the harm arising from the award of such interim measures does not exceed the harm that the claimant party intends to prevent.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Typically, in private enforcement cases the final remedy is liability claims for damages under article 483 of the Portuguese Civil Code. In this context and to rule in favour of the claimant, the Court shall conclude (i) that a breach of competition law has occurred, (ii) that damages have been produced to a third party, (iii) that there is a relevant fault of the defendant, and (iv) that a "causal link" exists between the breach of competition provisions and the occurrence of such damages.

Another relevant final remedy is the declaration of nullity of an agreement or specific clause or practice considered to be in breach of competition law, according to article 289 of the Portuguese Civil Code, which has retroactive effect and, when granted, requires that the defendant returns all considerations provided under the agreement, clause or behaviour.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Recent private enforcement law provides that the amount of compensation granted to the claimant shall consider (i) the damages caused directly by the breach of competition law, (ii) the loss of profits arising from the same breach of competition law, and (iii) interest due as from the date of the decision until full payment of compensation. There is no legal framework nor case law providing for exemplary damages.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

When granting compensation to the damaged parties, the Court is not required to consider the fines imposed by the competition authorities or by the European Commission, nor is it required to consider any redress scheme.

4 Evidence

4.1 What is the standard of proof?

The standard of proof required in civil claims is understood to be a

reasonable, although not absolute, certainty of the factual grounds based on the evidence produced and on the Court's freedom to decide according to its prudent assessment, unless a legal presumption is provided for under the applicable law or unless a certain type of evidence is required for certain facts to be demonstrated (in accordance with article 607 of the Portuguese Civil Procedural Code).

4.2 Who bears the evidential burden of proof?

Under Portuguese law, the party that files a liability claim shall bear the burden of proof in respect to the facts alleged as grounds to that claim and that are relevant according to the applicable legal framework (article 342 of the Portuguese Civil Code). Therefore, and as a general rule, in private enforcement cases the burden of proof lies with the claimant, unless the defendant invokes specific means of defence, in respect to which the burden of proof lies with him. It should be noted that when liability claims are filed following or in the context of final decisions issued by the Competition Authority (or final judgments in respect of decisions of the same regulatory body) the claimant can take advantage of that decision, notably in what concerns the existence of a breach of competition law and its circumstances.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

There are three relevant presumptions introduced by Law 23/2018. A condemnatory decision issued by the Portuguese Competition authority or by an appeal Court that confirms that competition law has been infringed establishes an irrebuttable presumption of the existence and nature of such infringement as well as of its material, subjective, temporal and territorial scopes, for the purpose of a claim for damages. The same applies, although in more limited terms, in respect to decisions issued by foreign competition authorities or foreign courts.

The second relevant presumption is that cartel infringements necessarily result in harm and therefore cartel participants are also considered liable for the damages caused due to their participation in such infringements, unless otherwise proven.

Additionally, cartel overcharges are presumed to be passed through to indirect customers, if demonstrated that (a) the defendant has committed an infringement of competition law, (b) this infringement had an additional cost for the direct customer of the defendant, and (c) the indirect customer acquired the goods or the services affected by the infraction or the goods or services derived from the ones affected by the infraction.

With this legal presumption foreseen in Law 23/2018 it is much more likely for indirect customers to obtain compensation, especially when compared with the previous regime where the burden of proof relied with the indirect customer.

Note that at the time of publishing, Law 23/2018 is not yet in force, so there are no practical examples of the application of these presumptions.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

In private enforcement cases, as in general civil litigation, all types of evidence are, in principle, admissible, including expert evidence,

unless the evidence is obtained in breach of applicable law or unless the applicable law states that a specific type of evidence is required, in which case the remaining types of evidence are not admissible.

Specific limitations also apply to the evidence obtained in the administrative proceedings initiated by the competition authority. In more detail, (i) the Court shall not order the competition authority to produce, and shall not consider, any evidence where exemption or reduction of fines is requested or where a settlement related to an infringement is proposed, and (ii) the Court shall not admit documents specifically prepared for the administrative proceedings or settlement proposals that are withdrawn, until these proceedings are concluded.

In any case, evidence obtained in administrative proceedings can only be used in Court by the person entitled to obtain such evidence, or by any legal successor, as well as by the persons that acquired the right to compensation for breach of competition rules.

In addition, please consider the limitations on disclosure set forth in question 4.5.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The new private enforcement law includes specific rules for disclosure.

If justified risk exists that it will be impossible or very difficult to obtain testimonies or to verify certain facts by means of an investigation or inspection, such evidence production may be carried out before the action is brought to the Courts.

In the context of the proceedings, a party may ask the Court (or the Court may issue such decision on its own competence) to oblige the other party or any third parties (including competition authorities) to submit any evidence that is in their possession, provided that the request is grounded, proportional and relevant for the final outcome of the case. The Portuguese Competition Authority may issue an opinion in respect to the proportionality of the request of evidence production.

However, no evidence may be presented in Court that implies (i) violation of physical or moral integrity, (ii) intrusion into private or family life, at home, in correspondence or telecommunications, or (iii) breach of professional privilege or State secret (which may be surpassed by a decision of the Court).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In general terms, if a witness does not appear in Court and does not provide acceptable justification, the Court may apply a fine to that witness and order its attendance under custody. Even if the witness is not enrolled by any party, the Court may call any person to testify if during the proceedings it considers that such person has knowledge of important facts for the decision of the case. In any case, it is possible to direct and cross-examine witnesses.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

A final decision issued by the Portuguese Competition Authority or by national courts is deemed to be irrefutably established in respect

to the existence, nature and circumstances that involve such breach for the purposes of a liability claim under Law 23/2018. If such decisions are issued by a foreign authority or by a foreign court, this is also established as *prima facie* evidence of an infringement of competition law and of its circumstances, but the defendant is entitled to produce additional evidence against such assumption.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

The disclosure of evidence that includes confidential information is admissible in liability claims pursuant to Law 23/2018. However, and in order to protect the confidentiality of such information, the Court may decide to limit access to that information, determine that such information is disclosed in a specific way to prevent access from third parties or impose any other formalities that are found to be necessary to protect such confidentiality.

The Court may also impose fines in respect of breaches of confidentiality obligations.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

There is no provision allowing the Portuguese Competition Authority to directly express its views on the case, but Portuguese law provides some mechanisms which allow some level of influence on judicial proceedings. In this context, it is relevant to consider that (i) the views expressed in the administrative decisions, when final, constitute an irrebuttable presumption of the existence of the breach in question, and (ii) it is legally foreseen that the Portuguese Competition Authority may provide written observations in respect to the proportionality of a specific evidence request obtained in the administrative proceedings.

There is no significant case law in Portugal regarding private enforcement cases where the national competition authority expressed its views or analysis.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Cartels and vertical agreements which contribute to improving the production or distribution of goods or services, or to promoting technical or economic development may be deemed as justified, where, cumulatively, (a) it reserves to users of such goods or services a fair share of the resulting benefit, (b) it does not impose on the relevant undertakings any restrictions which are not indispensable to the achievement of these objectives, and (c) it does not afford such undertakings the possibility of eliminating competition from a substantial part of the market regarding the relevant goods or services.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Yes, the passing on defence is available, and the indirect customers have legal standing to sue. This was introduced by Law 23/2018.

In actions for damages, the defendant may rely on the fact that the claimant has passed on (partially or totally) the price increase resulting from the infringement downstream in the production or distribution chain.

The indirect customers may claim damages based on the repercussion of additional costs resulting from competition law infringements. The burden of proof belongs to the indirect customer but there is a presumption that cartel overcharges are passed on to indirect customers, when the latter shows that: (a) the defendant has committed an infringement of competition law; (b) this infraction had an additional cost for the direct customer of the competition law infringers; and (c) the indirect customer acquired the goods or the services affected by the infraction, or goods or services derived from the goods or services affected by the infraction.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Yes, defendants can join other cartel participants to the claim as co-defendants. Interested parties not represented as a claimant or defendant may join a claim either voluntarily or by subsequent request of any of the parties:

- (i) The interested party may join the proceedings voluntarily, at any time, either by joining the defence presented by the co-party or, until the prior hearing, by presenting a separate defence.
- (ii) The interested party may also be forced to join the proceedings by order of the Court with prior request of either the claimant or the defendant. Generally, the claimant may request the Court for a third party to join the proceedings up until the prior hearing, while the defendant shall make that request in the defence statement. The new party joins the proceedings by joining the defence presented by the co-party or by presenting a separate defence.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

A five-year statute of limitation period is applicable in respect to competition law liability claims. This statute of limitation period starts from the moment the claimant has (or can reasonably be presumed to have) knowledge of factual circumstances giving rise to the claim: (i) that such circumstances represent a breach of competition law; (ii) the identification of the offender; and (iii) the existence of damages arising from such breach of competition law (independently of knowledge in respect to the full extent of the damage). In any case, the limitation period will never begin before the infringement of competition law ceases.

The statute of limitation period is suspended if (i) a competition authority commences an administrative investigation related to the breach of competition law that serves as ground to the liability claim, or (ii) a settlement is being negotiated.

Please note that other statute of limitation periods may apply to other administrative and judicial proceedings parallel to the civil liability claims under analysis.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Depending largely on the complexity of the case, a civil liability procedure is expected to take approximately three years before a first instance judgment is rendered.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No, although the parties may decide to submit a settlement agreement for homologation by the Court, notably for subsequent enforcement purposes.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Portuguese law does not provide for any particularities in respect to collective settlement.

The only speciality in collective actions is that the Prosecutor may replace the claimant in the event of discontinuation of the claim.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In principle, the losing party in a judicial dispute shall bear its respective legal costs and part of the winning party's costs can also be claimed. In cases of partial conviction, the costs are proportionally divided between the parties.

Special provisions apply to collective actions: the claimants are exempt from payment of judicial costs in the event of partial granting of the claim. However, in the case of total dismissal, claimants shall be sentenced to an amount determined by the Court. Furthermore, there is joint responsibility for the expenses of the claimants involved, in general terms.

8.2 Are lawyers permitted to act on a contingency fee basis?

Portuguese lawyers are not permitted to act exclusively on a contingency fee basis nor on any basis that make the fees dependent upon the final result of the proceedings. However, success fee agreements are permitted by law.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

No legal provision prohibits third party funding of competition claims.

9 Appeal

9.1 Can decisions of the court be appealed?

Judicial decisions are subject to appeal in the case of (i) breach of jurisdictional competence, (ii) contradiction of the decision with prior higher Court case law in respect to the exact same legal issues, or (iii) if the value of the Court proceedings exceeds a certain threshold: over €5,000 allows an appeal to be heard at the second instance Court of Appeal (*Tribunais da Relação*); and over €30,000 allows an appeal to be heard at the Portuguese Supreme Court of Justice (*Supremo Tribunal de Justiça*).

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The Portuguese leniency legal framework is foreseen in articles 75 to 82 PCL. Under these rules, immunity or reduction of fines may be granted in administrative offence proceedings concerning cartel infringements, pursuant to article 9 PCL and, if applicable, pursuant to article 101 TFEU.

Under the PCL, immunity from civil claims is not granted to leniency applicants. However, pursuant to article 5, no. 4 of Law 23/2018, the successful leniency applicants, to whom immunity from fines was granted, should only be liable in relation to their own direct and indirect customers or suppliers, except if injured parties other than the direct or indirect customers or suppliers do not receive full compensation for damages suffered by other infringing entities.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The leniency applicant may, as a principle, withhold evidence disclosed by it when obtaining leniency in any subsequent Court proceedings. As a rule, pursuant to article 81, no. 3 PCL, third parties' access to the PCL case file containing applications, documents and information submitted by the leniency applicant is subject to the leniency applicant's prior authorisation.

The Court may, at the request of any party, order the parties or any third party, including public entities such as the Portuguese Competition Authority, to submit evidence in their possession. However, the Court may not order the production of evidence containing statements relating to leniency applications.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

As mentioned before, the EU Directive on Antitrust Damages was implemented in Portugal by Law 23/2018. Law 23/2018 is still very recent and, at the time of writing, is still not in force, thus it is not yet

possible to assess its full impact. It is expected that this new regime, due to the procedural changes that it brings, will substantially increase the profile of actions for damages due to infringements of the competition law provisions, and it is expected that this type of action will become more common in the future.

There are several procedural changes brought by this regime that should be highlighted. The changes to presumptions stand out, since the claimant will be able to rely on condemnatory decisions by competition authorities to show an infringement of competition law; the presumption that cartel infringements result in harm and the presumption that cartel overcharges are passed on to indirect customers should also be relevant in proceedings pertaining to damages resulting from these infringements – for more details regarding the applicable presumptions, please refer to question 4.3. Other aspects to be highlighted relate to the new limitation period of five years to settle a claim for damages and the powers of the Courts to request documentation from third parties, which is notable to the Portuguese Competition Authority. Finally, it should also be noted that the liability of parent companies for damages caused by their subsidiaries is specifically foreseen.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The EU Directive on Antitrust Damages was implemented in Portugal by Law 23/2018, which enters into force on 4 August 2018.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Law 23/2018 expressly states that it is applicable irrespective of whether the infringement of competition law on which the claim for damages is based has already been declared, by a competition authority or by a Court, before its entry into force.

However, the substantive provisions of this law, including those relating to the burden of proof, do not apply retroactively. As far as procedural provisions are concerned, they do not apply to actions started before the entry into force of Law 23/2018.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

We are not aware of any other proposed reforms regarding competition law.

Acknowledgment

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Romania

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Raluca Maxim



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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The main types of claims which may be brought as a result of a breach of competition law, either before or after an official sanctioning decision of the Romanian Competition Council (the “RCC”), are claims for private damages suffered as a result of anticompetitive agreements and/or abuse of a dominant position. Additional claims include claims for the annulment of contracts or other legal acts concluded in breach of the competition provision, as well as injunction orders.

1.2 What is the legal basis for bringing an action for breach of competition law?

The basis for actions brought for breach of competition law in Romania are the following acts: Competition Law no. 21/1996 (the “Competition Law”); Emergency Government Ordinance no. 39/2017 on private damages claims (“EGO 39/2017”); the Romanian Civil Code (the “Civil Code”); and the Romanian Civil Procedure Code (the “Civil Procedure Code”).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

EGO 39/2017 constitutes a direct transposition 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, into national law, while the other competition law claims mentioned above have a national legal basis.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialist courts for competition law cases in Romania. However, claims for annulment of RCC decisions are judged by the Bucharest Court of Appeals, while claims for damages are judged by the Bucharest Tribunal. Furthermore, judges receive formal training on competition law as part of their training.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Standing is conditional upon having suffered a harm or a loss as a result of the respective competition infringement; consequently, any injured party may bring a claim for breach of competition law and any natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim, has the requisite standing. Insofar as collective claims are concerned, these can be brought solely by customers’ associations or trade associations, on behalf of their members, or based on an “opt-in” system.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Insofar as the most common type of claims is concerned, which is private damages claims, the exclusive and specialised competence for taking on such a claim lies with the Bucharest Tribunal (such a decision may be appealed with the Bucharest Court of Appeals, and further appealed with the High Court of Cassation and Justice).

In addition, according to the provisions of EU Regulation no. 1215/2012, claims for damages may be filed in the courts of the place where the infringement occurred or may occur. It is up to the claimant to choose one of the foregoing venues.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

At this point, the Romanian legislation is not particularly appealing to claimants nor to defendants due to the relative lack of predictability of the entire process. More specifically, the lack of a significant body of case law does not offer confidence to either party, as the manner in which the courts will apply the legal provisions is still unclear. Having said that, we believe that the relatively unsophisticated and direct manner in which the courts are likely to apply the said provisions favours the claimants, which would have to incur significantly less expenses than in other jurisdictions.

1.8 Is the judicial process adversarial or inquisitorial?

Romanian civil judicial proceedings are predominantly adversarial, with a notable exception lying in the active role of the judge. This essentially entails that, as a general rule, the judge is free to order the disclosure of evidence as he or she sees fit, to administer any other categories of evidence, as well as to inform and discuss with the parties any relevant factual or legal circumstances which were not presented as part of the initial claim or statement of defence.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

In accordance with art. 50 of the Competition Law, whenever there is a risk of serious and irreparable damage to competition, and a preliminary evaluation of the facts points to the existence of an anticompetitive behaviour that is expressly prohibited by law and that needs to be stopped without delay, the RCC may order any interim measures it deems necessary. It should be noted that, to the best of our knowledge, the RCC is yet to grant any interim measures. Furthermore, in accordance to the provisions of art. 997–1002 of the Civil Procedure Code, a claimant may bring a claim requesting the court to issue an injunction order so as to avoid the risk of irrecoverable damage. The claimant would have to prove *prima facie* that the likelihood of irreparable harm is extremely high, in the absence of the interim measure, as well as evidence of the anticompetitive nature of the conduct which is the object of the main proceedings.

Interim measures may cover a wide range of obligations, i.e. the obligation to supply, to grant access or to enter into an agreement.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The main and most sought-after final remedy is, evidently, the award of damages. The outline of a damages test relies on the following aspects: the existence of anticompetitive behaviour prohibited under the competition law (the court is bound by the RCC sanctioning decisions in this respect), the existence of a loss incurred by the claimant, as well as the causality link between the anticompetitive behaviour and the loss. Furthermore, the courts may find that an anticompetitive agreement is null and void.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Damages are available solely as compensation for losses suffered

and, while they cover actual loss and loss of unrealised profits, the applicable legal provisions expressly forbid the granting of exemplary damages. In case the precise extent of the loss suffered is difficult to determine, the courts have a degree of discretion in deciding upon the exact amount.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

As a matter of principle, fines imposed by competition authorities should not be taken into account when awarding damages, as damages are granted as compensation for loss suffered by the claimant, with punitive damages being unavailable.

Insofar as a redress scheme is concerned, this would be taken into account to the extent that it covers some of the loss suffered. To the extent that the redress scheme involves a settlement agreement being concluded between the claimant and the defendant, this may make a claim for damages inadmissible.

4 Evidence

4.1 What is the standard of proof?

As a general rule, the Civil Procedure Code does not provide a definition of the applicable standard of proof. It follows that the evidence will stand on the judge's free assessment, taking into account the particularities and circumstances of each case.

4.2 Who bears the evidential burden of proof?

The claimant bears the evidential burden of proof irrespective of whether a sanctioning decision has been issued or not at the moment the claim is brought before the court, and must prove that there was a breach of competition, that it suffered a loss and that the loss was suffered as a result of the breach of competition. Furthermore, the defendant must show the extent of the loss.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Following the adoption of EGO 39/2017, there are a number of presumptions which make the bringing of a claim for damages somewhat easier. First of all, a definitive decision of the RCC/the European Commission is considered to be a definitive proof of the existence of a breach of competition.

Furthermore, a distinctly important role in evidential presumptions is played by the presumption of loss in cartel cases, as provided for by EGO 39/2017. However, evidently, this presumption does not cover the extent of the loss.

Taking all of the above into account, in the event of a follow-on action the claimant must still prove the extent of the loss (taking into account the court's discretion, as mentioned at question 3.2 above) and the causality between the anticompetitive conduct and the loss.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Generally, there are no limitations on the forms of evidence which may be put forward by either side, including expert evidence. In practice, the lack of economic experts authorised by the Ministry of Justice may raise difficulties in bringing economic evidence as support to a claim for damages.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

- (i) No documents may be obtained before the commencement of the proceedings. As a general rule, a party must disclose documents on which it relies for its claim to the other parties in a case and to the court.
- (ii) Based upon either the claimant's or the defendant's request, the court may order the disclosure of relevant evidence in the possession of either party or of a third party. Such an order must contain express and determined categories of evidence, and must be limited to what is proportional in respect of the claim, as well as the legitimate interests of the parties and interested third parties. This proportionality test will evaluate whether the claim is already substantiated with sufficient factual basis and available evidence, the extent and cost of the disclosure, especially for third parties, as well as the content of confidential information.
- (iii) Please see question 4.7 below.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, witnesses may be forced to appear, in accordance with the provisions of the Civil Procedure Code, based on a court order. Cross-examination is allowed over the course of the witness' hearing.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Such an infringement decision may have probative value as to the liability; however, information substantiating the sanctioning decision of a competition authority may only be requested by the court where the information cannot be obtained from the other party or a third party, following a proportionality test concerning the disclosures.

Certain categories of evidence bear a different regime, as explained below.

The court may order the disclosure of the following categories of evidence only after the competition authority, through the adoption of a decision or other administrative act, has finalised its procedures:

- i) information which has been prepared by a natural or legal person specifically within the proceedings conducted by the RCC;
- ii) information that the RCC has drafted and transmitted to the parties during its proceedings; and
- iii) proposals for settlement which have been withdrawn.

Any such evidence obtained exclusively by access to the competition authority's case file is inadmissible until the finalisation of the authority's procedures.

Finally, as part of the follow-on claims, the court may not order a party to the trial or a third party to disclose any of the following categories of evidence:

- (i) leniency statements; and
- (ii) proposals for settlement.

If such evidence is obtained exclusively by access to the competition authority's case file, it will be deemed inadmissible by the court.

Please note that the RCC or another competition authority may submit observations with regard to the proportionality of the disclosure requests which it has been presented with.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

The courts are required to ensure the full confidentiality of business secrets, as well as any other information classified as confidential.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

As anticipated above, the RCC may express its view concerning the proportionality of the disclosure requests received from the court. Additionally, the court may require the RCC's assistance in determining the extent of the damages. However, the evaluation of the merits of the claims is restricted solely to the court.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

As a general rule, an anticompetitive agreement which results in certain quantifiable efficiencies which could not have been obtained otherwise and a substantial part of which are passed on to the consumers may be considered as not infringing the competition law provisions, provided that it does not allow its parties to eliminate competition from the market. However, no general "public interest" defence is available.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Yes, the "passing on defence" is available under the provisions of EGO 39/2017, with the burden of proof in relation to the transfer of the overcharge lying with the defendant. Indirect purchasers have a clear legal standing to sue under the same provisions, which is conditional upon proving the existence and extent of such a transfer.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Cartel participants are jointly and severally liable, with the claimant having the possibility to claim the full amount of damages from one

selected cartel participant. In such a case, the defendant may notify the other participants that he will be held liable for the entire loss and will then take recourse against the rest. The other participants may ask the court to intervene and carry out any procedural act in support of the defendant.

In any contentious proceedings, including claims for damages, the court has the possibility to decide upon the introduction of a third party into the proceedings, if any, only if it considers that the proceedings cannot be finalised without the presence of the third party. Consequently, the third party, once introduced, may become a defendant.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

There are limitation periods for bringing a claim for breach of competition law, as follows:

- i) for claims brought under the provisions of EGO 39/2017, the limitation period is five years and it does not start to run until two cumulative conditions are met: the infringement has ended; and the claimant knew or should have known:
 - a) the anticompetitive behaviour and the fact that it constitutes an infringement under competition law;
 - b) that such an infringement caused him damage; and
 - c) the identity of the author of the infringement;
- ii) for claims brought for the annulment of contracts or other legal acts concluded with an illicit scope (e.g. to form a cartel), there is no limitation period; and
- iii) for claims brought for the annulment of contracts or other legal acts concluded by way of economic violence (e.g. exercising abuse of dominance), the limitation period is three years and starts to run as of the ending of such violence.

For the purpose of the limitation period, time does not run during the following periods:

- i) periods during which an investigation is being conducted by the RCC or the European Commission;
- ii) periods during which domestic or European court proceedings relating to an infringement of competition law are pending; and
- iii) periods during which a consensual dispute resolution process relating to an infringement of competition law is being conducted.

The effect of these suspensory provisions is that the window for issuing competition damages actions in Ireland is longer than is generally the case for other types of actions.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Since claims for damages in Romania are extremely rare, it is very difficult to estimate the duration of the proceedings, as it depends on many individual factors, such as the complexity of the case, whether it is a follow-on or stand-alone claim, the causality link, the nature of the loss, etc. We believe that the duration of the proceedings brought about by a claim for damages could be anywhere between two to five years, with limited means available to expedite the proceedings.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No, the parties do not require the permission of the court for such a discontinuation, but they are under the obligation to notify the court, which will then issue a final decision acknowledging the settlement.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Collective settlements and settlements concluded by the representative body on behalf of the claimants are permitted under the provisions of the Civil Procedure Code, based on a specific mandate concluded for this purpose.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes, the claimant/defendant may recover its legal costs from the unsuccessful party. However, please note that if the claim is only partially upheld in court, the court will only grant a proportional share of the legal costs to the successful party, and, should the conditions be met, the costs may also be compensated.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, lawyers are permitted to act on a contingency fee basis (including success fees), but, depending on the circumstances, a contingency fee may not be recoverable from the unsuccessful party.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition law claims is not prohibited under Romanian law. However, the courts or other institutions do not hold official records in this respect.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes, decisions of the court may be appealed, generally within a timeframe of 30 days as of the day the decision was communicated to either party.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is not only offered, but rather extensively promoted and encouraged by the RCC.

Neither successful nor unsuccessful applicants for leniency are given immunity from civil claims, the immunity of the former relates solely to the fine applied by the RCC.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

This question has not been settled in practice.

While EGO 39/2017 faithfully reflects the Damages Directive and expressly states that leniency applications cannot be disclosed during claims for damages, there is no express provision regarding the withholding of evidence disclosed during the leniency application. Accordingly, the court may still request that the defendant disclose the information provided in the leniency application, but we believe that both the defendant and, if its intervention was requested, the RCC, could successfully oppose such a request as it would basically circumvent the restriction imposed by EGO 39/2017 and undermine the effectiveness of the leniency programme.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

As stated above, the EU Directive on Antitrust Damages Actions has already been transposed into national law by way of EGO 39/2017 amending the Competition Law.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The EU Directive on Antitrust Damages Actions was implemented by way of an Emergency Government Ordinance. This approach is based on a situation of emergency which requires immediate regulation and, on this precise ground, seeks to circumvent the normal legislative process (i.e. parliamentary approval).

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The material provisions of EGO 39/2017 have only been applied as of the effective date of the implementation, while the procedural proceedings have been applied retroactively for the claims submitted as of 26 December 2014 (the entry into effect of the EU Directive on Antitrust Damages Actions).

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

There are no such proposed reforms at the moment.

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Slovakia

Čechová & Partners

Tomáš Mareta



Marek Holka



1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

In general, based on Act No. 160/2015, the Civil Disputes Code (the “**Civil Disputes Code**”), a claimant may require the court to decide on:

- a. fulfilment of an obligation;
- b. settlement of rights and obligations between the parties, if a certain method of settlement of the relationship between the parties follows from the applicable law;
- c. determination of the existence or non-existence of a right, in case an urgent legal interest exists; and
- d. determination of a legal fact, if it follows from applicable law.

Before or after the initiation of civil dispute proceedings, a claimant may also ask for an interim measure.

Therefore, in the context of breaches of competition law, the scope of claims will usually consist of:

- a. declaration of invalidity of an anti-competitive arrangement;
- b. damages claims; and
- c. interim measures.

1.2 What is the legal basis for bringing an action for breach of competition law?

The right to compensation of damage suffered as a result of infringement of competition law follows expressly from Act No. 350/2016 on certain rules of pursuing claims for damages caused by infringements of competition law (the “**Damages Act**”), which implements Directive 2014/104/EU 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 (the “**Damages Directive**”) into Slovak law.

Other than the Damages Act, the general legal basis of legal actions is the Civil Code and the Commercial Code. The right to request interim measures follows from the Civil Disputes Code.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from EU law and national law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

All disputes following from competition law should be referred to District Court Bratislava II, whose jurisdiction covers the entire territory of the Slovak Republic. The appellate court is the Regional Court in Bratislava.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Any person who suffered damage caused by infringement of competition law is entitled to damages.

There are no collective claims, class actions or actions by representative bodies *per se* available in damages claims from infringements of competition law.

However, based on the Civil Disputes Code, there can be more persons on the side of the claimant or defendant. In case the proceedings concern independent rights and obligations of the parties, each party is acting for itself, and the court decides on each claim independently – this is the most likely case for competition law claims. In case the proceedings concern mutual rights and obligations of the parties, where the judgment must relate to all parties jointly, procedural acts of one party are valid for all parties on its side. In case there are more than 10 parties on one side of the dispute, the court may (but is not obliged to) appoint a single representative for the parties.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

In general, under the Civil Disputes Code, the courts decide on civil disputes and other civil matters, unless they are decided by other authorities based on applicable laws.

Pursuant to EU Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, persons domiciled in Slovakia shall, whatever their nationality, be sued in the courts of Slovakia. Further, a person domiciled in another EU Member State may be sued in Slovakia for matters relating to tort, delict or quasi-delict, in case the harmful event occurred or may occur in Slovakia.

Similar rules apply based on Slovak public international law, applicable in case EU law or international treaties do not apply. Based on these rules, jurisdiction of Slovak courts is given if the person against whom the claim is filed (a defendant) has a domicile, seat or property in Slovakia. The jurisdiction of Slovak courts is also given in non-contractual damages claims in case the harmful event occurred or may have occurred in Slovakia.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Slovakia is not among the preferred jurisdictions for filing private damages claims. The reason is primarily the lack of experience of Slovak courts with private enforcement of competition law, which was extremely rare in Slovakia before the implementation of the Damages Directive, as well as the length of the proceedings. It is yet to be seen whether this will change as a result of application of the Damages Act.

1.8 Is the judicial process adversarial or inquisitorial?

Civil disputes proceedings are adversarial, i.e. the courts do not search and execute evidence from their own initiatives.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim measures are available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

Slovak law recognises preventive measures, interim measures, and other measures.

By a preventive measure, a court may establish a lien over the property of the debtor to secure the pecuniary claim of the claimant in case of reasonable doubt that enforcement of such claim would be jeopardised. The request for a preventive measure must contain the description of the decisive facts reasoning the doubt that enforcement of the claim would be jeopardised, and the description of facts reasonably proving the existence of the claim.

Interim measures may be only granted in case it is necessary to immediately settle the matters, or in case of reasonable doubt that enforcement of claim would be jeopardised, while the goal cannot be achieved by means of a preventive measure. The examples of available interim measures include the obligation to deposit certain financial amount with the court, the obligation not to dispose of certain property, or to act, refrain from acting or to bear something.

Other measures include securing of evidence in case of a reasonable doubt that it will not be possible to execute such evidence in the future, or that execution of such evidence in the future will be possible only with substantial difficulties.

In general, however, any type of preventive, interim or other measures is only granted in case of exceptional circumstances, and only for the necessary time.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The final remedies depend on the claim pursued by the claimant, but will usually include awarding of damages and/or declaration of invalidity of an anti-competitive act (please see question 1.1). The final remedies will be granted in case the standard of proof (please see question 4.1) is met.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Damages in competition cases include actual damages, lost profits, and default interest calculated from the amount of actual damage and lost profits from the moment the damage occurred. Default interest is calculated, based on the choice of the claimant, as either:

- the basic interest rate of the European Central Bank valid as of the first day of the respective calendar half-year of the default, increased by eight percentage points – such interest rate is applicable for the entire duration of the respective calendar half-year of the default; or
- the basic interest rate of the European Central Bank valid as of the first day of the default, increased by nine percentage points – such interest rate is applicable for the entire duration of the default.

The damages cannot lead to overcharge exceeding the proven damage.

There are no exemplary or punitive damages in Slovak law.

We are not aware of any cases which are in the public domain.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

No, fines imposed by competition authorities are not taken into account by the court when calculating the award. Fines imposed by competition authorities and damages claims are independent from each other. For the special regime applicable to leniency applicants, please see question 10.1 below.

4 Evidence

4.1 What is the standard of proof?

Pursuant to the Civil Disputes Code, the court decides based on the discovered matter of fact. The court is bound by the claim of the claimant.

4.2 Who bears the evidential burden of proof?

The evidential burden of proof is borne by the claimant, who is

obliged to state the true and complete description of the decisive facts, and to designate the evidence to prove them, in the action, as well as to attach the evidence, to the extent possible, to the action. The defendant bears the burden of proof regarding all its statements (e.g. the passing on defence).

Under the Damages Act, in case the amount of damage can be determined only with unreasonable difficulties, or not at all, it shall be estimated by the court.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Based on the Damages Act, unless proven otherwise, it is presumed that the cartel is always causing damage. It is yet to be seen what the implications of this evidential presumption will be in practice.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Under the Civil Disputes Act, everything that may contribute to due clarification of the matter and that was procured lawfully may serve as evidence. The primary means of evidence are party testimonies, witness testimonies, documentary evidence, professional statements, expert statements and inspections. Evidence is executed by the court.

In case the assessment of matters requiring professional knowledge is necessary, the court shall, upon request, require a professional statement from a professionally capable person. In case the decision depends on the assessment of a matter requiring scientific knowledge, and the professional statement is not sufficient due to complexity of the matter, the court shall, upon request, require expert evidence. The court appointed sworn expert shall prepare a written statement and, if suitable, may be also summoned by the court. The parties may also submit an expert opinion on their own volition without an expert being appointed by the court.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

For the rules of securing of evidence, please see question 2.2.

In general, the court may require anyone to submit anything which is necessary to determine the facts, and everyone is obliged to submit a written statement upon request of the court.

Pursuant to the Damages Act, the claimant, as well as the defendant, may require the court to order the counterparty or a third person to disclose evidence important for decision in the case. The request to the court must be supported by reasoning containing the available facts and evidence sufficiently proving that the damages claim is reasonable, and must be as exact and specific as possible. When deciding on disclosure of evidence, the court shall take into account the legitimate interests of all parties concerned, and whether the request is reasonable and substantiated.

Similarly, the court may, upon request of a party, order disclosure of evidence from the file of the competition authority, if evidence cannot be disclosed by the counterparty or a third party, and the requesting party is not able to obtain the evidence otherwise. Certain types of documents may be disclosed only if the investigation or

proceedings were already concluded by decision of the competition authority. Leniency documents are excluded from the disclosure obligations.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, if a duly summoned witness fails to appear to the hearing, the court may request the police to secure their presence.

The witness may refuse to testify (however, they are still obliged to appear at the hearing) if it would risk criminal prosecution of themselves or their relatives, or breach a professional secrecy obligation.

At the hearing, the court asks the witness to describe all facts in their knowledge and, subsequently, the court and the parties may question the witness.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The court is bound by the operative part of the final and binding decision of the Slovak competition authority or the court reviewing a decision regarding the question of existence of the infringement.

A final and binding decision of a competition authority from another EU Member State is considered as evidence of the infringement, unless proven otherwise.

Therefore, in case of follow on-claims, the claimant still bears the burden or proof as regards causation and damage.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

The court shall protect information designated as business secrets or confidential information, and shall only allow the party to the dispute or only its legal representative to inspect such information if the information constitutes evidence of breach of competition law or the information is important to prove a damages claim, and the non-confidential version of the respective document is not sufficient. Such disclosure is subject to the consent of the person who provided the information. If such consent is not granted, the court shall only disclose the information to an external legal representative of the party.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Yes, the European Commission and the Slovak competition authority may appear before the court as *amicus curiae*, file a written statement, inspect court files, and ask the court to allow an oral statement.

So far, we are not aware of any intervention of the European Commission or the Slovak competition authority in any private damages claim. In the past, though, the European Commission successfully intervened to support the Slovak competition authority in the court case on review of the authority's decision.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

No, there is no such defence available under Slovak law.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Yes, the defendant can invoke the passing on defence. In such a case, the defendant bears the burden of proof that the claimant passed on the price increase resulting from a breach of competition law to other persons. For this purpose, the defendant can request disclosure of relevant information from the defendant or a third party.

Indirect purchasers have legal standing to sue. In case an indirect purchaser proves that the defendant infringed competition law, such infringement resulted in a price increase for the direct purchaser, and the indirect purchaser bought the product that was subject to the infringement or a derivative product, it is presumed that the price increase was passed on to the indirect purchaser, unless credibly proven otherwise by the defendant.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Upon proposal of the claimant, the court may allow another party to join the proceedings. If such other party wishes to join as a claimant, the consent of the original party is required.

Also, a party that has an interest in the result of the proceedings can intervene on the side of the claimant or defendant. Entry of the intervening party must be approved by the court. The intervenient is not considered a party to the proceedings, but is able to submit its own motions to the court.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The special limitation period of five years applies to damages claims from breaches of competition law. The limitation period only starts running when the infringement ends, and the injured party learns or it may be reasonably assumed that the injured party could have learned that the conduct is infringing competition law, that the injured party suffered damage as a result of the infringement, and the identity of the infringing party.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

In 2017, the average length of proceedings in commercial disputes in Slovakia was 21.6 months. Due to the complexity of competition cases, and since there is very little practical experience of competition litigation before Slovak courts, it can be assumed that the duration of proceedings in competition cases would be above average. It is not possible to expedite proceedings.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

A claimant can withdraw its action at any time (e.g. in case of out-of-court settlement). The court shall, however, not terminate the proceeding if the defendant does not agree to the withdrawal of the action for serious reasons. Further, the parties can reach court settlement during the proceedings, which is subject to approval of the court. The court shall not approve the settlement if it is contrary to generally binding legal rules.

In case the damages claim was fully or partially settled, the court shall not grant damages in the extent covered by the settlement. If one infringing party reaches a settlement, other infringing parties cannot require the settled party to participate in satisfying the remaining damages claim, unless the remaining parties are not able to satisfy the remaining part of the claim.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Since there are no collective claims, class actions or representative actions *per se* permitted in Slovak law, each party must reach the settlement individually.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

As a general rule, each party bears its own costs of the proceedings. The court shall order compensation of costs between the parties according to their success in the case. Therefore, a fully successful party shall be also entitled to full compensation of costs.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, however, only if the outcome of the case is uncertain, and if the contingency fee does not exceed 20% of the claimed amount.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition law claims is not regulated under Slovak law. We are not aware of any cases where such option would have been used.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes, a first instance court decision can be appealed within 15 days from the delivery of the decision. The appeal is decided by the

second instance court, being, in competition cases, the Regional Court in Bratislava. The second instance decision can be only subject to extraordinary remedies in the selected questions of law.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, leniency is available in cartel cases, and provides a partial immunity from certain civil claims. A successful leniency applicant receiving full immunity from fines is jointly and severally liable with other infringing parties only for civil claims towards its own direct and indirect customers and suppliers. A successful leniency applicant is only liable towards other claimants in case damages cannot be obtained from the remaining infringing parties. In such a case, the statutory limitation period shall expire only one year after the injured party learned that it can only claim damages from the successful leniency applicant.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Successful and unsuccessful leniency applications are excluded from the obligation to disclose evidence to the other parties to the proceedings and third parties.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

In the relatively short time since the entry into force of the Damages Act (27 December 2016), Slovakia has not seen a boom of private enforcement of competition law. There are occasional initiatives

among injured parties in Slovakia to file follow-on damages actions after European Commission decisions in different jurisdictions. Although there have been several private enforcement cases in Slovakia, the implementation of the Damages Directive did not have a significant impact on the number of cases due to its strict transitional provisions (see question 11.3 below). The main reasons why injured Slovak parties prefer filing abroad are lack of experience with similar cases and the length of proceedings before Slovak courts.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Damages Directive was implemented into Slovak law by means of the Damages Act as the separate piece of legislation, in practice copying the provisions of the Damages Directive. The Damages Act is a piece of special legislation, taking precedence over general applicable legislation in both substantive and procedural aspects of competition litigation.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The Damages Act entered into force from 27 December 2016; however, it applies only to damages claims arising after 26 December 2016, and only to proceedings initiated after this date.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

We are not aware of any current reform initiatives relating to competition litigation.



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Čechová & Partners, established in 1990, is one of the leading Slovak full-service commercial law firms. The firm represents a broad array of clients, spanning all major practices and industries. Čechová & Partners is committed to being an independent local law firm, offering in-depth knowledge of Slovak law and business and profound experience in the local market, while providing a high standard of legal assistance and client service. The firm is a member of Lex Mundi and World Services Group. The firm is consistently top-ranked for key areas in leading directories, including *Chambers & Partners* and *The Legal 500*.

Spain

Rafael Baena



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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Claims arising from a breach of competition law provisions included in Articles 1 and 2 of the Spanish Competition Act 15/2007 (“SCA”) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) can be brought before the competent courts in Spain.

In addition, other actions, such as interim measures, cessation requests, damages claims or restitution stemming from a breach of the above competition rules may also be brought.

Under the system of parallel competences previewed by EU Regulation 1/2003, national courts can apply simultaneously both Articles 101 and 102 TFEU and Articles 1 and 2 SCA to a competition infringement.

1.2 What is the legal basis for bringing an action for breach of competition law?

The legal provisions of both Articles 101 and 102 TFEU and/or Articles 1 and 2 SCA are directly enforceable by the mercantile courts, which are entrusted with the private enforcement of competition law provisions, including damages, in Spain.

The general provisions of Article 1902 of the Civil Code serve as a basis for private damages claims, and states that: “*any person who by action or omission causes harm to another by fault or negligence is obliged to repair the damage caused*”.

Regarding damages claims, there are two types of claims:

- on the one hand, follow-on claims, when there is an administrative decision by the EC, the *Comisión Nacional de los Mercados y la Competencia* (“CNMC”) or a regional competition authority that contains relevant data about the unlawful conducts that may come to reduce the burden of proof or even exempt the claimant to prove the unlawful practices. In this type of claim, the party seeking damages does not need to prove that there was an infringement of competition law but rather that the infringement (already established by the authority) has caused them harm. Most of these actions have been raised within the telecommunications and audio-visual sectors; and
- on the other hand, in absence of an administrative decision, a stand-alone claim is available, where the tribunal will need to make a deeper assessment to confirm if the alleged anti-

competitive practices violate the provisions of competition law. Therefore, the party seeking damages must first establish the breach of competition law before showing that the infringement caused them harm. These claims are quite common in the context of vertical agreements in the energy sector.

When the administrative investigation is still ongoing or when the administrative decision is not final (pending appeals), civil courts are still not bound by the findings of fact made by the competition authority.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims in Spain can derive from both international law (i.e. Articles 101 and 102 TFEU) and national law (i.e. Articles 1 and 2 SCA).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

In Spain, there are no concrete competition courts to which competition law cases are assigned.

On 1 September 2004, the enactment of Regulation (EC) 1/2003 forced a modification of the Spanish Judicial Power Act 6/1985 (SJPA) in order to allow the newly created mercantile courts to directly hear antitrust cases under Articles 101 and 102 TFEU, without needing a prior administrative decision. Since the adoption of the new Spanish competition regime in September 2007, they are also entitled to directly hear antitrust cases under Articles 1 and 2 SCA.

Therefore, all the mercantile courts may deal with competition cases, but among them there is no specific court that addresses those cases on an exclusive basis.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Any legal or natural person who has suffered harm as a result of a breach of competition law has standing to bring an action.

Also, if one person participating in the damages has compensated the victim in full, it will have standing to start proceedings against

the other parties to recover the part of the damages that has been paid on the latter's behalf ("*derecho de regreso*").

In Spain, there is no sort of American collective action in the sense of a group of affected people that join together, under certain conditions, to defend the interests of a group of people that are not identified or are difficult to identify, based on the principles of opt-in and opt-out.

In case claimants want to join themselves to bring a collective action for damages, they will have to use the current general procedural rules that require for the claim to be put forward that the claimants are perfectly identified or are easily identifiable.

The SCA does not contain any specific provision on the standing of classes, groups or representative bodies to file an action for the annulment of an agreement or a claim for damages before the civil courts based on an infringement of EC or national competition law.

As a general rule, consumer and user associations are entitled to bring actions to protect the rights and interests of their members and of the association itself, and those pertaining generally to consumers and end-users (Article 11.1 of the Civil Procedural Act, "*CPA*").

Articles 11.2 and 11.3 provide that:

- (i) The parties which are entitled to claim for the protection of "collective interests" ("*intereses colectivos*") before a court (when those affected by an act causing loss are a group of consumers or end-users whose members are readily ascertained or easily ascertainable) are:
 - (A) consumer and user associations;
 - (B) legally constituted entities which have as their purpose the defence or protection of consumers and users; and
 - (C) groups of affected persons (in such cases the members of the group would have to represent at least half the total number of affected persons).
- (ii) The parties which are entitled to claim for the protection of "diffuse interests" ("*intereses difusos*") (when those affected by an act causing loss are an unascertainable group of consumers and end-users or one whose members cannot be easily ascertained) are consumer associations which, according to law, represent general consumer interests ("*representativas*").

"Class actions" and "collective claims", as referred to by Articles 11.2 and 11.3 CPA, respectively, are only available for the protection of the rights of consumers and end-users who, for example, have suffered loss as a result of anti-competitive behaviour (i.e. consumers or end-users of the products or services of a company which has abused its dominant position by raising prices, or by forming a cartel), provided that the requirements set out in Article 11 CPA are met.

Under the CPA, in "class actions" and "collective claims", any award is made in respect of each individual claimant and not in respect of the class or group as a whole. Following the judgment made in respect of the "class action" or "collective claim", each applicant must then apply to the court: (a) to be recognised as a member of the class or group; and (b) to quantify individual damages. This is the main difference between Spanish "class actions" and "collective claims", and their genuine version.

Other types of affected groups (e.g. an association formed by the defendant's competitors, distributors or customers which are not consumers or end-users) cannot rely on Article 11 to bring a class action. If the parties suffering a loss, who are not consumers or end-users (i.e. competitors, distributors or customers of the offender), wish to bring a collective claim, they will have to do so by consolidating their individual claims and by granting powers of

attorney to the same barrister for the latter to represent them jointly in the proceedings. The consolidation of claims of different claimants is acceptable provided that there is a link between all the actions due to the same object or the same petition. To this effect, the court will presume that such link exists when the actions are based on the same facts. In these cases, the judgment will only affect the injured parties which are represented during the proceedings, and not all those persons who did or could have elected to participate in them.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

If the court case has an international dimension and involves, for example, parties domiciled in different Member States, the rules determining which Member State has jurisdiction are laid down in Council Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Regulation 1215/2012 is applicable in these cases due to it being binding in its entirety and directly applicable in all Member States in accordance with the European Treaties.

As to the rules of jurisdiction under Spanish law, the general rule laid down by Article 22-*bis* and -*ter* of Organic Law 6/1985, of 1 July, on Jurisdiction ("**Law 6/1985**") is that the Spanish courts shall be competent when the parties have submitted to their jurisdiction, whether expressly or tacitly, and also when the defendant is domiciled in Spain. In the case of legal persons, the domicile may be its registered office or main place of business.

In the absence of the above criteria, Spanish courts will also have jurisdiction in the situations set out under Article 22-*quinquies* of Law 6/1985, which includes:

- (a) in relation to contractual obligations, Spanish courts will be competent when those obligations originate or are to have been fulfilled in Spain; and
- (b) in relation to non-contractual obligations, Spanish courts will be competent when the act or omission has taken place in Spain.

The CPA contains specific rules on the territorial jurisdiction of courts, i.e. rules determining the allocation of jurisdiction among the courts within the Spanish territory which indicate the appropriate court to turn to. Articles 50 and 51 CPA set out the basic rules.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Traditionally, antitrust damages claims have been relatively scarce in Spain, both stand-alone and follow-on. The reason for this lack of precedents may lie in the fact that Spain is a jurisdiction where the standard of proof for non-contractual damages has always been very stringent and for all procedural barriers (today gone) for these actions.

After the transposition of the Damages Directive, the number of claims has substantially increased because the new regime makes it easier to claim damages for antitrust infringements (for example, in terms of disclosure of evidences), and it is expected that Spain becomes an attractive jurisdiction for these actions because of the limited cost of actions, the limited economic risk in case of losing the claim, the quick procedure (a first-instance decision will take no more than 12 or 18 months), and the increasing experience of courts in these matters, among other factors.

1.8 Is the judicial process adversarial or inquisitorial?

In Spain, there is an adversarial system, where the judge has to take into account the different facts presented by the parties.

In the framework of private judicial proceedings, the burden of the proof lies in the claiming party. Despite this, since the introduction of Royal Decree-Law 9/2017, of 26 May, implementing into Spanish law the EU Directive on Antitrust Damages Actions (“**RDL 9/2017**”), there is a rebuttable presumption that cartels cause harm. The presumption is based on the finding that more than 90% of cartels cause a price increase. In the cases where a cartel does not cause price increases, infringers can still prove that their cartel did not cause harm.

It is also worth noting that the defendant has the burden of proof for finding evidence supporting the passing on defence; in particular, in relation to follow-on cases.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

There are several interim remedies available in Spain (which will be explained in detail in question 2.2) that can be adopted in both administrative and judicial proceedings in relation to competition law cases.

In administrative proceedings before the CNMC, Article 54 SCA states that the authority can adopt, once an investigation is opened, at its own initiative or at the parties’ request, interim remedies to ensure the effectiveness of the decision it will take later in the proceedings. In addition, Article 67.g) SCA foresees periodic penalty payments of up to €12,000 per day in case the company does not comply with the interim measure adopted. In contrast, in judicial proceedings, the courts can only adopt interim remedies at the parties’ request (Article 721 CPA).

2.2 What interim remedies are available and under what conditions will a court grant them?

Article 727 CPA includes a non-exhaustive list of interim remedies such as the freezing of assets, judicial administrations of goods, the deposit of goods and injunctions to cease or refrain from carrying out a certain activity. In competition law cases, the most requested and adopted interim remedies relate to the suspension of the fine adopted in a final decision, the suspension of the agreement or the cease of the conduct in question, and granting access to an essential facility.

Article 728 CPA sets the three cumulative conditions claimants must meet to obtain interim remedies:

- arguable case (*fumus boni iuris*): the claimant must show, *prima facie*, the merits of the grounds put forward (based on data, arguments and evidence) for the authority/court to be able to ascertain whether there is a sufficiently large probability of success of the action;
- irreparable harm (*periculum in mora*): the claimant must adduce evidence that it cannot await the outcome of the proceedings without incurring serious and irreparable harm so the delay might hinder the effectiveness of an eventual decision/judgment; and
- provision of a sufficient security: which will be determined by the court in view of the circumstances of the case, in order

to ensure that the claimant can compensate the defendant for any loss and damages suffered as a consequence of the interim measure if the claim is withdrawn eventually.

It is worth noting that the appeals of the CNMC’s decisions usually come together with an interim measure request consisting of the suspension of the fine until a final judgment is issued by the court. If this is the case, in addition to meeting the aforementioned three conditions, the court usually requires the appellant to provide a bank guarantee covering the amount of the fine being appealed before granting the suspension, in order to ensure that if the appeal is withdrawn, the appellant will be able to pay the fine.

Regarding interim remedies that have been requested by the parties to the court in relation to damages claims, they have not been generally successful to date. For example, in *Pedro León v Liga de Fútbol Profesional*, a stand-alone claim, a professional football player asked for damages derived from a rule imposed on clubs by the *Liga de Fútbol Profesional* that limited the maximum salaries to which the clubs could commit (what allegedly constituted an abuse of a dominant position as the rule limited the freedom of clubs’ indebtedment) which he considered an obstacle for his promotion. However, the court rejected the interim measures request as it considered that, *prima facie*, the conduct of La Liga was justified, so the claimant failed to meet the first aforementioned condition (Judgment dated 10 July 2015, appeal 41/2015, ECLI: ES:APM:2015:711A). Another example of a rejected application for interim measures is the case *Ryanair v Aena* (Judgment from the *Audiencia Provincial de Alicante*, 19 January 2012, appeal 833/2011, ECLI: ES:APA:2012:1A).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

There are four possible final remedies available in Spain derived from an antitrust infringement:

- imposition of fines;
- restitution: cease of the practices or conducts and elimination of the effects;
- declaration that the practices are null and void; and/or
- awarding of damages.

The CNMC can impose the first three remedies (so they are not empowered to award damages) and the courts can impose the last three (so they are not empowered to impose fines).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Article 72 SCA, which reproduces Article 3 of the Damages Directive, states that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

It should be noted that in Spain the general rule of “*restitutio in integrum*” predates the transposition of the Damages Directive, as it stems from Article 1,106 of the Civil Code, which seeks to restore the parties to the positions they would have been in but for the breach or infringement.

As regards the quantification of damages:

- (a) There are no set legal models for the calculation of damage arising as a result of breaches of competition law. It is not possible to indicate with certainty the financial model(s) which might be used by the courts to estimate “but for” income and costs. In theory, expert reports may use a variety of accounting and evaluation techniques aimed at identifying and supporting the revenues and costs which would otherwise have been received and incurred if the anti-competitive conduct had not taken place. Normally, experts will elect the economic model which suits the majority to the case at hand.
- (b) The court may request assistance with respect to the determination of the quantum of damages from the Spanish competition authorities (Article 76(4) SCA).

Spanish law does not recognise the concept of punitive or exemplary damages. This is reinforced by Article 72(3) SCA, which – following the Damages Directive – states that full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

Regarding the possible assistance of the CNMC to the courts, although it was already foreseen in Article 5.2.b) of Ley 3/2013, *de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia*, the new Article 76.4 SCA foresees that the CNMC will inform the courts, at their request, about the criteria to quantify the loss in damages claims. In fact, the CNMC stated, in its 2018 strategic plan, that it will elaborate a guide to quantify the loss in damages claims. In addition, the EC is drafting guidelines to help national courts to estimate the economic harm caused by cartels, which are deemed to be a very useful instrument for the courts to rely on in the future (the guidelines are now subject to public consultation and any interested party can submit its views until 4 October 2018).

There are several examples in Spanish case-law in relation to damages claims resulting from competition infringements.

The first time damages were awarded in Spain was by the Supreme Court in its Judgments of 8 June 2012 (appeal 2163/2009, ECLI:ES:TS:2012:5462) and 7 November 2013 (appeal 2472/2011, ECLI:TS:2013:5819), regarding a follow-on action related to the so-called *Sugar Cartel* case (Decision from the former *Tribunal de Defensa de la Competencia* in 1999: 426/98 – *Azúcar*). By those rulings, the sugar manufacturers Ebro Foods and Acor were sentenced to pay €4.1 and €1.1 million in damages respectively to 14 different biscuit manufacturers (Nestlé among them). The Court considered that the companies had suffered the cost of the artificial price increase of sugar and that they had not passed it downstream to consumers, so they should be compensated by the sugar manufacturers that participated in the infringement. The importance of the ruling relies on the fact that the Court established: (i) the approach that must be used in order to quantify damages in such cases; and (ii) that the facts proven in the framework of a sanctioning proceeding, once confirmed by the administrative court, constitute proven facts regarding a damages claim.

Another important decision is the Judgment of the *Juzgado de lo Mercantil de Madrid* of 9 May 2014 (appeal 24/2012, ECLI:ES:JMM:2014:3797), confirmed by the *Audiencia Provincial de Madrid* on 22 June 2017 (appeal 285/2017, ES:APM:2017:2421A), also regarding a follow-on action in relation to the *Seguros Decenales Cartel* case (Decision from the former CNC in 2009: S/0037/08 – *Compañías de Seguro Decenal*), in which the court awarded

€3,550,615.70 in damages. In 2010, the competition authority imposed fines of €120 million to several insurance and reinsurance companies for their participation in a 10-year insurance cartel. The facts that caused the damages that MUSAAT claimed were closely related to those prosecuted and sanctioned in the mentioned cartel case, although MUSAAT did not base its claim on the existence and the direct effects of the cartel, but, instead, in the boycott suffered by three of the members of the cartel (ASEFA, CASER and SCOR). The court in this case did not rule on the cartel (although the resolution of the competition authority is brought up on many occasions), but on the accessory boycott linked to it, which it considered proven.

The most recent decision on this subject can be found in the Judgment of the *Juzgado de lo Mercantil de Barcelona* of 6 June 2018 (appeal 30/2015, ECLI:ES:JMB:2018:228), again regarding a follow-on action in relation to the *Sobres de papel Cartel* case (Decision from the former CNC in 2013: S/0316/10 – *Sobres de Papel*), in which the court awarded €477,435 in damages. The CNC had sanctioned 15 different companies for creating and maintaining for more than 30 years a cartel in the paper envelope sector that originated in 1977, coinciding with the call for the first democratic elections in Spain. The court has now granted Cortefiel, a company affected by the cartel, the right to receive compensation, and 10 of the members of the cartel must pay jointly and severally the abovementioned amount.

Other important damages decisions in Spain include the *Centrica/Endesa* case of 2014 (appeal 1743/2012, ECLI:ES:TS:2014:2941), by which Endesa was sentenced to pay €3 million in damages by the Supreme Court, and the *Conduit/Telefónica* case of 2006 (appeal 170/2006, ECLI:ES:APM:2006:6773), in which Telefónica had to pay an amount of €639,003 as a result of its abuse of a dominant position.

Finally, it is important to keep in mind that, during this year, numerous lawsuits have been filed in Spain requesting a compensation for damages related to the so-called truck cartel (fined by the EC), the car manufacturers cartel, and the petrol station case (both fined by the CNMC), but they are still pending resolution in the court of first instance.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The previous imposition of a fine or any possible redress schemes that the infringer might have offered during the administrative procedure are not taken into account by the courts when awarding damages.

The only provision in this regard is the new Article 64.3.c) SCA which introduces a new mitigating circumstance (to carry out actions to repair the harm caused) that the CNMC must take into account, but not the courts, when calculating the fine in case of an infringement. In addition, the effective restitution of the harm caused before the CNMC issues a decision on the case will be deemed as a qualified mitigating circumstance (“*atenuante cualificada*”).

4 Evidence

4.1 What is the standard of proof?

Under general principles, the claimant must prove the following four elements:

- a) an unlawful act or omission;

- b) the existence of negligence or wilful misconduct;
- c) loss suffered by the claimant which is quantifiable; and
- d) a causal link between the negligent act or omission and the loss suffered.

Aside from such general principles, the SCA has incorporated the presumptions contained in the Damages Directive. Therefore:

- (i) An infringement of competition law found by a final decision of the Spanish competition authorities or courts is deemed to be irrefutably established for the purposes of an action for antitrust damages (Article 75.1). The same is true with regard to European Commission decisions, as per Regulation 1/2003.
- (ii) The existence of an infringement will be presumed (rebuttable presumption) in the case that a final decision finding an infringement of competition law is issued by the competition authorities or courts of another Member State.
- (iii) It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption (Article 76.3).

As to the quantification of harm, the courts are empowered to estimate the amount of harm if it is established that a claimant suffered it but it is practically impossible or excessively difficult to precisely quantify it on the basis of the evidence available.

4.2 Who bears the evidential burden of proof?

The burden of proving an infringement of competition law and or damages derived from such infringement lies with the claimant (Article 217 CPA and Article 76 SCA).

Defendants have the burden of proving the passing on of overcharges (Article 78.3 SCA). According to the Supreme Court case-law (Judgment of 7 November 2013), the defendant must show that the claimant passed on to consumers not only the price increase but also any other indirect damages, in order for the passing on to be accepted.

Indirect purchasers who seek damages on the grounds that an overcharge was passed to them have the burden of proving the existence and scope of such a passing on (Article 79 SCA). There is a rebuttable presumption that the said passing on has occurred where the indirect purchaser shows that: (i) the defendant has committed an infringement of competition law; (ii) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (iii) 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 CPA establishes that the court shall bear in mind the degree of access which each party has to relevant evidence (Article 217.6). This means that the criteria mentioned above will have to be approached in light of the respective ease the parties are able to prove certain facts with.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Before RDL 9/2017 there were no presumptions that cartel infringements caused harm under Spanish law.

In relation to other evidential presumptions, before RDL 9/2017, the Spanish Supreme Court stated in its judgment from 2013 in the *Sugar Cartel* case (see question 3.2 for further reference) that

there is a presumption that the facts and evidence considered proven in a decision from the CNMC confirmed by the courts constitute proven facts regarding a damages claim. Although it is a rebuttable presumption, the margin for an alternative explanation of the facts and evidence was practically non-existent in practice.

Now, the aforementioned presumption has been broadened with RDL 9/2017 as the new Article 75 SCA states that the existence of an antitrust infringement found by a final (that is, not appealed within the time limit or no longer appealable) decision of a national competition authority or a court is deemed to be irrefutably established for the purposes of an action for damages. Thus, final decisions from a competition authority (that have not been appealed), and not only decisions confirmed by the courts, constitute a non-rebuttable presumption of the existence of a competition infringement.

In addition, the new Article 79.2 includes a rebuttable presumption that the damage has been passed on to an indirect purchaser if the following three conditions are met:

- the defendant infringed competition law;
- the infringement led to a overcharge paid by the indirect purchaser; and
- the indirect purchaser acquired goods or services affected by the infringement or those derived from or which contained the aforementioned.

In any case, this presumption can be rebutted if the defendant proves that the overcharges were not passed on, in all or in part, to the indirect purchaser.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The CPA does not establish any limitation on the forms of evidence to be put forward by the parties. Nevertheless, it does set forth the main means of taking of evidence that are admissible (Article 299), which are:

- (i) Examination of the parties.
- (ii) Public and private documents.
- (iii) Expert reports.
- (iv) Taking of evidence by the court (judicial examination).
- (v) Examination of witnesses.
- (vi) Recorded words, sounds and images, and any instruments that allow words, data and mathematical operations carried out for accounting purposes or any other purposes, which are relevant to the proceedings, to be saved, known or reproduced.
- (vii) Any other form of evidence not expressly identified in the CPA which may allow the court to reach certainty on significant facts.

The list of forms of evidence is therefore not closed, but only illustrative.

Furthermore, at the request of the court, the European Commission and the Spanish Competition Authorities may contribute information to the proceedings (Article 15-bis CPA). The contribution of the information shall not include the data or documents obtained within the scope of a leniency programme.

As mentioned, expert evidence is accepted by the courts, where scientific, artistic, technical or practical knowledge may be necessary to ascertain any facts or circumstances that are relevant to the matter or to acquire certainty about them. Both *ex parte* experts brought by the parties or court-appointed experts are admissible. Each party may obtain expert reports on the issues under consideration and may

request the oral examination of the experts in order to clarify, if necessary, the content of their reports before the courts.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The CPA currently contains disclosure proceedings in line with the Damages Directive (Article 283-*bis* (a) to (k)). As a result, in proceedings relating to an action for damages resulting from antitrust infringements, both the claimant and defendant may request that the counterparty or a third party discloses relevant evidence which lies in their control, including documents.

The request for disclosure will be granted by the court to the party who presents a reasoned justification containing available facts and evidence sufficient to support the plausibility of its claim for damages. The court may order the disclosure of specified items of evidence or relevant categories of evidence and will respect proportionality. The request for disclosure may include, *inter alia*, information regarding:

- (i) the identity and addresses of the alleged offender;
- (ii) conducts and practices amounting to the alleged infraction;
- (iii) identification and volume of affected products and services;
- (iv) identity and addresses of direct and indirect purchasers of the affected products and services;
- (v) prices successively applied to the affected products and services; and
- (vi) identity of the affected parties.

The court may also order the disclosure of evidence included in the file of a competition authority, as long as no party or third party is reasonably able to provide that evidence, excluding leniency statements and settlement submissions. Some categories of evidence can be disclosed only when the competition authority has closed its proceedings: (i) information that was prepared by a natural or legal person 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.

The disclosure request may be filed before the proceedings begin, when submitting the claim or at any time during the process. In light of this, the claimants will be able to obtain disclosure early on in proceedings to assist them in drafting their pleadings. In the case that the disclosure of evidence was agreed before the initiation of the proceedings, the applicant would have to lodge the claim within 20 days or face payment of compensation and costs.

Aside from the disclosure proceedings reserved for antitrust damages claims, the CPA provides for certain mechanisms that can be used by the potential claimant to obtain information from the defendant: pre-trial request of very specific documents (Article 256); or request to the counterparty or a third party, during the proceedings, of specified documents that are not available to the petitioner (Articles 328 and 330). In our view, these mechanisms would have a very limited application in competition law claims due to their very narrow scope.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

As per Article 292 CPA, the witnesses summoned have the duty to appear in the trial or hearing. Failure to carry out this duty shall be

sanctioned by the court with a fine of €180 to €600, with a previous hearing for five days. On imposing this fine, the court shall request the fined witness to appear when he is again summoned by the Court Clerk, with a warning that action might be taken against him for contempt of court.

In practice, measures destined to force the appearance of witnesses (fines or contempt of court) are seldom applied.

Each party is entitled to cross-examine the other party and the witnesses summoned by it. Cross-examination takes place after the party or the witness has been examined by its own counsel. The judge may intervene when he or she deems appropriate. There is not redirect examination or re-cross-examination.

Cross-examination is not limited to subjects covered during direct interrogation. The judge will however reject: (i) any irrelevant or useless questions, i.e. repetitive questions or those which are not appropriate to ascertain the disputed facts or are not related to the subject matter of the trial; (ii) questions not referring to the personal knowledge of the witness; or (iii) any valuations or qualifications included in the questions.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Before RDL 9/2017, the commercial and civil courts in Spain were legally bound by the decisions of the European Commission. For the rest of the decisions and rulings, it was important to differentiate between administrative decisions (the CNMC or other administrative bodies) and judicial decisions (from the Spanish High Court and Spanish Supreme Court) upholding those administrative decisions. Between these two, only the latter were binding for the Spanish courts in damages claims (see the judgment from the Spanish Supreme Court in 2013 explained in question 4.3).

In any case, traditionally, the Spanish courts relied on decisions from the CNMC in damages claims for several reasons: (i) the CNMC is considered the most-suited body to tackle antitrust infringements due to the technical complexity of the cases; (ii) the judge does not have to discuss again the same facts; and (iii) it avoids the risk of conflicting solutions.

The aforementioned situation changes with RDL 9/2017, as Article 75.1 states that the existence of an antitrust infringement found by a final (that is, not appealed within the time limit or no longer appealable) decision of a national competition authority or a court is deemed to be irrefutably established for the purposes of an action for damages. The same applies, *prima facie*, to final decisions from competition authorities or courts of other Member States.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As foreseen in the Directive, RDL 9/2017 introduces a new Article 283-*bis* b) in the CPA that enables the courts to disclose confidential information (such as business secrets or other sort of commercial sensitive information) in actions for damages when such disclosure is considered relevant for lodging the claim.

However, such confidential information needs to be appropriately protected and Article 283-*bis* b) foresees a range of measures at the courts' disposal to protect such confidential information from being disclosed during the proceedings such as:

- redacting sensitive passages in documents;

- conducting hearings *in camera* or restricting access to the same;
- restricting the persons allowed to get access to the evidence;
- instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form; and
- restricting access to certain evidence to the legal representatives of the parties in the proceeding and to experts subject to confidentiality obligations.

While balancing the interests at stake when deciding the disclosure of evidence in order to limit it to that what is proportionate, Article 283-*bis* b) states that the companies' interest in avoiding damages claims arising from a competition infringement shall not constitute an interest that justifies the protection of the evidence.

Lastly, the article also foresees that when ordering the disclosure of evidence, the courts shall protect the rules regarding client-lawyer communications, as well as those rules regarding the duty of secrecy (when applicable).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Article 16 SCA foresees the possibility that the CNMC and the regional competition authorities will assist Spanish courts as *amicus curiae*, expressing their views and making observations in relation to the application of Articles 1 and 2 SCA and Articles 101 and 102 TFEU on its own initiative. In addition, Article 15.3 of Regulation 1/2003 allows the European Commission to submit written observations before national courts on its own initiative where the coherent application of Articles 101 and 102 requires so.

Article 15-*bis* CPA enables Spanish courts to request the EC, the CNMC and the regional competition authorities oral or written assistance in relation to the application of Articles 1 and 2 SCA and Articles 101 and 102 TFEU.

The first time the CNMC (at that time the CNC) intervened as *amicus curiae* submitting written observations was at the request of the court *Juzgado de lo Mercantil nº 4 de Madrid* in a follow-on action brought by AUSBANC, a consumer association, against Telefónica, in relation to the EC Decision of 4 July 2007 in the case *Wanadoo v Telefónica* (COMP/38.784), in which the latter was fined €151 million for an abuse of a dominant position consisting of margin-squeeze practices over five years in the Spanish broadband market. AUSBANC claimed €458 million in damages, but the claim was dismissed at first (2012) and second instance (2013) as AUSBANC had lost its representative association status before the proceedings began (it was excluded from the Spanish Registry of Consumer Associations) and, thus, the courts considered it lacked standing to sue on behalf of consumers (Judgment from the *Audiencia Provincial de Madrid*, 30 September 2013, appeal 158/2013, ECLI:ES:APM:2013:2461A).

The former CNC also submitted oral observations for the first time at the request of the court in the application for interim measures by Ryanair against AENA (the public body in charge of the airports' management) in a stand-alone damages claim against an alleged abuse of a dominant position by AENA (2011). Both the interim measures request and the damages claim were dismissed (by Judgment from the *Audiencia Provincial de Alicante*, 19 January 2012, appeal 833/2011, ECLI:ES:APA:2012:1A, and Judgment from *Juzgado de lo Mercantil nº 3 de Alicante*, appeal 346/2011, 26 March 2012, ECLI:ES:JMA:2012:52, respectively). In addition, Ryanair filed an abuse of a dominant position complaint before the

former CNC in 2011 on the same grounds, but the CNC closed the investigation without finding an abuse in 2013.

In recent years, the CNMC has also intervened as *amicus curiae* in other cases in the petrol, franchise and credit cards sectors, among others.

The EC has also intervened as *amicus curiae* in Spain in at least two cases. First, before the Spanish Supreme Court in five appeals of the former CNC's decision, S/0037/08 – *Compañías de Seguro Decenal* (2009), in which the authority fined several insurance companies with more than €120 million for an cartel infringement in the construction insurance market. Second, also before the Spanish Supreme Court during the appeal that put into question the authority's communication on the method to calculate fines (that was considered illegal by the court in its famous judgment dated 29 January 2015 (appeal 2872/2013, ECLI:ES:TS:2015:112)).

Lastly, as already explained in question 3.2, the new Article 76.4 SCA foresees that the CNMC will inform the courts, at their request, about the criteria to quantify the loss in damages claims. In fact, the CNMC stated, in its 2018 strategic plan, that it will elaborate a guide to quantify the loss in damages claims.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Although it is not a public interest defence as such, Articles 1.3 SCA and 101.3 TFEU provide an exemption from the prohibition contained in Articles 1.1 SCA and Article 101.1 TFEU where it is possible to demonstrate that the alleged restriction of competition is outweighed by the pro-competitive effects of the agreement in question. For such a defence to be successful, four conditions must be met:

- the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress;
- the agreement allows consumers a fair share of the resulting benefit;
- no restrictions are imposed which are not indispensable to the attainment of these objectives; and
- the parties to the agreement are not able through it to eliminate competition in respect of a substantial part of the products in question.

In addition, Article 4 SCA states that competition law does not apply when the conduct or behaviour results from the application of a law; thus, a sort of law compliance defence is also available in Spain.

However, these defences cannot be put forward by the parties in follow-on actions where the question of liability is closed in the authority's decisions, as the existence of an antitrust infringement found by a final CNMC's decision is deemed to be irrefutably established for the purposes of an action for damages (see question 4.3). Therefore, these defences can only be put forward in stand-alone actions.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The passing on defence relates to the principle that a defendant (for example, a supplier) can seek to defend itself against claims put forward by a claimant (for example, a supplier's customer) by arguing that it has passed on to its own customers all or part of the loss that it has suffered as a result of the anti-competitive conduct so that the claimant has not actually suffered any direct loss.

Before RDL 9/2017, the possibility to put forward a passing on defence was accepted by the Spanish Supreme Court in its judgment from 2013 in the *Sugar Cartel* case (appeal 2472/2011, ECLI:ES:TS:2013:5819). In this regard, it is interesting to note that the Spanish Supreme Court stated that this defence will be successful if it is demonstrated that the claimant passed on downstream the damage, which not only encompasses the higher prices paid but other factors such as the reduction of sales as a consequence of the price increase, loss of competitiveness or reputational value. As the defendant, Ebro Foods, only argued that the claimants passed on the higher prices paid, as they increased their prices during the period in question, but did not prove that they passed on the damage, the passing on defence was eventually rejected for lack of sufficient proof.

Since RDL 9/2017 entered into force, the passing on defence is expressly regulated in Articles 78 to 80 SCA. The new Article 78.3 SCA concretely states that the defendant can argue in its defence that the claimant has passed on all or part of the overcharge resulting from the competition infringement, being the burden of proof on the former.

Lastly, according to the new Article 72 SCA, any natural or legal person that has suffered a damage derived from a competition infringement has legal standing to sue, thus, indirect purchasers are able to lodge a damages claim. In addition, as explained in question 4.3, the SCA includes now a rebuttable presumption that the damage has been passed on to such indirect purchaser if three conditions are met.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

In case of damages claims put forward against one or several cartel participants, the remaining participants have the possibility to act as co-defendants inasmuch as they prove that they have direct and legitimate interest to participate in the proceedings (Article 13 CPA).

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The new Article 74.1 SCA establishes a new limitation period of five years, replacing the previous one-year time limit applicable to contractual obligations.

According to Article 74.2 SCA, the five-year limitation period starts to run since the moment the competition infringement ceased and the claimant knows, or could have reasonably known, the following circumstances:

- the conduct and the fact that such conduct constitutes a competition infringement;
- the damage derived from such infringement; and
- the infringer's identity.

In addition, according to Article 74.3, the limitation period is interrupted if a competition authority initiates an investigation or a sanctioning proceeding in relation to a competition infringement. Such interruption will end once a year has elapsed since the decision from the authority becomes final (that is, not appealed within the time limit or it can no longer be appealed). Then, the limitation period will be restarted.

Likewise, according to Article 74.4 SCA, the limitation period is also interrupted when a settlement between the parties is initiated. The interruption will only be applicable to those parties taking part in the settlement.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

There is not a timetable established and the length of proceedings will depend on several factors such as the court's workload, the complexity of the case, etc. On another note, Spanish law does not foresee any specific mechanism to expedite proceedings.

However, getting compensation for damages usually takes longer in follow-on cases than in stand-alone claims. A decision, in the case of the CNMC, will take up to 18 months since the opening of the proceedings (Article 36.1 SCA). Furthermore, the decisions by the competition authorities can be appealed, in which case the length of the proceedings will depend on the court's workload and on whether there is a subsequent appeal. However, please note that there is no need to wait for a decision in the appeal procedure, as the follow-on damages action can be lodged once the competition authority's decision has been taken.

Proceedings from stand-alone actions have a duration of 12–18 months, or even less. For instance, proceedings in the *Conduit/Telefónica* case lasted 10 months since the claim was lodged and in the case *Centrica/Iberdrola* the court dealt with the claim in seven months.

It is expected that, after the Royal Decree entered into force, the duration of the court proceedings will be shortened once there is more experience.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

In general, the parties do not require permission of the court to discontinue their claims, unless under exceptional circumstances such as when the withdrawal of the claim by any of the parties is legally inadmissible.

In this regard, according to Articles 19 to 22 CPA, the parties have several options to discontinue the proceedings (including claims in relation to competition infringements):

- the defendant accepts the claims of the claimant;
- the claimant withdraws its claim;
- the parties decide to bring the claim to a Court of Arbitration; or
- the parties settle the claim between them.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

The CPA does not regulate collective settlement. Any settlement will therefore need to be agreed to by each individual party to the proceedings.

Please note that Article 77 SCA has incorporated the rules established in Article 19 of the Damages Directive as regards the effect of consensual settlements on subsequent actions for damages.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The legal costs to litigate in Spain are very low. In this regard, although they are not legally capped, they are governed by orientation guidelines established by each bar, which are substantially lower than in other jurisdictions such as UK, France, the Netherlands and Germany.

As regards the recovery of legal costs, the court will always order the party which loses the case to pay both parties' costs ("*criterio del vencimiento*"), unless (i) the case raises serious doubts as regards the facts or the application of the relevant law, or (ii) the arguments of the losing party are not totally dismissed. In those cases, the court will not make an order for costs and each party will pay its own. If the arguments of the losing party are only partially dismissed but the court considers that it has litigated rashly ("*con temeridad*"), the losing party will also be ordered to pay both parties' costs.

In the context of actions for damages resulting from antitrust infringements, the "loser-pays" rule also applies in relation to the legal costs of the specific proceedings relating to the request for disclosure of evidence. Additionally, a party may be ordered to pay the costs of the proceedings (irrespective of the outcome) and also the costs linked to the request for disclosure of evidence directed to such party in the event of any of the following:

- (a) its failure or refusal to comply with the disclosure order of the court;
- (b) its destruction of relevant evidence;
- (c) its failure or refusal to comply with the obligations imposed by a national court order protecting confidential information; or
- (d) its breach of the limits on the use of evidence provided for in the CPA.

Legal costs comprise, *inter alia*, lawyers' fees, court agent's fees, expert fees, expenditure relating to witnesses, judicial fees and deposits (Article 241 CPA).

There is a limit to the costs that the losing party must bear: one-third of the value of the action ("*cuantía*"). This limit does not apply if the court finds that the claimant (or the counterclaimant, as appropriate) has litigated rashly.

8.2 Are lawyers permitted to act on a contingency fee basis?

Since 2008, contingency fees are permitted in Spain (pursuant to the Supreme Court Judgment dated 4 November 2008, appeal 5837/2005, which lifted a centuries-old prohibition on the *pactum de quota litis*).

The lawyer can consequently agree with his client that he will only receive a percentage of any amount awarded at trial, and that if a judgment is given against his client, he will not get any fees at all.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding is permitted, as there is no rule under Spanish law to the contrary.

This option has not been used in many competition law claims to date. In fact, the levels of awareness of third party funding solutions

are generally still low in Spain. However, it is expected that the recourse to such solutions gradually increases over time, as the new regime arising from the implementation of the Damages Directive makes it easier to claim damages for antitrust infringements (for example, in terms of disclosure of evidence). Major international funders, such as Burford, Cartel Damages Claims, Therium and Calunius, are beginning to be present and known in the market.

As an example, it has been published that the litigation fund Therium is going to fund the cost of the claims that the law firm Ejaso Abogados is preparing against Cepsa, BP and Repsol (fined €7.9 million by the CNMC in 2009 for fixing prices of fuel) on behalf of petrol stations that worked with those companies as resellers. Ejaso estimates that the claims will range between €250,000–€600,000 for each petrol station. As a consideration for the funding of the litigation, Therium will perceive 30% or 40% of the damages obtained if the claims succeed.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the court in damages procedures can indeed be appealed up to two times.

Initial decisions from the mercantile courts can be appealed before the provincial courts of the same jurisdiction, that is, to the next upper court in line. In this second instance, both facts and legal grounds of the case can be reviewed by the provincial court. Most of the damages decisions reach this level of appealing.

Those judgments of the court of second instance can also be appealed under certain circumstances to the Supreme Court. It is quite unusual that these kinds of appeal are accepted, and the Supreme Court usually only examines the legal grounds of the case. For facts to be re-examined by this Court, one of these two conditions must be met: either the analysis of the provincial court is deemed to be unreasonable, arbitrary or illogical, or the quantum claimed is higher than €600,000.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Articles 65 and 66 SCA foresee that the CNMC might grant immunity or, alternatively, a reduction in the amount of the fine to those companies that provide the authority with information about a cartel in which they participated (under certain circumstances specified in those articles). However, any immunity or reduction in the amount of the fine granted by the CNMC does not extend to protection from damages claims lodged by victims of the infringement.

That being said, the new provisions in the SCA foresee some limitations on the liability of immunity recipients. In this regard, Article 73.4 SCA foresees that their liability will be limited to the harm caused to their own direct and indirect purchasers, instead of being jointly and severally liable for the entire harm caused by the infringement (although there is an exception where the remaining co-infringers are unable to fully compensate the other victims). In addition, Article 73.5 SCA also limits claims from other co-infringers to the harm caused to their own direct and indirect purchasers and, where the harm is not caused to their direct or indirect purchasers,

the limit will be set according to its relative responsibility in the infringement. These limitations are aimed to compensate the reluctance of companies to apply for leniency due to the likelihood of becoming a target of damages claims (as a successful leniency, applicants must acknowledge its participation in the infringement).

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The new Article 283-*bis* i) states that the court cannot order any party to disclose information relating to both leniency and settlements (“*terminación convencional*” or “*transacciones*”). In addition, the SCA does not differentiate between successful or unsuccessful applications, so the courts are presumed to treat both sorts of applications equally. Thus, leniency or settlement applications, whether successful or unsuccessful, benefit from absolute protection from disclosure in any subsequent court proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Damages Directive has been transposed in Spain through RDL 9/2017.

The transposing instrument implements several directives. Title II is the section of the Royal Decree dealing with the implementation of the Damages Directive. In its turn, Title II is divided into two articles: (i) Article 3 aimed at amending the substantive rules contained in the SCA; and (ii) Article 4 aimed at amending procedural rules contained in the CPA.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The deadline for transposing the Damages Directive was 27 December 2016, but only a few Member States complied with it. In Spain, RDL 9/2017 was passed on 26 May 2017, and it entered into force on 27 May 2017.

As already explained, the Spanish legislator opted to modify the substantive rules contained in the SCA and the procedural rules contained in the CPA.

In this regard, it modified the SCA, by introducing: a new title dealing with all substantive changes derived from the Damages Directive (new limitation periods, new presumptions, etc.); and an ancillary modification in Article 64.3 SCA that now contains a new mitigating circumstance (carrying out actions to compensate the damages caused by the infringer’s conduct). It also modified the Additional Final Provision, which modifies the definition of cartel in Spanish law (that before required the agreement, decision or concerted practice to be secret in order to be characterised as a cartel) and introduces the whole set of definitions contained in the Damages Directive.

In turn, the CPA now contains a new section that is only applicable to damages claims, so the procedural system remains intact for damages claims not derived from competition infringements.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

RDL 9/2017 entered into force since its publication in the Spanish Official Journal (“BOE”).

In order to ensure that the new provisions do not apply retroactively (in accordance with Article 22.1 of the Damages Directive) the transposing instrument states that (First Transitional Provision):

- Article 3, aimed at amending the substantive rules contained in the SCA, does not apply retroactively; and
- Article 4, aimed at amending procedural rules contained in the CPA, will only apply to proceedings initiated after RDL 9/2017 enters into force.

Therefore, the new regime will only apply to proceedings initiated on or after 27 May 2017 which relate to infringements which occurred on or after that date.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

There are not any proposed reforms since, as already explained, the Royal Decree has already modified both the SCA and the CPA, producing substantive and procedural modifications on both sets of legislation in order to transpose the Damages Directive.

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The United States has both federal and state competition laws.

Under the federal antitrust laws, the government, through the Department of Justice (DOJ) brings criminal claims. The DOJ, the Federal Trade Commission (FTC), and private plaintiffs can bring civil claims. State antitrust law varies.

Federal antitrust law governs both joint and unilateral behaviour.

It prohibits multi-firm conduct and “contract[s], combination[s], or conspirac[ies]” that unreasonably restrain trade. Classic examples of multi-firm behaviour likely to “unreasonably” restrain trade include price fixing, bid rigging, and market-allocation schemes. Other conduct, like exclusive dealing, non-compete agreements, non-solicitation provisions, resale price maintenance, and other vertical and horizontal restraints are subject to scrutiny under the federal antitrust laws.

The federal antitrust laws forbid a single firm from “monopolization, attempted monopolization, or conspiracy or combination to monopolize”. Possessing a monopoly market share is not by itself illegal, but firms violate the U.S. competition laws when they obtain, maintain, or exercise monopoly power in an anticompetitive manner. Examples of potentially problematic single-firm conduct include tying, bundling, and refusals to deal.

The federal antitrust laws also govern mergers and acquisitions where the effect may be to substantially lessen competition. The DOJ and FTC can sue to stop mergers if they determine the combination will substantially lessen competition.

1.2 What is the legal basis for bringing an action for breach of competition law?

The Sherman Antitrust Act is the principal competition law in the United States. Section I of the Sherman Act governs multi-firm conduct. Section II applies to single-firm conduct and monopolisation. Sections 4 and 16 of the Clayton Act grants private parties who have been injured under the competition laws with a right to bring civil claims against the violators for damages and injunctive relief, respectively. 15 U.S.C. §§ 15, 26.

Section 7 of the Clayton Act (15 U.S.C. § 18) governs mergers, acquisitions, and joint ventures and prohibits such transactions where “the effect of such acquisition may be substantially to lessen

competition, or tend to create a monopoly”. Section 7 is primarily enforced by the DOJ and the FTC, though states attorneys general and private parties may enforce it under Sections 4 and 16 of the Clayton Act. 15 U.S.C. §§ 15(c), 26.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for U.S. competition claims is derived from federal (national) and state (regional) law. Except for indirect purchaser claims, most antitrust claims are brought under federal law.

International law is typically not invoked for substantive competition claims. The U.S. Supreme Court recently held that a federal court determining foreign law should accord respectful consideration to a foreign government’s interpretation, but that a U.S. court is not bound to accord conclusive effect to the foreign government’s statements. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 585 U.S. ___, (2018).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialist courts for competition law.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

The government may bring civil or criminal actions against violators of the antitrust laws. In addition, private plaintiffs who have been injured in their “business or property by reason of anything forbidden in the antitrust laws” have a right to sue under the Clayton Act.

The Supreme Court has limited standing for monetary damages under the federal statutes to those plaintiffs who are “direct purchasers” or are competitors directly injured. *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982). In addition, the harm must be caused by the competition-reducing aspects of the challenged conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). One caveat to this general limitation is that several states have passed statutes allowing for indirect purchasers to have standing to sue under state antitrust laws.

Representative plaintiffs may bring claims on behalf of themselves and similarly situated entities. A case can only proceed as a class action if it meets the prerequisites set forth in Federal Rule of Civil Procedure 23(a):

(1) the class is so numerous that joinder of all members is impracticable (“numerosity”); (2) there are questions of law or fact common to the class (“commonality”); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (“typicality”); (4) the representative parties will fairly and adequately protect the interests of the class (“adequate representation”);

and one of the sections of 23(b):

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rules 23(b)(1) and (2) class actions do not permit “opt-outs”, while 23(b)(3) class actions do proceed on an “opt-out” basis.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Courts must have both subject-matter and personal jurisdiction to decide competition law claims.

Subject-matter jurisdiction: Federal district courts have subject-matter jurisdiction over cases arising under federal statutes (called federal question jurisdiction). Federal district courts also can decide state antitrust law claims when they are brought with federal claims and arise from the same nucleus of operative giving rise to the federal claim. In addition, federal district courts have subject-matter jurisdiction over controversies arising between citizens of different states when the amount at issue exceeds \$75,000 (diversity jurisdiction). As such, federal courts can decide state law competition claims where the litigants are from different states and the alleged damages exceed \$75,000. The Class Action Fairness Act also establishes subject-matter jurisdiction for certain class actions where the amount in controversy exceeds \$5 million, the class comprises at least 100 plaintiffs, and there is at least minimal diversity between the parties (i.e., at least one plaintiff class member is diverse from at least one defendant). 28 U.S.C. § 1332(d).

When claims concern conduct that occurred outside of the United States, to establish jurisdiction the plaintiff must show that the foreign conduct imposed a “direct, substantial, and reasonably foreseeable effect” that caused the plaintiff’s injury. *See* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a.

Personal jurisdiction: Under the Clayton Act, a plaintiff may initiate a suit in any district “in which the defendant resides or is found or has an agent”. 15 U.S.C. § 15. A corporation may be sued in any judicial district where it is an “inhabitant” or in any district where it may be “found” or “transacts business”. 15 U.S.C. § 22. Additionally, 28 U.S.C. § 1391(c) grants all federal district courts personal jurisdiction over “alien” (non-U.S.) defendants.

Even where a U.S. court has jurisdiction to decide a competition claim, however, it may not exercise that jurisdiction on comity grounds.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The availability of treble damages, attorneys’ fees and costs unquestionably attracts plaintiffs to bring claims. Antitrust suits are most commonly initiated by plaintiffs and the government, though defendants may occasionally initiate suit under the Declaratory Judgment Act.

1.8 Is the judicial process adversarial or inquisitorial?

The U.S. judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available.

2.2 What interim remedies are available and under what conditions will a court grant them?

Under the Clayton Act, plaintiffs can seek preliminary injunctions “against threatened loss or damage by a violation of the antitrust laws”. For preliminary injunctions, a showing of actual injury is not required, but plaintiffs must show that “irreparable harm” is likely – money damages alone are not enough. In addition, a plaintiff seeking a preliminary injunction must show: (i) a likelihood of success on the merits; (ii) that the threatened injury outweighs the harm that the injunction may create for the defendant; and (iii) that the injunction is in the public interest.

With the exception of merger disputes and the enforcement of non-compete agreements, interim remedies are not typically sought in U.S. antitrust cases because the alleged harms, if proven, can generally be remedied through monetary damages and a permanent injunction at the case’s conclusion.

In the merger context, the federal government can seek a “hold separate” order, requiring the acquirer to keep the assets separate and distinct until the case has been decided. When the FTC, but not the DOJ, seeks a preliminary injunction to stop a merger, at least some courts have interpreted the threshold for the injunction to be lower, “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest”. 15 U.S.C. § 53(b). *See, e.g., FTC v. Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

In criminal cases, final remedies include prison sentences for individuals and criminal fines for individuals or corporations. To impose such penalties, the government must prove the individual or corporation's guilt beyond a reasonable doubt.

In civil cases, final remedies include damages, injunctions, and other forms of equitable relief. Civil plaintiffs must first prove liability by a preponderance of the evidence, but once liability is established the amount of damages need not be proved with precision. For injunctive relief, a Plaintiff must show:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange L.L.C., 547 U.S. 388, 391 (2006). Injunctive relief can take many forms, but most often, the court orders the defendant to cease the anticompetitive conduct.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Money damages for direct purchasers are based on the amount of overcharge caused by the anticompetitive behaviour. Competitors typically seek lost profits or the loss of value to their businesses. Damage awards are almost always the subject of expert opinion and testimony, though the final determination is left to the jury (or judge, in a bench trial).

Trebled damages are automatic for any judgment under the U.S. antitrust laws. Each violator is held "jointly and severally liable" for all damages, meaning that any one defendant can be made to pay the entire judgment. Conversely, defendants are precluded from seeking contribution from other defendants in the damages payment.

Damages awarded by a judge or jury are publically available. However, most antitrust cases settle before a judgment is reached and those settlements, which can be very large, are not made readily public unless the case is a class action. Class action settlements must be approved by courts and therefore are publicised. In addition, the DOJ publishes the criminal fines it levies.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

No. Defendants found liable in civil cases do not receive a deduction from private judgments for fines they may have paid to the federal government. However, if a firm has obtained amnesty from the federal government through its leniency programme, that defendant's civil damages will be limited to single damages (rather than the ordinary trebled damages) under the Antitrust Criminal Penalty Enhancement and Reform Act.

4 Evidence

4.1 What is the standard of proof?

In criminal cases, the government must prove guilt "beyond a reasonable doubt".

In civil cases, the standard is lower. The plaintiff must show through a "preponderance of evidence", or that it is more likely than not, that the defendant violated the antitrust laws as alleged.

4.2 Who bears the evidential burden of proof?

In criminal cases, the government bears the burden of proof.

In civil cases, the party bringing the claim (whether the government or private plaintiffs) bears the ultimate burden of proof. However, in some circumstances, certain burdens shift to defendants to show the procompetitive benefits of their behaviour once the plaintiff makes a *prima facie* case of a violation.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

While not technically an evidential presumption, once a plaintiff establishes liability, impact and causation, it is common for a plaintiff to argue that the amount of damages need not be proven with precision. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 ("[E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act on probable and inferential as well as (upon) direct and positive proof.'") (internal citation omitted).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Yes, there are limits to the forms of evidence that can be presented. In federal trials, admissibility is governed by the Federal Rules of Evidence. The threshold test for admissibility is relevance. Evidence is relevant if it has the tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence. In addition, the evidence must pass certain requirements for indicia of reliability. Certain evidence, though relevant, may be excluded if the court determines that its introduction would be more prejudicial than probative.

Expert evidence is accepted by the courts and is offered in nearly every antitrust case. Expert evidence is generally offered on liability, and as appropriate, class certification and damages. Federal Rule of Evidence 702 governs what testimony an expert may present, and it allows experts to testify to their opinions if (a) the expert's specialised knowledge will help the trier of fact understand or determine a fact at issue, (b) the testimony is based on sufficient facts or data, (c) the testimony is based on reliable principles and methods, and (d) the expert reliably applied the principles and methods to the facts of the case.

Parties often challenge the admissibility of expert testimony, arguing that the expert fails to meet one or more of the Rule 702 criteria. Such challenges are known as *Daubert* challenges, after the Supreme Court case *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court interpreted Rule 702 and directed judges to act as “gate keepers” and prevent the courts from becoming a forum for “junk science”. In the class certification context, the Supreme Court has also required that the expert evidence must fit the theory of liability in the underlying complaint. *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The rules on disclosure differ depending on whether the case is criminal or civil. Generally, documents can only be obtained by consent or under Freedom of Information Act requests to the government before proceedings have begun. There are a few U.S. jurisdictions that permit pre-filing discovery, but those are relatively rare. After the initiation of a criminal or civil case, both parties have access to additional tools to gather information and documents, both formally and informally, from the other party and third parties.

In criminal cases, the *Brady* doctrine requires the government to turn over all exculpatory evidence to the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). Federal Rule of Criminal Procedure 16 also provides a vehicle for defendants to request additional discovery. But, seeking that discovery opens defendant up to reciprocal discovery requests. Fed. R. Crim. P. 16(b)(1)(A). Both the government and the defendant can also use subpoenas to gather information from third parties in criminal cases. Fed. R. Crim. P. 17.

After the initiation of a civil case, both parties have access to broad discovery from each other and third parties. Both may request and “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case”. Fed. R. Civ. P. 26(b)(1). Parties can use requests for production of documents (Fed. R. Civ. P. 34), interrogatories (Fed. R. Civ. P. 33), requests for admissions (Fed. R. Civ. P. 36), and depositions (Fed. R. Civ. P. 30–31) to elicit documents and information from the other party. The parties can elicit documents and testimony from third parties using subpoenas under Fed. R. Civ. P. 45. Though there are limits on the burden the parties may place on each other and third parties, antitrust discovery is typically broad, wide-ranging, time-consuming and very expensive.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, if a person is a party or a party’s employee, their presence can be compelled so long as the place for testimony is within the state where the person resides, transacts business, is employed, or if the person is commanded to appear at trial and would not incur substantial expense to do so. Similarly, third party witnesses can be forced to appear at trial or for deposition pursuant to Fed. R. Civ. P. 45(c), provided the place for testimony is within 100 miles of where the witness resides, is employed, or regularly transacts business.

Cross-examination of witnesses is standard practice and parties have a right to ask questions of witnesses called by the opposing party. During cross-examination, counsel may ask the witness leading questions. Fed. R. Evid. 611(c).

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Yes. A final judgment of guilt in a criminal antitrust case constitutes “*prima facie* evidence against such defendant” in follow-on civil actions based on the same acts and applicable law. 15 U.S.C. § 16(a).

However, “consent judgments or decrees” and pleas of *nolo contendere* (no contest, but no admission) do not have a preclusive effect if entered before any testimony has been taken. *Id.*

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Courts enter protective orders to protect commercially sensitive business information. These orders are usually heavily negotiated between the parties and set forth the manner in which the parties designate information as confidential, who may receive such information, and how it may be used. During discovery, the information so designated is usually only available to persons designated by the parties.

However, if the parties wish to file confidential material with the courts, they generally do so “under seal” to avoid public disclosure. To file under seal, parties must move the court to permit sealed filings and explain the justification for keeping records sealed. Since U.S. courts have a presumption of openness, such requests may sometimes be denied. For example, in class actions, courts may require parties to open certain records so that the public can adequately consider the sufficiency of settlements. *See, e.g., Shane Grp. Inc. et al. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299 (6th Cir. 2016).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Yes. A government entity can offer its views on a private case by: (i) filing an *amicus curiae* (“friend of the court”) brief setting forth its interest and perspective on the case; or (ii) moving to intervene in the case as a party.

Most often in practice, the government moves to intervene for the limited purpose of protecting an ongoing criminal investigation from civil discovery by seeking a stay in the private case. Additionally, when antitrust cases are heard by the U.S. Supreme Court, the Court frequently asks the Solicitor General (the executive officer who represents the federal government before the Court) to submit its views through an *amicus curiae* brief.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

No. The U.S. antitrust laws do not have a justification or public interest defence. However, the U.S. Courts and Congress have

developed a number of immunities for conduct that might otherwise violate the antitrust laws. For example, labour unions, certain farming co-ops, some sports leagues, and other such groups have been given legislative and judicial immunity for behaviour that may otherwise violate the antitrust laws as written.

In addition, courts apply “Noerr-Pennington” immunity to legislative or judicial activity (such as lobbying the government or filing a lawsuit) alleged to have harmed competition, as long as that activity is not a “sham”.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Under federal antitrust law, there is no “pass on defence” and indirect purchasers do not have legal standing to bring claims for money damages. However, some states (about half) permit indirect purchaser damages claims under state law. In some of those states, defendants can be subject to up to 200% (*before trebling*) of the damage caused.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Yes, defendants can join other cartel participants as co-defendants. They may do so if the other participant is jointly liable for claims arising out of the same transactions or occurrences. Fed. R. Civ. P. 20.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Yes. For federal civil antitrust claims, the statute of limitations is four years. 15 U.S.C. § 15b. For federal criminal antitrust claims, the statute of limitations is five years. 18 U.S.C. § 3282.

The statute of limitations begins to run at the time of the “accrual of the cause of action”. The accrual period begins when the plaintiff suffers injury to her business or property. However, many private antitrust suits are brought challenging conduct that occurred more than four years prior because the statute of limitations can be deferred or “tolled”.

The most common ground for tolling the statute of limitations is the fraudulent concealment doctrine, which can arise if a defendant conceals its conduct such that a diligent plaintiff could not have discovered its injury and filed suit within the limitations period. If established, fraudulent concealment tolls the statute of limitations until the time that the plaintiff knew or should have known of the conduct giving rise to the claim.

In addition, the Clayton Act tolls the statute of limitations on any claim that is subject of “any civil or criminal proceeding...instituted by the United States”, during the suit’s pendency and for one year after.

A class action can also toll the limitations period on any claim. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (holding that the filing of a class action “tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status”).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Antitrust cases can be lengthy. The time from filing to final judgment varies by venue and judge, but even relatively simple cases usually take at least two years. In complicated cases, such as class actions, it can often take five years (or more) to complete discovery, class proceedings, summary judgment, and trial.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No. As a general matter, private parties may settle and dismiss claims without court approval, but see question 7.2 below.

Claims brought by the government, however, do require court review and approval of the consent judgment terms under the Tunney Act. 15 U.S.C. § 16.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Yes, in class actions, the class representative can, and often does, settle claims on behalf of the class. But, unlike individual private settlements, class settlements must be considered and approved by the Court, and class members must be given an opportunity to object or opt-out of the settlement. Fed. R. Civ. P. 23(e).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes. Pursuant to Fed. R. Civ. P. 54(d), a prevailing party can typically recover its costs other than attorney’s fees, whether plaintiff or defendant. Additionally, a successful antitrust plaintiff can recover its attorney’s fees. Under the Clayton Act, such an award is mandatory when the plaintiff receives trebled damages. 15 U.S.C. §15(a).

Successful defendants typically cannot recover attorney’s fees, except if an action is found to be “frivolous, unreasonable, without foundation, or in bad faith”. 15 U.S.C. § 4304.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, contingency fees are permitted.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Yes. This type of funding is permitted but not often disclosed, so it is difficult to tell how frequently it is used. However, some

courts will permit discovery on how litigation is funded and the Northern District of California has imposed a standing order for all judges mandating the disclosure of people or entities who “fund[] the prosecution of any claim or counterclaim” in proposed class, collective, or representative actions. N.D. Cal., Standing Order for all Judges of the Northern District of California, ¶ 19 (Jan. 17, 2017).

9 Appeal

9.1 Can decisions of the court be appealed?

Yes. Final decisions in federal civil and criminal litigation, including antitrust litigation, are subject to appeal as a matter of right. 28 U.S.C. § 1291. Most state courts also allow appeals of final decisions as a matter of right.

Generally, the appeals courts have discretion to hear certain other Interlocutory Appeals when requested by a party or wait to consider the issue until a final judgment is reached in the case. 28 U.S.C. § 1292(b).

For non-final class certification decisions, the losing party can seek discretionary review from the Courts of Appeals under Rule 23(f).

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, the DOJ offers leniency to corporations and individuals who report their cartel activity and cooperate in the DOJ’s investigation of the cartel. Leniency is offered to the *first* corporate or individual conspirator to confess participation in an antitrust crime, cooperate, and meet other conditions required by the DOJ’s leniency policies. Companies that are not first, but cooperate early, can receive reduced sentences.

Neither successful nor unsuccessful leniency applicants are immune from civil claims. However, under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004) (ACPERA), successful leniency applicants have their damages limited in civil claims to single damages, rather than the ordinary trebled damages under the Clayton Act. In addition, successful leniency applicants are not subject to joint-and-several liability as they ordinarily would be under the Clayton Act. To receive such protections in civil litigations, the successful leniency applicant must also cooperate with the plaintiff(s) as required by ACPERA.

In 2017, the DOJ published updated guidance on the leniency programme. Important changes included more limited protection for former employees and employees found to be most culpable. The update also emphasised the “Penalty Plus” policy, under which the

DOJ may seek enhanced sentences if the applicant fails to disclose additional antitrust offences that the government later discovers. The revisions suggest a tightening of the leniency programme and a more restrictive approach by DOJ going forward.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

No, this is not permitted.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Directive is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

The Directive is not applicable.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

The Directive is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Reforms generally occur through judicial decisions and are difficult to predict. However, U.S. antitrust regulators have suggested that they may ask the courts to reconsider the rule that indirect purchasers cannot bring claims for money damages under the Federal Antitrust statutes.

Other changes to antitrust practice may take place at the agency level, through policy changes at the FTC or DOJ, or via Congressional action.

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