THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Twelfth Edition

Editor
Ilene Knable Gotts

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Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys’ fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a ‘follow on’ to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement
law. The most significant developments, however, are in Europe as the EU Member States implement the EU’s directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority’s file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a
private action will be decided by the court. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spill-over effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States’ system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for...
punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, Korea, the Netherlands, Switzerland and Spain) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that ‘laying your cards on the table’ and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility that some privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties
to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
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EU OVERVIEW

William Turtle, Camilla Sanger and Olga Ladrowska

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Damages Directive, which has now been implemented in all Member States, has continued to shape the private antitrust litigation landscape in the EU in 2018. The Damages Directive is intended to achieve greater harmonisation between private competition enforcement regimes across Member States, in pursuit of the expressed aim of the European Commission (Commission) to encourage greater private enforcement of competition law. It is also intended to foster a complementary relationship between public and private enforcement.

While the Damages Directive sets out a series of minimum requirements, Member States retain discretion over a range of areas, and there remain significant variations between national regimes post-implementation. Major changes and areas of difference are discussed in greater detail below, but the effect in many jurisdictions has been to create a unique regime for competition damages claims that is distinct from general civil litigation claims.

Another recent development has been an increased focus on the potential introduction of a harmonised class action regime. Following the publication of the Commission report on the practical implementation of the Commission Recommendation 2013/396/EU in January 2018 and the Commission proposal for the ‘New Deal for Consumers’ in April 2018, the debates on collective redress mechanisms have accelerated at both the EU and Member State levels.

In terms of litigation activity, there has been an upward trend in antitrust litigation across the EU. Of particular note are the follow-on damages claims arising from various Commission decisions that have been litigated (often in parallel) in multiple Member States.

1 William Turtle and Camilla Sanger are partners and Olga Ladrowska is an associate at Slaughter and May.
3 Commission report on ‘the implementation of the 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’ (COM(2018) 40 final).
4 The New Deal for Consumers comprises two proposals:
   a a proposal to amend the Directive on unfair terms in consumer contracts, the Directive on consumer protection in the indication of the prices of products offered to consumers, the Directive concerning unfair business to consumer commercial practices and the Directive on consumer rights (COM(2018) 185 final); and
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR
PRIVATE ANTITRUST ENFORCEMENT

Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), alongside Regulation 1/2003, provide the foundation of the legislative framework for private antitrust enforcement: these directly applicable provisions afford EU citizens the substantive right to bring damages claims for harm suffered as a result of a breach of EU competition law.

These legal instruments do not, however, address the procedural elements of private antitrust enforcement. Until the introduction of the Damages Directive, there was no single EU legal instrument addressing how antitrust claims could be brought in practice. As discussed in Section I, the Damages Directive set out to create ‘a more level playing field for undertakings operating in the internal market’ by stipulating the minimum requirements that Member States’ national laws must meet.

Despite this, the extent of harmonisation should not be exaggerated. The Damages Directive does not address a number of important practical matters, such as costs and funding, collective redress and injunctive relief. Moreover, for issues such as jurisdiction and governing law, it is necessary to turn to other pieces of EU legislation (see further below). Even where the Damages Directive does address a particular issue, there is scope for divergence in the interpretation (and therefore the implementation) of its provisions. This is apparent in, for example, how certain Member States have chosen to treat the provisions relating to limitation.

i Limitation

The Damages Directive introduced a minimum limitation period of five years for cartel damages claims. This five-year period does not begin to run until the infringement ceases and a claimant is aware of (or can reasonably be expected to be aware of) the behaviour constituting the infringement; the fact that the infringement caused him or her harm; and the identity of the infringer.

The Damages Directive also includes a provision to suspend the limitation period during an investigation and any subsequent appeal process. This suspension must end no earlier than one year after the infringement decision has ‘become final’ (the meaning of which is open to some debate). The limitation period must also be suspended for the duration of any consensual dispute resolution process.

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6 Recital 9, Damages Directive.
7 Article 10(3), Damages Directive. The limitation period in a number of jurisdictions (e.g., the UK and the Netherlands) already met this requirement, while in others (e.g., Germany and Spain), it was extended by the national implementing legislation.
8 Article 10(2), Damages Directive.
9 Article 10(4), Damages Directive. There has been some criticism, for example by the City of London Law Society in its response to the UK government’s consultation on the national legislation implementing the Damages Directive, that Article 10(4) is not clear as to whether an appeal on penalty alone will suspend the limitation period, and whether an appeal by one addressee suspends the limitation period for all addressees. Such questions were previously addressed by the English courts in relation to the former limitation provisions in the cases of BCL Old Co v. BASF [2009] EWCA Civ 434 and Deutsche Bahn AG v. Morgan Advanced Materials plc [2014] UKSC 24. At an EU level, these ambiguities could result in a preliminary ruling request to the European Court of Justice.
10 Article 18(1), Damages Directive. Recital 48 states that ‘consensual dispute resolution mechanisms’ will include out-of-court settlements, arbitration, mediation and conciliation.
These provisions have significantly extended the limitation periods in a number of Member States. Pre-implementation, this was an area where there was wide divergence between Member States, both in terms of the length of limitation periods and the point at which they began to run. Compare, for example, the UK (six years after the cause of action accrued) with Spain (one year from the date the injured party discovered the harm). This meant that limitation periods often used to play an important role for claimants when selecting the jurisdiction in which to bring a claim.

Nonetheless, some divergence will remain. The Damages Directive does not prevent Member States from imposing limitation periods in excess of five years or absolute limitation periods. Moreover, different interpretations of ambiguous provisions will preserve divergence in this area (as well as others).

ii Jurisdiction

Under EU law, jurisdiction is regulated by the Recast Brussels Regulation, which applies to proceedings issued on or after 10 January 2015. Under the Recast Brussels Regulation, the default position is that a claim should be brought in the jurisdiction in which the defendant is domiciled, irrespective of where the contract was concluded or the harm suffered.

Where there are multiple defendants domiciled in different jurisdictions, a claimant can opt to bring a claim in any of those jurisdictions. A defendant may then become an ‘anchor defendant’, with others being joined on to that claim, provided that the claims are so closely connected that it is expedient to hear them together.

Claims may also be brought in the jurisdiction where the harmful event occurred (meaning either where the cartel was definitively concluded or where the claimant company has its registered office). Alternatively, if a claimant is a consumer, the claim may be brought in the jurisdiction where the consumer is domiciled.

The European Court of Justice (ECJ) has recently considered the application of jurisdiction agreements in competition law cases. In Apple Sales International, the ECJ held that the mere fact that a jurisdiction clause does not explicitly refer to claims based on competition law does not automatically prevent it from applying to actions for damages for

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11 By way of example, consider a scenario in which the Commission opened an investigation in 2018 in respect of behaviour that took place between 2010 and 2016, and reached an infringement decision in 2021, with an appeals process lasting until 2024. In this case, the limitation period would only begin to run in 2025, and would last a minimum of five years, until 2030. Therefore, the company would be at risk of a damages claim for almost 15 years after it ceased its anticompetitive conduct.

12 The Damages Directive does allow for long-stop dates to be put in place. Recital 35 states 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’. For example, in the Netherlands a 20-year long-stop limitation period will apply, starting on the date on which the damage was inflicted, irrespective of the victim’s awareness.

13 Regulation No. 1215/2012 of 12 December 2012 (Recast Brussels Regulation).

14 Article 4(1), Recast Brussels Regulation.

15 Article 8(1), Recast Brussels Regulation.


abuse of dominance based on Article 102 TFEU. The decision contrasts with the ECJ’s earlier decision in CDC, which held that an explicit reference to claims based on competition law is a prerequisite for applying a jurisdiction agreement to cartel-related claims based on violations of Article 101 TFEU.

iii Governing law

For events that gave rise to damage after 11 January 2009, the governing law applicable to a restriction of competition is determined by the Rome II Regulation. Under the Rome II Regulation, the governing law will be the law of the country where the market is affected. When the market is affected in multiple countries, a claimant may choose to base its claim on the law of the Member State where it is bringing its claim, as long as the market of that Member State is directly and substantially affected by the restriction of competition that gives rise to the claim. This enables claimants to have their case for antitrust damages heard by one court applying one law, even where more than one defendant is involved or damage occurred in several EU Member States.

The Rome II Regulation also allows parties expressly to agree a law to govern their non-contractual obligations, either before or after the occurrence of an event that gives rise to damage.

In recent years, Member State courts have considered the application of choice of law rules under the Rome II Regulation (and the respective national rules pre-dating the Rome II Regulation) in the context of competition law claims. This developing jurisprudence may result in a preliminary ruling request to the ECJ.

III EXTRATERRITORIALITY

EU competition law applies to any conduct that has an appreciable effect on trade between Member States. The EU courts and the Commission have long considered to what extent, and in what circumstances, EU competition law can apply extraterritorially (i.e., to non-EU undertakings and to conduct that takes place outside the EU) without infringing the principles of public international law. The two main legal tests that have been developed to limit the extraterritorial reach of EU competition law are the implementation test and the qualified effects test. The former requires that the practices that restrict competition are implemented in the EU (e.g., by direct sales into the EU), and the latter requires that such practices have immediate, substantial and foreseeable effects in the EU. The relationship
between the implementation test and the qualified effects test was clarified in Intel, where the ECJ observed that the tests pursue the same objective and that EU competition law is applicable if either one is satisfied.

In recent years, Member State courts have started to examine the limits of extraterritorial application of EU competition law in the context of private enforcement, and it remains to be seen whether a consistent approach will be adopted across the EU.

IV STANDING

Any individual or undertaking may claim compensation before national courts for harm suffered as a result of an infringement of EU competition law – a longstanding position which has been entrenched by the Damages Directive. The exercise of the right to sue will be governed by national law provisions in the particular jurisdiction in which an action is brought, but the rules and procedures facilitating such actions must not be less favourable than those governing similar actions resulting from infringements of national law.

The causal relationship between the harm and the infringement need not be direct, and the Damages Directive grants indirect purchasers standing to sue. A party need not have a contractual link to a cartelist, and will have a claim against cartelists where loss was suffered as a result of an undertaking not party to the cartel (having regard to the practices of the cartel) setting its prices higher than would otherwise have been expected under competitive conditions (umbrella pricing).

V THE PROCESS OF DISCOVERY

The move towards harmonisation of the disclosure regimes across Member States is one of the most significant changes brought about by the implementation of the Damages Directive. Previously, there was a wide disparity between jurisdictions with sophisticated and well-established disclosure regimes (such as the UK), which were considered claimant-friendly, and jurisdictions where extensive disclosure did not feature in civil litigation (notably Germany and the Netherlands, although these nevertheless remained popular jurisdictions for bringing proceedings for other reasons). EU legislators considered the lack of extensive disclosure regimes in such countries to be an obstacle to effective private enforcement of competition law on the basis that it maintained the information asymmetry that may exist between a party allegedly having suffered loss and an infringer of competition law.

To address this, the Damages Directive requires Member States to ensure that national courts are able to order defendants or third parties to disclose relevant evidence that lies within their control in response to a reasoned justification by a claimant. Member States should also ensure that national courts are able, on the request of a defendant, to order a claimant or

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27 See, for example, Iyama (UK) Ltd & Others v. Samsung Electronics Co Ltd & Others [2018] EWCA Civ 220.
28 Article 3(1), Damages Directive.
29 Article 4, Damages Directive.
30 Article 12(1), Damages Directive.
31 Case C – 557/12 Kone AG and others v. ÖBB-Infrastruktur AG (2014).
32 Article 5(1), Damages Directive.

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a third party to disclose relevant evidence.\textsuperscript{33} To address concerns regarding excessive disclosure or fishing expeditions, the Damages Directive stipulates that national courts must be able to limit disclosure to what is proportionate having regard to the legitimate interests of all parties concerned.\textsuperscript{34} While Member States are to ensure that national courts have the power to order the disclosure of relevant confidential information, national courts are also to have at their disposal effective measures to protect such information\textsuperscript{35} and to give full effect to applicable legal professional privilege rules.\textsuperscript{36}

For legal systems unaccustomed to extensive disclosure exercises, these new rules may require a significant cultural change (although a combination of transitional rules\textsuperscript{37} and the need for national courts to acclimatise may mean it will be a number of years before the full effects become apparent). In particular, the references in the Damages Directive to disclosure of relevant categories of evidence will mark a significant change in jurisdictions where disclosure was previously limited to specific documents identified in a disclosure request.\textsuperscript{38} However, while there is likely to be some degree of harmonisation between Member States going forward, the Damages Directive sets only minimum requirements,\textsuperscript{39} and a number of jurisdictions have taken the opportunity to go further by creating a substantive right to disclosure (as opposed to giving national courts a mere discretion). It remains to be seen whether these regimes will develop to match the extensive disclosure seen in the UK.

As a further protection against excessive disclosure, the Damages Directive contains a number of limits on disclosure of evidence included in a competition authority’s file. In particular, leniency statements\textsuperscript{40} and settlement submissions\textsuperscript{41} are granted absolute protection from disclosure,\textsuperscript{42} as well as verbatim quotations from such documents.\textsuperscript{43} Disclosure of the following materials from a competition authority’s file is permissible, but only after the competition authority has closed its proceedings: information prepared specifically for the

\begin{itemize}
\item Article 5(1), Damages Directive.
\item Article 5(1), Damages Directive. Competition authorities are also expressly permitted to submit observations to the national courts on the proportionality of such disclosure requests (Article 6(11)).
\item Article 5(4), Damages Directive. For instance, through redacting sensitive passages in documents, conducting hearings \textit{in camera}, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in aggregated or otherwise non-confidential form (see Recital 18).
\item Article 5(6), Damages Directive.
\item For instance, the new provisions on disclosure only apply to claims where proceedings were commenced on or after 27 December 2016 in Germany and 27 May 2017 in Spain.
\item Article 5(2), Damages Directive.
\item Article 5(8), Damages Directive.
\item Defined as an oral or written presentation voluntarily provided to a competition authority (or a record thereof) describing the provider’s knowledge of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, and not including pre-existing information (i.e., evidence that exists irrespective of the proceedings of a competition authority: e.g., contemporaneous documents) (Articles 2(16) and 2(17), Damages Directive).
\item Defined as a voluntary presentation to a competition authority acknowledging the provider’s participation in an infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure (Article 2(18), Damages Directive).
\item Article 6(6), Damages Directive. Previously, national courts were expected to undertake a balancing exercise of weighing up the need to facilitate private enforcement of competition law by allowing disclosure of leniency documents versus the public interest in protecting the effectiveness of leniency regimes.
\item Recital 26, Damages Directive.
\end{itemize}
proceedings of a competition authority; information drawn up by the competition authority and sent to the parties in the course of its proceedings; and settlement submissions that have been withdrawn.\textsuperscript{44} Even then, national courts should (as part of the proportionality assessment) consider the need to safeguard the effectiveness of public enforcement when choosing whether to order disclosure of such documents.\textsuperscript{45}

The ECJ examined the scope of publication of leniency material in a Commission decision in the \textit{Evonik Degussa} and \textit{AGC Glass Europe} cases.\textsuperscript{46} In \textit{Evonik Degussa}, the ECJ found that the content of a leniency statement can be referred to in a Commission decision, provided that the source cannot be identified and the precise contents of the submission cannot be reconstructed. These principles were affirmed in \textit{AGC Glass Europe}. These decisions form part of an ongoing line of cases concerning the confidential nature of materials relating to Commission decisions, which is very significant in the context of private actions for damages in the national courts. The primary motivation for these appeals was to reduce civil claims risk.

\section*{VI \ USE OF EXPERTS}

The Damages Directive is silent on the issue of experts, but the Commission recognises the importance of expert advice in private competition actions, and has published, commissioned and contributed to various guidelines for judges and other practitioners on obtaining and assessing expert evidence.\textsuperscript{47} This is driven in particular by the complexities of quantifying harm, which in practice requires significant data, with both claimants and defendants routinely engaging economic experts to assess the amount of loss suffered.

The use of experts and their role in court proceedings vary from Member State to Member State. Rules differ, for example, regarding whether experts should be party-appointed or court-appointed, and the weight given to their findings. Dutch, English, French and German courts are willing to deal directly with economic reports prepared by experts appointed by the parties, for example, while judges in certain other jurisdictions tend to rely solely on court-appointed experts when addressing economic questions.

Member States also differ significantly in the level of partiality permissible to a party-appointed expert, and this question will clearly bear on the weight that the court places on expert evidence. For example, in English courts, party-appointed experts owe a duty to the court, while in Germany there is no express requirement towards objectivity, and so party-appointed experts are treated as potentially partisan extensions of the party in question.

Experts need not always be economics or accounting professionals. There is a growing trend in antitrust cases for industry experts to testify, lending their knowledge of the dynamics

\begin{itemize}
\item \textsuperscript{44} Article 6(5), Damages Directive.
\item \textsuperscript{45} Article 6(4)(c), Damages Directive.
\item \textsuperscript{46} Case C-162/15 \textit{Evonik Degussa v. Commission} (2017) and case C-517/15 \textit{AGC Glass Europe and Others} (2017).
\item \textsuperscript{47} See, for example, ‘Study on the Passing-on of Overcharges’, RBB Economics et al (2016); Communication from the Commission on quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07); and Commission Staff Working Document: Practical Guide – quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (SWD (2013) 205).
\end{itemize}
and operation of certain markets, particularly in cases concerning complex distribution chains. This serves the dual purpose of educating the court on the market in question and ensuring that economists approach the market on the basis of correct assumptions.

VII CLASS ACTIONS

On the same day that the Commission published its proposal for the draft Damages Directive (11 June 2013), it also published a Recommendation on collective redress mechanisms for breaches of citizens’ rights granted under EU law (Recommendation). The Recommendation followed a Green Paper on antitrust damages actions published in 2005 and a White Paper published in 2008, which included suggestions on competition-specific collective redress mechanisms. Due in part to concerns about the potential for US-style class actions, a consensus was not reached on this subject, and provision for collective redress was not included within the Damages Directive. Instead, the Commission issued a non-binding Recommendation (and an accompanying Communication) to Member States to implement collective mechanisms for violations of EU law rights by 26 July 2015 (concerning both injunctive and compensatory relief). The Recommendation applied not only in the competition sphere, but also in relation to claims for other breaches of citizens’ rights under EU law, including consumer protection, environmental protection, protection of personal data, financial services legislation and investor protection.

The Recommendation provides, among other things, that collective redress should be based on express consent of the relevant claimants (i.e., the opt-in model); that any exceptions to this principle (such as opt-out proceedings) should be ‘duly justified by reasons of sound administration and justice’; and that there should be safeguards for minimising the risk of excessive litigation.

On 25 January 2018, the Commission published a report on the practical implementation of the Recommendation. As anticipated, the report shows that the availability of collective redress mechanisms, and safeguards against the abuse of such mechanisms, is not consistent across the EU. On the one hand, some Member States (including Belgium, France, Lithuania and the UK) have actively promoted collective redress since 2013. On the other, there are nine Member States that do not provide for any possibility of collective redress for damages arising from breaches of EU law. The report indicates that the Commission will continue to promote and analyse the Recommendation.

Following the publication of the Commission report, on 3 October 2018, a study entitled Collective redress in the Member States of the European Union was published. The study, which was commissioned at the request of the European Parliament’s Committee

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52 Recital 7, the Recommendation.
53 Paragraph 21, the Recommendation.
on Legal Affairs, aims to provide further assessment of the current state of play of collective redress at both the Member State and EU levels; evaluate the opportunity of a European intervention; and provide the European Parliament with concrete recommendations.

Separately, on 11 April 2018, the Commission published a proposal for the ‘New Deal for Consumers’, which aims to enhance consumer protections through, among other things, the introduction of new measures supporting collective redress.

These recent publications contribute to a growing debate on collective redress, and the various proposals will likely be subject to further discussions at both the EU and Member State levels.

VIII CALCULATING DAMAGES

With a view to assisting in relation to the complicated issue of quantification, in 2013 the Commission published a Communication on quantifying harm in antitrust damages actions, together with a more detailed Practical Guide, to provide national courts and parties to damages actions with an overview of the main economic methods and empirical insights available. The Practical Guide covers various techniques for estimating prices in a counterfactual non-infringement scenario, including observation of comparator data, interpolation and regression analysis.

While the right to compensation is an EU right, the actual methodology for quantifying damages is largely a matter for national law. However, the following broad principles have been established at an EU level under the Damages Directive:

a. There must be a rebuttable presumption that cartels cause harm. This presumption was deemed necessary because the inherently secret nature of cartels may create an information asymmetry between parties that makes it more difficult for claimants to obtain the evidence necessary to prove the harm.

b. Compensation must place claimants in the position in which they would have been had the infringement of EU competition law not been committed. Compensation must therefore cover actual loss, loss of profit and interest, and should not result in overcompensation, whether by means of punitive, multiple or other damages.

c. National courts are entitled to estimate the amount of harm a claimant has suffered if it is impossible or excessively difficult to quantify that harm on the basis of the evidence available.

d. Member States must nonetheless ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.

55 Communication from the Commission on quantifying harm in actions for damages based on breach of Article 101 or 102 of the Treaty of the Functioning of the European Union (2013/C 167/07).
57 Article 17(2) and Recital 47, Damages Directive.
58 Article 3, Damages Directive.
59 Article 17(1), Damages Directive.
60 Article 17(1), Damages Directive.
Where requested, and if they deem it appropriate, national competition authorities (NCAs) may provide guidance to national courts on the determination of the quantum of damages.61

IX  PASS-ON DEFENCES

Member States are required under the Damages Directive to ensure the availability of the passing-on defence. This means that any defendant may invoke as a defence that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proof that any overcharge was passed on falls to the defendant, who may reasonably require disclosure from the claimant or from third parties.62

The Damages Directive also addresses the position of indirect purchasers, making it easier to claim damages incurred as a result of any overcharge that was passed on down the supply chain. Although the burden lies with the indirect purchaser to prove the existence and extent of any pass-on, there is a rebuttable presumption that this burden is satisfied if the indirect purchaser can establish that the defendant has committed an infringement of competition law (which is automatically the case in any follow-on action); the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and the indirect purchaser has purchased the goods or services that were the subject of the infringement, or has purchased goods or services derived from or containing them.63

The passing-on defence was already recognised in many Member States prior to implementation of the Damages Directive, but some changes to national legislation have been required, for example, to transfer the burden of proof from the claimant to the defendant (as in France) or to introduce a presumption in favour of indirect purchasers (as in Hungary and the Netherlands).

On 5 July 2018, the Commission launched a consultation on draft guidelines designed to give national courts practical guidance on how to estimate the passing-on of overcharges. The draft guidelines set out the applicable legal framework and discuss the economics of pass-on (including the economic theory and quantification methods). The consultation period closed on 4 October 2018.

X  FOLLOW-ON LITIGATION

The Damages Directive is intended to facilitate greater follow-on litigation in the Member States, as well as to ensure the optimal interaction between private and public enforcement.

To this end, the Damages Directive provides that a final decision by a Member State’s NCA (or review court) finding an infringement irrefutably establishes that infringement for the purposes of follow-on litigation in the courts of that Member State.64 An equivalent EU-level provision, preventing national courts from taking a contrary view to the Commission where the Commission has found an infringement, has been in place for some time.65

61 Article 17(3), Damages Directive.
62 Article 13, Damages Directive.
63 Article 14, Damages Directive.
64 Article 9(1), Damages Directive.

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The Damages Directive further provides that a final decision in another Member State must be taken as *prima facie* evidence by a court that an infringement occurred.\(^{66}\) It is noteworthy that some Member States have already gone further in this regard, with German law providing that a final decision by any Member State’s NCA will be treated as binding proof of an infringement before the German courts. Implementation has differed significantly across other Member States ranging from Austria (which has followed Germany in making other NCA decisions binding on national courts) to Hungary (which has taken a more restrictive approach by implementing a rebuttable presumption of an infringement in this situation). Regardless of these discrepancies, the overall effect should be to reduce the base evidentiary hurdle to establishing a breach of competition law for follow-on claimants in the EU.

As explained above, the Damages Directive also introduced changes to other key issues that affect follow-on damages, such as limitation and disclosure. The net effect has been to increase venue choice for claimants, with many jurisdictions where the private enforcement regimes were arguably underdeveloped now adopting broadly similar rules.

**XI PRIVILEGE**

The Damages Directive stipulates that Member States must ensure that national courts give full effect to applicable legal professional privilege under EU or national law when ordering the disclosure of evidence.\(^ {67}\) It is otherwise silent on the issue of privilege. There is no requirement to apply EU privilege laws,\(^ {68}\) meaning that the privilege regimes of individual Member States will be applicable to damages proceedings brought in national courts.

The rules protecting communications between a lawyer and his or her client vary considerably between Member States. Broadly, a distinction can be drawn between common law and civil law jurisdictions, with the scope of privilege generally more extensive in the former.\(^ {69}\) This stems from the fact that disclosure obligations in civil law jurisdictions were typically (prior to the implementation of the Damages Directive) much narrower than they were under common law.\(^ {70}\) This reduced the need for the protection of sensitive legal advice in such jurisdictions. Overlaying this broad distinction is a patchwork of different specific rules. For example, German law hardly recognises the concept of legal privilege at all. In Ireland, the UK, Poland, the Netherlands and Portugal, legal privilege is recognised for in-house counsel as well as external counsel. In the Netherlands and the UK, privilege is extended to communications with lawyers qualified outside the EEA.

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\(^{66}\) Article 9(2), Damages Directive.

\(^{67}\) Article 5(6), Damages Directive.

\(^{68}\) Note that under EU law, legal professional privilege is considered a limitation on the Commission’s investigatory powers and has consequently been defined narrowly. For example, the EU concept of privilege does not extend to advice given by in-house counsel.

\(^{69}\) In common law jurisdictions (such as the UK, Ireland and Cyprus), privilege will protect confidential documents or communications that have been created for the purpose of giving or obtaining legal advice or in preparation for litigation.

\(^{70}\) For example, under English common law a party is required to disclose all documents on which it relies; which adversely affect or support its or another party’s case; or that it is required to disclose by a relevant practice direction.
It will be interesting to observe whether Member States with narrower concepts of legal privilege will adapt their regimes in light of the increased disclosure obligations under the Damages Directive to provide defendants with additional protection.

XII SETTLEMENT PROCEDURES

While the Recitals to the Damages Directive emphasise that damages actions represent only one element of an effective private enforcement system (which should also involve consensual dispute resolution), the Damages Directive does not mandate any alternative dispute resolution mechanisms. Nor does it regulate settlement procedures generally. However, it did introduce three measures aimed at incentivising the use of consensual dispute resolution mechanisms and increasing their effectiveness.

First, as noted above, to provide both sides with an opportunity to engage in settlement discussions before bringing proceedings, limitation periods are required to be suspended for the duration of a consensual dispute resolution process. Likewise, if proceedings have already been issued, national courts may suspend their proceedings for up to two years to enable settlement discussions to take place.

Secondly, the Damages Directive provides that a competition authority may consider compensation paid as a result of a consensual settlement as a mitigating factor when making its decision in imposing a fine.

Thirdly, and most significantly, the Damages Directive seeks to ensure that an infringing party that pays damages through consensual dispute resolution should not be placed in a worse position in relation to its co-infringers than it would otherwise have been in absent the consensual settlement. This might be the case, for example, if a party, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement, and therefore remains open to contribution proceedings from other co-infringers. To address this, Member States are to ensure that, following a consensual settlement, the claimant’s claim is reduced by the settling co-infringer’s share of the harm (which is not necessarily the amount it has actually paid), and the claimant can only pursue its remaining claim against non-settling co-infringers. Importantly, non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer. This creates significant incentives for defendants to offer an early settlement.

Further, in addition to a class actions regime (discussed in Section VII), a number of Member States have collective settlement regimes pursuant to which groups of claims can be settled, including on an opt-out basis. For example, in the UK the collective action regime

71 Recital 5, Damages Directive.
72 Article 18(1), Damages Directive.
73 Article 18(2), Damages Directive.
74 Article 18(3), Damages Directive.
75 Article 19(1), Damages Directive.
76 According to Recital 51 of the Damages Directive, ‘the claim of the injured party should be reduced by the settling infringer’s share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party’.
77 Article 19(2), Damages Directive.
78 Article 19(2), Damages Directive.
available in the Competition Appeal Tribunal also includes an opt-out collective settlement regime. In the Netherlands, the Dutch Act on the Collective Settlement of Mass Claims similarly provides for an opt-out mechanism that facilitates collective settlement through a binding declaration from the Amsterdam Court of Appeal.

XIII ARBITRATION

Arbitration is listed among the consensual dispute resolution mechanisms that are actively promoted by the Damages Directive. 79 Although the Damages Directive does not prevent claimants from submitting damages claims to arbitration, it is silent on more specific issues such as whether (and how) to include contractual arbitration clauses in respect of competition claims.

Arbitration is still relatively rare as a means of resolving competition disputes in Europe, due in part to an inherent tension between arbitration as a private system of dispute resolution and EU competition law as a public system designed to protect consumer welfare and the integrity of the internal market. There are other more specific obstacles to the widespread adoption of arbitration in this field; for example, competition claims often involve a large number of claimants or defendants, or both, from different levels of the distribution chain, which can be problematic where each party has an independent contract with its own arbitration clause (or lack thereof).

On the other hand, both arbitration and antitrust claims invariably arise in an international context, and arbitral tribunals are accustomed to complex, multiparty cases. Further, a recent decision by the English High Court 80 to stay court proceedings so as to give effect to an arbitration clause indicates that antitrust arbitration may be becoming increasingly accepted in the sphere of private enforcement.

XIV INDEMNIFICATION AND CONTRIBUTION

The Damages Directive requires Member States to ensure that cartelists are jointly and severally liable for the full harm caused by the infringement to which they are a party, and that the claimant has the right to full compensation from each of the infringers. 81 However, in relation to immunity applicants, it provides that they should only be jointly and severally liable to their own direct and indirect purchasers, and should only be liable to other injured parties where full compensation cannot be obtained from the other infringers. 82

The Damages Directive further provides that Member States must ensure that any individual infringer can recover a contribution from co-infringers, in accordance with the relative responsibility for the harm of each co-infringer. 83 Again, a carve-out is in place to ensure that immunity applicants can only be required to contribute an amount up to the harm caused to their own direct and indirect purchasers. 84 The Damages Directive does not

79 See Recital 48, Damages Directive.
81 Article 11(1), Damages Directive.
82 Article 11(4), Damages Directive.
83 Article 11(5), Damages Directive.
84 Article 11(5), Damages Directive.
explain what is meant by relative responsibility for harm, and this will be left to Member States to decide.\textsuperscript{85} Notably, the Damages Directive does not specify a limitation period for contribution claims, meaning that this too will be a matter to be decided at a national level.

As long as they have not led an infringement,\textsuperscript{86} coerced other undertakings to participate in an infringement or previously been found to infringe competition law,\textsuperscript{87} small and medium-sized enterprises (SMEs) also gain protection from joint and several liability.\textsuperscript{88} Absent these circumstances, SMEs are liable only to their own direct and indirect purchasers provided their market share was below 5 per cent at some point during the infringement, and applying normal joint and several liability rules would irrevocably jeopardise their economic viability.\textsuperscript{89}

These changes represent a novel development for many jurisdictions, including the UK, France, Germany and the Netherlands, and could complicate the recovery process for contribution claimants.

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

A major development on the horizon is the UK’s withdrawal from the EU. At present, the UK is one of the most important jurisdictions within Europe for private enforcement actions, and claimant firms have expressed confidence that it will remain as such after the UK leaves the EU. Fundamental to whether this will be the case is the extent to which claimants will be able, post-Brexit, to rely on infringement decisions issued by the Commission as a basis for founding a follow-on claim in the UK. If the UK and EU Parliaments ratify a withdrawal agreement under the terms agreed in November 2018, which is not certain at the time of writing, the whole body of EU law will continue to apply to and in the UK until the end of the transition period (i.e., 31 December 2020, unless extended pursuant to the agreement). Accordingly, the Commission would maintain jurisdiction over investigations initiated before the end of that period and claimants would be able to rely on EU law (and the relevant Commission decisions) to initiate private antitrust proceedings before the UK courts. In contrast, if the UK and EU Parliaments do not ratify the agreement, EU law will cease to apply to and in the UK in March 2019. Practically, however, it is likely that claimants would still be able to initiate claims based on breaches of EU competition law (and rely on the relevant Commission decisions) if these claims are framed as foreign tort claims.

More generally in relation to EU law, it is only over the next few years that the effect of the Damages Directive will become clear. It seems likely at this stage that its major impact will be to increase venue choice for claimants, as jurisdictions that might not previously have been considered become more appealing to claimants.

Another area of interest is the work that the Commission is doing in relation to class actions, with various legislative proposals being discussed at both the EU and Member State levels. This may include European-wide legislative amendments, which may lead to

\begin{footnotesize}
\textsuperscript{85} Recital 37, Damages Directive does provide that relevant criteria for assessing contribution to harm will include turnover, market share or role in the cartel.

\textsuperscript{86} Article 11(3)(a), Damages Directive.

\textsuperscript{87} Article 11(3)(b), Damages Directive.

\textsuperscript{88} Article 11(2), Damages Directive.

\textsuperscript{89} Article 11(2), Damages Directive.
\end{footnotesize}
further significant changes in private enforcement. There appears to be an increased legal and commercial interest in collective proceedings, but at the time of writing it is unclear if any EU-wide changes will be imminent.  

Finally, the upward trend in private antitrust litigation activity across the EU is likely to continue and may even be further bolstered by the increased availability of direct litigation funding (including from non-traditional sources, such as private equity houses). These higher levels of activity should in turn lead to further clarification of the relevant law at both the EU and Member State levels.

90 In relation to the consumer redress legislation, it was announced on 6 December 2018 that the legislation will not be adopted before EU elections in May 2019.

91 The jurisprudence of the ECJ on private enforcement of EU antitrust law is ever-growing. In 2018, Member States requested preliminary rulings on, among other things, the question of which parties are liable for compensation of damage caused by cartel conduct (cases C-724/17 Vantaan kaupunki v. Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy) and the question of what activities amount to participation in a cartel agreement (case C-228/18 Gazdaság Versenyhivatal v. Budapest Bank Nyrt and Others).
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

On 24 May 2018, the National Congress enacted the new Antitrust Law, bringing significant changes to antitrust enforcement in Argentina.

The Antitrust Law creates a new decentralised and autarchic antitrust authority within the Executive Branch: the National Competition Authority. However, the existing double-tier system comprising the Antitrust Commission and the Secretary of Trade will remain in force until the appointment of the members of the new antitrust authority, which will include three divisions: the Antitrust Tribunal, the Anticompetitive Conduct Secretariat and the Merger Control Secretariat.

The enforcement authority’s members will be appointed by the Executive Power after a pre-selection process carried out by a qualified jury composed of the Ministry of Production, the National Treasury Procurer and members of the legislative branch, a representative of the National Academy of Law and a representative of the Argentine Association of Political Economy.

The Antitrust Tribunal will be composed of five members. The roster of the new authority will include at least two economists and two attorneys. The Tribunal will be in charge of imposing the sanctions established in the new Antitrust Law, resolving preliminary defences, deciding on the approval of mergers and carrying out market investigations that may be deemed pertinent.

For its part, the Merger Control Secretariat will have as its main objective the receiving and processing of advisory opinions and merger dockets that are filed before the authority. Furthermore, it will have the authority to decide on the approval of mergers that qualify for a fast-track review process, the requirements of which will be determined by the Antitrust Tribunal.

Finally, the Anticompetitive Conduct Secretariat will be created with the main purpose of receiving and processing investigations on anticompetitive conduct in order to give the Antitrust Tribunal recommendations regarding the sanctions that would have to be applied.

1 Miguel del Pino and Santiago del Río are partners at Marval, O’Farrell & Mairal.
2 Antitrust Law No. 27,442.
3 All references to the antitrust authority should be considered as corresponding to the double-tier structure until such authority has been set up.
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition enforcement in Argentina is based on the general tort law provisions of the Argentine Civil and Commercial Code in combination with the specific competition law provisions set out by the Antitrust Law.

Pursuant to Section 1 of the new Antitrust Law, certain acts relating to the production and exchange of goods and services are prohibited if they restrict, falsify or distort competition, or if they constitute an abuse of dominant position, and provided that, in either case, they cause or may cause harm to the general economic interest. Such behaviour or conduct is not unlawful as such, and nor must it cause actual damage: it is sufficient that the conduct is likely to cause harm to the general economic interest. It is important to emphasise that the general economic interest need only be potentially affected for the infringement to exist. Likewise, Section 2 of the new Antitrust Law sets out that certain collusive conduct is considered anticompetitive per se and harmful to the general economic interest without further analysis.

Section 3 of the Antitrust Law provides a non-exhaustive list of the practices that, provided they meet the requirements set forth under Article 1, would constitute practices forbidden by the new Antitrust Law. The list provided under Section 3 of the Antitrust Law includes the following practices:

- price fixing or resale price maintenance;
- practices that restrict or control technical development or the production of goods and services;
- practices that establish minimum quantities or the horizontal allocation of zones, markets, customers or sources of supply;
- exclusion or obstruction of one or more competitors from entering a market;
- practices that affect goods and services markets through agreements to limit or control the investigation or development of new technologies, or goods production or the provision of services; or practices that hamper investment into the production of goods or the provision of services;
- conditions that tie the sale of goods to the purchase of other goods or to the use of a service, and conditions that tie the provision of a service to the use of another service or the purchase of goods;
- conditions that tie a purchase or sale to an undertaking not to use, purchase, sell or supply goods or services produced, processed, distributed or commercially exploited by third parties;
- imposition of discriminatory conditions for the purchase or sale of goods or services not based upon existing commercial practices;
- unwarranted refusal to fulfil purchase or sale orders of goods or services submitted in existing market conditions;
- suspension of the provision of a dominant monopolistic service in the market to a provider of public services or services that are of public interest;
- predatory pricing; and
- the simultaneous participation of a person in relevant management positions in two or more companies that are competitors.

Pursuant to Section 62 of the Antitrust Law, any individual or legal entity suffering damage from any conduct or act prohibited under the Antitrust Law has the right to file a private action for damages in accordance with the civil law provisions.
Damages can be requested pursuant to the provisions set forth in Article 1716 of the Civil and Commercial Code, which states that a violation of the duty of not causing damage to another person gives rise to compensation for such damage. Those actions are ruled by the Civil and Commercial Code and must be filed before the competent courts within the jurisdiction of the defendant's domicile. The basic rule derived from the provision is that whoever causes damage intentionally or due to negligence is liable to the damaged party.

In relation to the applicable statute of limitations, the new Antitrust Law puts an end to the historic debate regarding which legislation applies. It sets out that the prescription term of five years applies, commencing from the generation of the harm itself. For cases of ongoing conduct, the term is deemed to commence as of the moment the anticompetitive conduct under analysis concludes.

The new Antitrust Law sets out the applicable statute of limitations for damages as follows: a three-year term that commences on the date the conduct takes place or finishes, or when the victim becomes aware or could reasonably have become aware of said conduct; or a two-year term from the issuance of the Antitrust Authority's condemnatory resolution.

In addition, the Antitrust Law determines that the action's limitation period will be interrupted by:

- the filing of the claim;
- the performance of another action sanctioned by the Antitrust Law;
- the submission of a request for the application of the leniency programme or a reduction of the fine;
- the transfer of the claim regarding the performance of anticompetitive conduct; or
- indictment for anticompetitive conduct.

Furthermore, the action's limitation periods will be suspended once the Antitrust Authority initiates the investigation or the procedure to determine the existence of an anticompetitive conduct, and will remain so until a final decision of the Antitrust Authority is confirmed by the courts.

One of the most important changes introduced by the new Antitrust Law is a new chapter devoted to damages, which includes several changes to the current system.

Section 63 of the new Antitrust Law sets out that once a resolution is issued by the Antitrust Authority, follow-on damages litigation will be carried out by means of an executive summary proceeding (namely, the most rapid of all proceedings in Argentine procedural law) and that the court will base its decision on the Antitrust Authority's decision. In addition to damages, Section 64 sets out that a civil fine in favour of the injured party may also be granted, depending on the gravity and circumstances of the case. Where more than one person or company has carried out the action, they will all be jointly liable for the payment of the damages or fines, as per Section 65.

Furthermore, a specific provision (Section 65) regulates the scenario posed with regard to leniency applicants, in the sense that they ‘may be exempted or their liability reduced’ as regards damages and fines as set out in that very specific chapter. The very same section sets out an exemption to said rule for the following cases: as regards its direct or indirect buyers or suppliers; and any other injured parties only when the full reparation of the damages of the conduct could not be obtained from the other companies involved in the same anticompetitive conduct.
III  EXTRATERRITORIALITY

Pursuant to Section 4 of the Antitrust Law, all of its provisions are applicable to all individuals and entities that carry out business activities within Argentina, and those that carry out business activities abroad to the extent that their acts, activities or agreements may affect the Argentine market (known as the effects theory). Therefore, if a company carries out business activities abroad and such activities have effects in the Argentine market, the Antitrust Law may be applied.

While there are no specific precedents regarding extraterritorial private antitrust litigation, analysis of the effects in merger control cases could be used as a guideline.

In that regard, the Antitrust Commission has established a special test to measure the effects that the parties to a foreign-to-foreign transaction have in Argentina. This test may be applied only if the parties involved in the foreign-to-foreign transaction have sales or imports into Argentina. According to this test, the effects in the local market of a foreign-to-foreign transaction must be substantial, normal and regular, but there is no precise rule to determine such matter. The Antitrust Commission has decided several cases based on the market participation of the products imported by the parties of a foreign-to-foreign transaction, and the regularity of the imports over a certain period of time (the immediately preceding three years). The effects have been considered substantial if the exports into Argentina represent a significant percentage of the total relevant market in Argentina of that specific product. The effects are regular and normal if the imports have been constant during the preceding three years. However, the matter must be analysed on a case-by-case basis.

Applied to anticompetitive practices, those acts carried out abroad, but with substantial, normal and regular effects in Argentina, could be investigated and punished by the Antitrust Law.

IV  STANDING

According to Argentine civil legislation, any person who has suffered damage arising from anticompetitive practices prohibited by the Antitrust Law is entitled to file a suit for damages before the competent court.

To be entitled to file a suit for damages arising from anticompetitive practices, the prior intervention of the Antitrust Commission is not necessary; the Antitrust Commission is not part of the proceedings generated by the private action unless expressly requested by the court. If, however, the Antitrust Commission has investigated the anticompetitive practice and issued an opinion, courts have relied on the findings of the regulator, and have only focused on the link between the already proven conduct and the claim for damages rather than retracing the investigation.

Pursuant to Section 43 of the Argentine Constitution, class actions may be submitted by the affected person, the ombudsman and associations authorised by law.

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V THE PROCESS OF DISCOVERY

In the current civil Argentine procedure, there is no preliminary stage. Thus, a claimant cannot request from a counterparty information related to facts that are essential to develop the purpose and characteristics of his or her claim, or to develop his or her strategy and defence. As such, parties are under no obligation to produce documents other than those upon which they wish to rely. It is in the court’s sole discretion to admit or reject the production of any evidence, including documents of any nature.

Sections 325 and 326 of the Argentine Civil and Commercial Procedural Code provide that in certain cases, those who are or will be part of a discovery process, and who have reasonable grounds to believe that the production of their evidence during the evidence period may be impossible or very difficult, may request the production of the following evidence:

- witness testimonies of an old or sick person, or a person who is going to be absent from the country;
- an expert report to register the existence of documents, and the state, quality or condition of goods or places;
- reports from public entities or private individuals or companies; or
- the exhibition, protection or seizure of documentation related to the purpose of the trial.

Without reasonable justification for not doing so, evidence must be produced before the judge during a trial. Parties must produce all relevant documentary evidence upon submitting their claim or their answer, and a list of specific documents that they want to have the court order produced from the opposing party or from a third party. They must also indicate all other means of evidence they intend to rely upon.

The evidentiary stage has two well-defined phases. The first phase consists of a hearing of the parties before the judge, where the latter invites the parties to conciliate. If parties cannot settle the matters in dispute, the judge must define the questions of fact that are relevant to the adjudication of the parties’ claims and on which evidence will be produced. The judge must then receive the objections of the parties to the evidence that the other party intends to rely on. The second phase consists of the production of the relevant evidence.

The Argentine Civil and Commercial Procedural Code identifies and regulates in detail the types of admissible evidence, which includes the following: documents, reports, interviews with the parties, testimonies of witnesses, experts’ reports and judicial inspection. The Argentine Civil and Commercial Procedural Code also provides rules to deal with evidence appearing after the evidence period has expired.

The procedure for the discovery of documents is unfamiliar to the Argentine legal system. Parties are under no obligation to produce documents other than those upon which they wish to rely. However, a party may request from its opponent (or a third party) the submission of one or more specifically identified documents that are relevant to the resolution of the dispute.

The burden of evidence lies on the party that asserts the existence of a controverted fact which that party raises as the basis for its claim or defence. However, Section 1735 of the Argentine Civil and Commercial Code states that the court may modify this principle to impose the burden on the party in the best position to produce such evidence.

As noted above, the new Antitrust Law introduces a leniency programme for the first time and provides an important disposition for leniency applicants. It sets out that the identity
of applicants will remain confidential, as well as their depositions or any other information provided in the course of an ongoing investigation conducted by the Antitrust Authority. This confidentiality is of great importance, especially given that judges who intervene in any follow-on litigation regarding an antitrust offence will not be able to unveil the identity of the applicants or require the evidence provided by them during the course of the administrative investigation.

VI USE OF EXPERTS

The use of experts’ reports is among the types of admissible evidence regulated by the Argentine Civil and Commercial Procedural Code.

Parties may request that the court appoint an expert. Additionally, courts may appoint experts even when the parties have not requested the assistance of an expert. Experts must provide their opinion on the questions put to them by the courts. In practice, each party prepares a list of the questions they want the expert to answer, then the court reviews these questions and puts them to the expert. The judge may, however, decide to change the questions, eliminate some or all of them, or add further questions. Once the expert has produced his or her report, the parties are given the opportunity to question all or parts of the report. Parties may also be assisted by party-appointed experts.

VII CLASS ACTIONS

Pursuant to Section 43 of the Constitution, the affected person, ombudsman and associations authorised by law are entitled to file a class action.

Considering the lack of a law regulating this kind of action, the Argentine Supreme Court,5 in a leading case in this matter, held that there are three categories of rights: individual rights, rights with a collective impact that concern collective assets, and rights with a collective impact that concern individual but homogeneous assets.

This third category – rights with a collective impact that concern individual but homogeneous assets – is constituted by personal or property damage resulting from conduct that damages the environment or competition, or the rights of users and consumers and those of discriminated persons, consisting of a single or continuous act that cause harm to all the members of the group.

The Argentine Supreme Court further identified the requirements that must be met to bring a collective action: the existence of a common factual cause that causes injury to a significant number of individual rights; the claim must be focused on the collective effects of such cause and not on what each individual might seek; and a demonstration that individual actions are not justified, which could affect access to justice.

However, even in the presence of typically individual rights, class actions will also be available when there is a strong state interest in their protection, whether this is because of their social relevance or because of the special features of the affected parties.

One of the most renowned cases regarding cartels in Argentina has been the Cement case,6 in which six major cement-producing companies were accused of agreeing to allocate

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5 Case Halabi, Ernesto c/ PEN - Ley 25.873 - Dto 1563/04 s/ Amparo Ley 16.986.
markets nationwide for almost 20 years. The Antitrust Commission’s investigation began in 1999, when a disgruntled employee supposedly revealed to a newspaper that the cement companies were exchanging information and agreeing to divide the market. While the source of the article was never revealed, it was used as a starting point for the Antitrust Commission’s investigation. According to the findings of the Antitrust Commission, the alleged exchange of confidential detailed market information was performed via the Association of Portland Cement Manufacturers (APCM). After a raid on the APCM premises, the Antitrust Commission found records of real-time software that was used to exchange current commercial records of the cement companies.

This finding, as well as evidence of meetings in hotels between representatives of four of the companies, led the Antitrust Commission to discover the existence of a cartel that exchanged confidential and sensitive information about the cement market and that fixed prices in some areas. The fine imposed on 25 July 2005 by the Antitrust Commission and the Secretary of Trade totalled 309,729,289 Argentine pesos and was confirmed by the Argentine Supreme Court in August 2013.

Based on this anticompetitive conduct, the Consumer Protection Association of Mercosur, a consumer association, filed a class action against the cement companies for the damage caused by the cartel. The Association claimed to represent a global class that primarily involved all the consumers, another class that involved all indirect consumers, and finally a sub-class of indirect consumers that involved all persons that had acquired new or recently built buildings, or that had requested a third party (e.g., architects, engineers or building contractors) to construct a building or structure using cement.

The Argentine Supreme Court considered that the initiators of a collective process must provide an objective, certain and easily verifiable definition of the class they wanted to represent. The members of the class should be effectively identified so as to facilitate the Court checking the existence of the relevant class as well as determining who its members are. Furthermore, the plaintiff must present the reasons for which the denial of the class action would affect the rights of the represented class.

In the consumer association action, the Argentine Supreme Court considered these requirements not fulfilled by the consumer association, and the suit was dismissed.

VIII CALCULATING DAMAGES

The affected parties of illegal conduct under the Antitrust Law may request three types of damages compensation that are not mutually exclusive: actual damages, recovery for loss of goodwill and moral hardship.

If the injured party can prove that the damage arose from an offence against it and from conduct expressly prohibited by law, then the victim can claim for compensation for actual injuries. The injured party is entitled to claim for actual profits during a given preceding period to be taken for the calculation of the average or normal profit of the injured

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7 Id.
8 Id.
9 Id.
10 Argentine Supreme Court of Justice, Asociación Protección Consumidores del Mercado Común del Sur el Loma Negra Cía Industrial Argentina S.A y otros dated 10 February 2015.
party. Once the court has determined the monthly or yearly average profit, this figure will be projected over a period to be determined by the court (e.g., six months or one year). The length of time will depend on the specific case and lies within the discretion of the court.

Furthermore, recovery for loss of goodwill can also be requested. Success in obtaining this type of compensation will more likely depend on whether the injured party has suffered an injury to its commercial prestige or credibility. In assessing the damages, a variety of circumstances should be considered such as, \textit{inter alia}, the nature of the business, the quantity and importance of the injured party’s clients, its prestige and experience in the market, and the volume of gross sales.

Finally, other possible damages could be those related to moral hardship, pursuant to which the injured party can recover additional compensation on the grounds that the unlawful conduct has substantial emotional disturbance.

\textbf{IX \ PASS-ON DEFENCES}

Although the Antitrust Law does not expressly regulate the existence of pass-on defences, the matter has been analysed by the courts. In that regard, when analysing \textit{Autogas/YPF} (analysed in depth in Section X), the appellate court contemplated the pass-on defences invoked by the accused party and only accepted 30 per cent of the alleged damages regarding that specific matter, since it considered that the remainder had been borne by the final customers.

\textbf{X \ FOLLOW-ON LITIGATION}

Even though civil claims regarding antitrust matters can be filed without a prior administrative procedure before the Antitrust Commission, in those cases where the regulator has already analysed the matter, the resolution issued by the Antitrust Commission could have \textit{res judicata} effect regarding the conduct. This resolution would be used as a basis for the civil court’s decision and as evidence for the parties.

The most relevant precedent for a private party seeking damage compensation results from an anticompetitive behaviour previously investigated and punished by the Antitrust Commission. Such was the situation in \textit{YPF/Autogas}.\textsuperscript{11} The original conduct investigated by the Antitrust Commission was the practice of exporting a large amount of liquid petroleum gas (LPG) at prices that were lower than those charged for LPG in Argentina by YPF, the national gas company, which was controlled by private funds at the time of the alleged wrongful conduct. Further, YPF’s export contracts prohibited the re-importing of LPG into Argentina. The Antitrust Commission concluded that this conduct was harmful to the general economic interest, and ordered YPF to cease its price discrimination between the domestic and export markets and to eliminate the prohibition on the re-importing of LPG. Additionally, it imposed a fine of 109.644 million Argentine pesos on YPF. The decision was upheld by the Argentine Supreme Court.

Based on this case, a private company claimed that it had been affected by YPF’s anticompetitive conduct. Auto Gas based its claim on the abuse of dominant position of YPF having had a twofold effect: an undue increase in prices and a diminishment in the quantities of LPG that were commercialised by Auto Gas. When analysing the case, the court left in

\textsuperscript{11} Argentine Supreme Court of Justice on 11 October 2018, \textit{Auto Gas SA c/ YPF SA y otro s/ ordinario}.
record that it would not analyse YPF’s anticompetitive conduct, since that had already been analysed and sanctioned by the Antitrust Commission and ratified by the Argentine Supreme Court. Thus, it considered that the existence of the conduct had already been proved, as well as the fact that it had been performed by means of deceit. The analysis was therefore focused on whether there had been damage to Auto Gas and whether it had been caused by the already proven act performed by YPF. Regarding the damage caused by the abuse of dominant position, Auto Gas considered that it consisted of two items.

The first was the difference in prices that Auto Gas had to pay between the LPG’s local price and the price that had been set up for the exporting of the product. On this point, the court took into account what it had been informed by the Antitrust Commission regarding whether such increase in prices had been transferred to the final price paid by the consumers. Thus, the parties who would have been harmed by YPF’s conduct would not have been the LPG distributors, but the final customers, who had to endure the price increase. After analysing the financial expert witness reports, the court decided to accept 30 per cent of the claim.

Second, within the abuse of dominant position was the loss of profits from the reduction in the amount of LPG that was commercialised by Auto Gas, due to YPF’s practices. The court took into account the analysis performed by the financial expert witnesses regarding the financial records of the company, which showed that this loss of profit rose to 15 per cent of the requested amount due to the relationship between the cost of the product and the financial cost for its commercialisation. The court also analysed other types of damage, such as damage that stemmed from the breach of contract or that originated from the alleged supply cut performed by YPF on Auto Gas.

As a result of this analysis, Auto Gas was awarded 13,094,457 Argentine pesos.

XI PRIVILEGES

Section 13 of Regulatory Decree No. 480/2018 provides that a party may request the confidentiality of information submitted in a proceeding when its disclosure may cause damage to that party’s interest. Although this provision is primarily applicable to the merger review process, the enforcement authority may apply it within claims or investigations carried out by the Antitrust Commission to safeguard commercial secrets of the involved parties.

When a private claim is filed before the courts and the opinion of the Antitrust Commission is used, it should not contain sensitive information, and parties can request confidentiality if any trade secret or other confidential information is disclosed in the opinion. The request should provide the reasons, and a non-confidential version of the submitted information should be included. Likewise, all the dockets pending before the Antitrust Commission are secret, and only the parties can access them.

Finally, and pursuant to Section 6 of Law No. 23,187, it is a specific obligation of lawyers to preserve the attorney–client privilege unless otherwise authorised by the interested party (i.e., the client). Likewise, Section 7 provides that it is a right of the lawyers to keep confidential information protected under attorney–client privilege. Furthermore, Section 444 of the Argentine Civil and Commercial Procedural Code provides that a witness may refuse to answer a question if such answer would entail revealing information protected under a professional secret (i.e., including attorney–client privilege).
XII SETTLEMENT PROCEDURES

Under Argentine Law No. 26,589, pre-judicial mediation proceedings are mandatory for disputes of an economic nature (unless otherwise exempted by this Law, such as criminal or family claims) as a prerequisite for having access to the courts. Mediation purports to settle disputes out of court by means of direct communication between the parties, assisted by a neutral third party (mediator), with the aim of the parties reaching a mutually beneficial settlement. A settlement in mediation has res judicata effect (claim preclusion). If no agreement is reached, the mediator will formally close the mediation proceedings and the claimant will then be able to pursue its case before the courts.

Pursuant to Section 360 of the Argentine Civil and Commercial Procedural Code, before the beginning of the evidence period the judge invites the parties to settle. The judge can order the parties to go to mediation if the circumstances of the case justify it. If the parties cannot settle the matters in dispute, the trial continues.

Furthermore, parties are able to settle the matters in dispute at any time during the procedure. That settlement must be homologated by the judge.

XIII ARBITRATION

On 4 July 2018, the National Congress enacted the International Commercial Arbitration Law, creating for the first time a legal framework for the resolution of international commercial conflicts in Argentina by means of a specific law. The Law adopts the main principles set out in the comparative legislation that regulates this matter. Therefore, the application of the Law will be limited to international commercial arbitrations that are seated within the Argentine territory, while domestic arbitrations will continue to be regulated by the local procedural rules: the Argentine Civil and the Commercial Procedural Code, which has been in force since 2015.

However, arbitration remains a rarely used method of dispute resolution in private antitrust litigation in Argentina, and it remains to be seen how arbitrators will apply antitrust proceedings.

XIV INDEMNIFICATION AND CONTRIBUTION

In principle, the injured party is only able to request full compensation from the party that causes the damage by means of an anticompetitive practice. The link between the damage and the anticompetitive practice must be proved for compensation to be granted.

Despite the lack of precedent regarding joint and several liability in Argentina regarding antitrust matters, pursuant to civil general principles, if the Antitrust Commission or the courts determine that several persons have jointly caused damage, they would be jointly and severally liable for damage to the injured party, and the latter would be enabled to assert a claim against one or all of the defendants.

However, as detailed in Section II, under the new Antitrust Law, all responsible companies will be jointly liable for the payment of the damages or fines, pursuant Section 65. Furthermore, in addition to said damages, Section 64 sets out that a civil fine in favour of the injured party may also be granted, depending on the gravity and circumstances of the case.

12 Section 827 et seq. and Section 1751 of the Civil and Commercial Code.
Specifically referring to joint responsibility, Section 65 of the new Antitrust Law also regulates the scenario posed as regards leniency applicants, setting out that they ‘may be exempted or their liability reduced’ as regards damages and fines. The exemption or reduction would depend on the degree of the overall type of leniency or immunity granted to the company. The same section sets out an exemption to said rule, maintaining that company’s liability to its direct or indirect buyers or suppliers, and to any other injured parties, only when the full reparation of the damages of the conduct could not be obtained from the other companies involved in the same anticompetitive conduct.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Antitrust Commission has published for the first time a draft version of the Guidelines for the Analysis of Cases of Abuse of Dominance for public consultation. The Guidelines are expected to be issued in the near future.\(^{13}\)

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

A year has passed since the legislative framework supporting private antitrust enforcement rights in Australia underwent significant reform. As part of the reform, the Competition and Consumer Act (CCA) was amended to simplify provisions relating to the misuse of market power and cartel conduct, introduce a new prohibition on corporations engaging in concerted practices, and amend Section 83 of the CCA to allow any finding of fact made by a court in an earlier proceeding, or any admission of fact made by a party in an earlier proceeding, to be used as prima facie evidence in subsequent proceedings. Notably, the latter amendments have the potential to positively impact the ease with which class actions might be pursued following a regulatory enforcement action. Notwithstanding this, the effects of these reforms remain to be seen, as the amended legislation has yet to be tested by the courts. However, it is expected that the reforms will open up sectors of the economy to increased competition and potentially increase follow-on private antitrust litigation as a result.

The only private antitrust litigation commenced in the Federal Court of Australia in 2018 was Unlockd v. Google. Unlockd, an Australian tech start-up that provides an online advertising publication service for Android mobile devices, commenced proceedings against Google seeking an injunction preventing Google from withdrawing Unlockd’s services from the Google Play Store and terminating the supply of Google’s AdMob service to Unlockd globally. The litigation was anticipated to be the test case for the new misuse of market power provision that was amended as part of the 2017 reforms, and a significant case in terms of private antitrust litigation in Australia. However, in October 2018, Unlockd discontinued the proceedings, reportedly on the basis that it was unable to secure funding to pursue Google.

The fact the Unlockd proceedings may have been discontinued for the reason reported highlights a key barrier to private antitrust litigation in Australia: cost. However the fact the proceedings were commenced may also be a sign of things to come, given the increasing market power of digital platforms such as Google and Facebook and the dynamic nature of the technology sector, meaning that companies such as Unlockd may not be able to necessarily rely on regulatory action to resolve antitrust-related disputes with competitors, as is often the case in Australia.

Despite this, the increasing market power of digital platforms has recently caught the attention of the Australian Competition and Consumer Commission (ACCC), which has launched an inquiry into digital platforms focusing on the effects of digital search engines,
social media platforms and other digital platforms on competition in the media and advertising markets. The inquiry’s preliminary report was handed down on 10 December 2018, and identifies concerns regarding the ability and incentive of key digital platforms to favour their own business interests through their market power and presence across multiple markets. The report finds that Facebook and Google have substantial market power in various markets (Google in the supply of online searching in Australia, online search advertising and news media referral services; and Facebook in the markets for social media services and display advertising, and in the supply of news media referral services). The inquiry’s final report is due in June 2019, and may foreshadow increased regulatory action against digital platforms, changes to legislation, or both.

Another major focus of the ACCC continues to be cartel conduct. In July 2018, the ACCC commenced its first gum jumping case against Cryosite Limited, which provides cord blood and tissue banking services in Australia, for allegedly coordinating its business activities with Cell Care Australia Pty Ltd prior to obtaining regulatory approval for a merger between the two companies. There have also been three more criminal prosecutions under Australia’s criminal cartel regime following the first conviction under the regime last year. This includes a high-profile prosecution against a series of major banks (ANZ, Deutsche Bank and Citigroup) and senior bank executives. In addition, the ACCC secured the highest-ever civil penalty under the CCA after the Federal Court of Australia ordered that the Yazaki Corporation pay A$46 million for cartel conduct. There is yet to be any private antitrust follow-on litigation from the ACCC’s recent focus on public cartel enforcement; however, commentators continue to speculate that it is increasingly likely that such litigation will arise.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The CCA, together with the Federal Court Act, provides the legislative framework for private antitrust litigation in Australia. Part IV of the CCA prohibits a broad range of anticompetitive conduct, including cartel conduct, exclusive dealing and concerted practices, misuse of market power, and anticompetitive mergers and acquisitions. Any person who has suffered loss or damage, or is likely to suffer loss or damage, as a result of a breach of the prohibitions on anticompetitive conduct under the CCA can bring proceedings to recover that loss or damage under Section 82 of the CCA, or seek compensation or other orders to limit the loss or damage suffered or likely to be suffered as a result of the conduct: for example, an order declaring the whole or part of a contract to be void. Private litigants can also seek injunctions in relation to a breach or proposed breach of the prohibitions on anticompetitive conduct, other than the prohibition on anticompetitive mergers and acquisitions (which can only be sought by the ACCC). An action for damages or compensation or other orders may be commenced at any time within six years after the day on which the cause of action that relates to the conduct accrued.

Under Section 86(1) of the CCA, the Federal Court of Australia has jurisdiction to hear all civil proceedings arising under the CCA. Under Section 163 of the CCA, the Federal Court also has jurisdiction to hear prosecutions for criminal offences under the CCA. The Federal Circuit Court has jurisdiction to hear misuse of market power cases and matters arising under industry codes registered under the CCA, but cannot make an award for

3 Federal Court of Australia Act 1976 (Cth).
damages greater than A$750,000 under Section 86AA of the CCA. Private enforcement proceedings commenced or heard in the federal courts are subject to the Federal Court Rules 2011 (Federal Court Rules). The CCA also confers limited jurisdiction for private antitrust enforcement on the several courts of Australian states, although in practice claims under the CCA are more commonly pursued in the Federal Court.

While a framework exists for private enforcement actions, including by making use of provisions in the CCA that allow for follow-on proceedings (discussed further in Section X), such private enforcement actions are not common in Australia. This is likely due to the difficulties in assessing damage suffered as a result of anticompetitive conduct, the high cost of conducting proceedings in the Federal Court and potentially a lack of effective compensation mechanisms such as treble damages, which in other jurisdictions are perceived to create greater incentives for private litigation.

III  EXTRATERRITORIALITY

The CCA contains a number of provisions that extend the prohibitions on anticompetitive conduct beyond Australia's borders. Section 5(1) of the CCA extends the application of the prohibitions in Part IV of the CCA to conduct engaged in and outside Australia by bodies corporate incorporated or carrying on business in Australia, and by Australian citizens or persons ordinarily resident in Australia. Similarly, prohibitions on exclusive dealing and resale price maintenance are extended to any person outside Australia if that person is supplying goods or services to persons in Australia. Additionally, the misuse of market power prohibitions in the CCA are extended by virtue of Section 5(1A) of the CCA to New Zealand citizens, residents, bodies corporate and corporations carrying on business in New Zealand.

The extraterritorial effect of the CCA's prohibitions against cartel conduct and the extraterritoriality provisions set out in Section 5 of the CCA were examined in *Norcast SárL v. Bradken Limited*, where the court found that cartel conduct in the form of bid rigging did not need to occur in Australia or relate to an Australian market for the court to have jurisdiction over the conduct in question. In that case, it was sufficient that the corporations involved in the bid rigging had practical links to Australia and that one of the participants was an Australian corporation. However, the application of the *Norcast* decision will likely be called into question in future cases brought under the new cartel conduct provisions on account of the new requirement that the conduct has an effect on trade or commerce within, to or from Australia.

Section 5 of the CCA was amended last year so that private parties are no longer required to seek ministerial consent before relying on extraterritorial conduct in private competition law actions. The amendment removed a potentially cumbersome roadblock to private litigants when seeking redress for harm suffered as a result of a contravention of the CCA.

IV  STANDING

The CCA permits a person (including a corporation) to seek damages, declarations that all or part of a contract is void, divestitures and other remedies if he or she has suffered

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4 *Norcast SárL v. Bradken Limited (No. 2) [2013] FCA 235.*
loss or damage, or is likely to suffer loss or damage, as a result of conduct committed in contravention of Part IV of the CCA. Any person can seek an injunction in relation to a contravention or proposed contravention of Part IV of the CCA, other than in relation to a breach of the prohibition on anticompetitive mergers and acquisitions.

In relation to representative proceedings (also known as class actions), a person will have standing to commence proceedings as a representative applicant under the Federal Court Act where the person has sufficient interest to bring an action on his or her own behalf.

V THE PROCESS OF DISCOVERY

There are a range of processes for obtaining access to documents from opposing parties and non-parties in private enforcement actions in Australia.

Prior to commencing proceedings, a person can seek preliminary discovery to ascertain the identity or whereabouts of a prospective defendant or, more commonly in private competition enforcement actions, to determine whether to commence proceedings against a prospective defendant. To obtain preliminary discovery, the person must first make an application to the court. The court will only make an order for preliminary discovery to determine whether to commence proceedings if each of the following matters is satisfied:

a. the person reasonably believes that he or she may have the right to obtain relief from a prospective defendant;
b. the person has made reasonable inquiries but does not have sufficient information to decide whether to commence proceedings;
c. the prospective defendant is likely to have documents that are directly relevant to the question of whether the person has the right to obtain relief from the prospective defendant; and
d. the documents will assist with making the decision as to whether to bring proceedings.

In Australia, there is no automatic right to discovery once proceedings have commenced. Rather, a party who wishes to obtain discovery from another party to the proceedings must first make an application to the court for an order that another party to the proceedings give discovery. A party to proceedings in the Federal Court must not apply for an order for discovery unless it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. In addition to discovery, parties to proceedings can also obtain specific documents from opposing parties without a court order by issuing a notice to produce. Notices to produce are more limited in scope than discovery.

A party to proceedings can also obtain documents from non-parties by seeking an order for non-party discovery or seeking leave from the court to issue a subpoena to produce documents. A party can also seek leave to issue a subpoena to a non-party requiring that person to attend court to give evidence.

However, there are limitations on the ability of a private litigant to obtain documents from the ACCC in proceedings to which the ACCC is not a party. In July 2009, the CCA was amended to enhance the protection afforded to information given in confidence to the ACCC that relates to a breach, or possible breach, of a cartel prohibition (protected cartel

5 Federal Court Rules, Rule 20.11.
information). As a result of the amendments, the ACCC is not required to produce to a court or tribunal, or to give discovery or produce to a person, a document containing protected cartel information, or to disclose protected cartel information to a court or tribunal, except by leave of the court or tribunal.

VI USE OF EXPERTS

Expert evidence is commonly used in private competition enforcement actions in Australia. An expert may be appointed by the court to inquire into and report on any question or facts relevant to any question arising in a proceeding, or a party to a proceeding may call an expert to give expert evidence at a trial. The procedural rules vary depending on whether the expert is a court-appointed expert or an expert called by a party to the proceedings. In both cases, however, the expert is required to prepare a report outlining his or her opinion on the particular questions that he or she has been asked to opine on. The expert may then be required to give oral evidence at the hearing.

The role of an expert is to assist the court on matters relevant to his or her area of expertise. An expert’s paramount duty is to the court and not to the person who has retained him or her. Accordingly, experts appointed by parties to the proceedings are required to adhere to strict guidelines in the provision of their evidence, including in relation to the form of their report.

In Australia, it is common in antitrust enforcement actions involving multiple competing expert witnesses for expert evidence to be presented concurrently, otherwise known as a hot tubbing. This practice involves calling all of the experts to give evidence at the trial concurrently. Each expert presents his or her opinion, and then each other expert is given an opportunity to respond. The judge will also ask questions of the experts, and cross-examination of the experts by the parties may be permitted.

VII CLASS ACTIONS

In Australia, representative proceedings (or class actions) are governed by Part IVA of the Federal Court Act. To commence a representative proceeding in Australia, the following requirements must be met: there must be at least seven persons who have claims against the same person or persons; the claims of all these persons must arise out of the same, similar or related circumstances; and the claims of all these persons must give rise to a substantial common issue of law or fact.

Generally, there is no requirement for a person to give consent to be a group member of a representative proceeding, and the courts operate on an opt-out basis (i.e., the courts will fix a date by which group members of a representative proceeding can opt out of the representative action by giving notice in writing). In Australia, the representative applicant bears the costs burden in the proceedings. Group members are not required to contribute to the costs of the proceedings or to any costs orders made against the representative applicant in the proceedings. Accordingly, there is often very little incentive for group members to opt out of representative proceedings in Australia.

6 Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008, Explanatory Memorandum, 87, [7.1].
7 See, for example, Federal Court of Australia, Practice Note GPN-EXPT.

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Once a representative proceeding has been commenced, it is subject to strict supervision by the court, and it cannot be settled or discontinued without the court's approval. In addition, a representative applicant is unable to withdraw as the representative applicant without the leave of the court. This limits the parties' flexibility in terms of alternative dispute resolution (ADR) processes and can hinder settlement efforts. Further information on the settlement processes for representative proceedings is set out in Section XII.

VIII CALCULATING DAMAGES

Punitive and exemplary damages are not available as remedies for private enforcement actions in Australia. Rather, damages are assessed on compensatory principles. Defendants are jointly and severally liable (i.e., each person involved in the contravention that led to the litigant’s loss and damage is jointly and severally liable for that loss). Defendants may seek to join additional defendants involved in a contravention to the proceedings. Damages and compensation orders available under Sections 82 and 87 of the CCA are limited to only the actual amount of loss or damage suffered by the litigant from the contravention of the CCA. This is consistent with the general Australian approach of using damages and other forms of monetary compensation to restore a litigant to the position he or she would have enjoyed had the contravening conduct or breach not occurred. Therefore, when assessing damages in private antitrust enforcement actions, the courts do not consider any fines imposed on the respondent as part of public enforcement action taken by the ACCC.

If a court has ordered a defendant to pay a pecuniary penalty as a result of enforcement action by the ACCC and has also made a compensation order as a result of a private enforcement action, and the defendant lacks the financial resources to pay both, the court is required to give preference to the compensation order as required by Section 79B of the CCA. There is also a rebuttable presumption under Section 51A of the Federal Court Act that interest is payable on actions to recover any money (including any debt or damages or the value of goods) at such rates as the court considers fit.

IX PASS-ON DEFENCES

There is no established pass-on defence in Australia. The current relevance of passing on in Australia is limited to the assessment of damages under Section 82 of the CCA. As noted above, Australia's damages regime is intended to compensate for actual loss or damage suffered. Damage awards may be reduced (or not awarded at all) if an individual has passed on some or all of that loss or damage to subsequent purchasers.

X FOLLOW-ON LITIGATION

There are currently no limitations on follow-on claims for private actions against parties who have been subject to public enforcement action. While the ACCC has an immunity policy for self-reporting cartelists that can grant immunity from criminal prosecution and ACCC-initiated civil proceedings for cartel conduct, this immunity cannot be granted in respect of private enforcement actions for the same cartel behaviour.
As discussed in Section I, under Section 83 of the CCA, findings of fact and admissions made in earlier proceedings, including proceedings brought for contraventions of cartel conduct prohibitions, are *prima facie* evidence of those facts or admissions in later proceedings for damages or compensation orders. This now extends to allow admissions of fact made by a party in the earlier proceeding to be used as *prima facie* evidence of those facts in later proceedings. A corollary of this development is that it may adversely impact the ACCC’s ability to resolve enforcement proceedings with private parties by consent, given that a consent-based outcome would not avoid the risk of admissions being relied upon in follow-on claims.

There have been limited recent follow-on proceedings in Australia in respect of cartel conduct. Follow-on proceedings that have been pursued and settled in the past 10 years include a cardboard packaging cartel,8 a rubber chemicals cartel9 and an air cargo cartel.10

XI PRIVILEGES

Australian courts recognise legal professional privilege. A party to a private competition enforcement action will not be required to produce a privileged document to another party through compulsory court processes. A person is also not required to produce any document that would disclose information that is the subject of legal professional privilege to the ACCC during an investigation.

In Australia, there are two types of legal professional privilege: legal advice privilege and litigation privilege. Legal advice privilege extends to confidential communications between a lawyer and his or her client, or the contents of a confidential document prepared by the client, lawyer or another person, for the dominant purpose of the lawyer providing legal advice to the client. Litigation privilege extends to a confidential communication between the client and another person, or between a lawyer acting for the client and another person; and the contents of a confidential document that was prepared for the dominant purpose of the client being provided with professional legal services in actual or anticipated legal proceedings.

XII SETTLEMENT PROCEDURES

Under Division 28.1 of the Federal Court Rules, the parties must consider options for ADR, including mediation, as soon as reasonably practicable. Prior to commencing proceedings in the Federal Court, parties must file a ‘genuine steps statement’ where the parties outline the steps that have been taken to resolve the dispute, and, if no steps have been taken, why this is the case.11

If the parties consider that ADR is appropriate, an application may be made to the court seeking an order that the proceeding or relevant part of the proceeding be referred to

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8 Jarra Creek Centra Packing Shed Pty Ltd v. Amcor Ltd.
9 Wright Rubber Products Pty Ltd v. Bayer AG [No 3].
10 De Brett Seafood Pty Ltd v. Qantas Airways Ltd.
11 Section 6 of the Civil Dispute Resolution Act 2011 (Cth).
an arbitrator, mediator or suitable person, and that the proceedings be adjourned or stayed until that process concludes or is terminated. The Federal Court also has the discretion to order parties to attend ADR if it considers ADR appropriate.

The Federal Court, at its discretion, may award costs to the successful party on an indemnity or solicitor–client basis. An order for indemnity costs might be made where a party fails to accept an offer of settlement and subsequently achieves an outcome that is less favourable than the proposed settlement offer.

In representative proceedings, the Federal Court has a supervisory role in relation to class action settlements, and parties must first obtain the Federal Court’s approval prior to settling the proceeding.\(^{12}\)

The Federal Court has developed its own criteria for approving class action settlements.\(^{13}\) The parties will usually need to persuade the court that the proposed settlement is fair and reasonable having regard to the claims made on behalf of group members bound by settlement; and the proposed settlement has been undertaken in the interests of group members, as well as those of the representative applicant, and not just in the interests of the representative applicant and the defendant.

XIII ARBITRATION

As discussed in Section XII, it is a requirement of Division 28.2 of the Federal Court Rules that parties consider options for ADR as soon as reasonably practicable, and each party must file a genuine steps statement.

A party may apply to the court for an order referring all or part of the proceedings to mediation or arbitration and to have the proceedings stayed. If the court orders that the parties proceed to arbitration, then either party may apply to the court to have an arbitrator appointed and make orders about how the arbitration is to be conducted, including how the arbitrator’s fees will be paid and when the arbitration must be completed. If the arbitration is successful, the parties may apply to the court to make an order in terms of the award set out by the arbitrator. In practice, arbitration is not widely used for private antitrust enforcement in Australia.

XIV INDEMNIFICATION AND CONTRIBUTION

A private litigant can bring a damages claim under Section 82 of the CCA against any person involved in the contravention that caused his or her loss or damage. Each person involved in the contravention will be jointly and severally liable for the loss or damage suffered as a result. In Australia, a private litigant is entitled to commence proceedings against a single defendant in circumstances where there are multiple potential defendants that would be jointly and severally liable for the loss or damage caused if joined to the proceedings.

\(^{12}\) Section 33V of the Federal Court Act.

\(^{13}\) Federal Court of Australia, Practice Note GPN-CA.
XV FUTURE DEVELOPMENTS AND OUTLOOK

Whether recent developments in Australian antitrust law, including the 2017 reforms to the CCA and the ACCC’s increased enforcement action against cartel conduct, will lead to increased private antitrust follow-on litigation remains to be seen. One area of private antitrust litigation that may increase in the near future is litigation brought by start-ups and traditional media and advertising companies against digital platforms such as Google and Facebook, given the substantial market power of these companies.
I \hspace{1em} \textbf{OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY}

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the Austrian Federal Competition Authority (FCA) and the Austrian Federal Cartel Prosecutor (with the decision in the Elevators and Escalators cartel\(^2\) being the show-starter). Based on such decisions finding violations of antitrust law, the Austrian Supreme Court (OGH) in several cases has affirmed the possibility of claims for damages for directly damaged parties\(^3\) as well as for indirectly damaged parties,\(^4\) including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).\(^5\)

In addition, Austrian private antitrust litigation has been the nucleus for landmark decisions of the Court of Justice of the European Union (CJEU), such as the \textit{Kone case}\(^6\) regarding antitrust damages claims based on umbrella pricing and the \textit{Donau Chemie case}\(^7\) concerning access to the file by possible private damages claimants.

Following these judgments, the Austrian Supreme Court in May 2018 asked the CJEU whether lenders that provided publicly subsidised funding to customers of the Escalator cartel (such as housing and building cooperatives) may claim damages (from increased loan and funding requirements) from the cartel members.\(^8\) Therefore, although private antitrust litigation today plays a pivotal role in Austrian antitrust practice, and Austrian courts are also actively shaping the law on a European level (by referring such important questions to the CJEU), final decisions in major proceedings often experience substantial delay owing to numerous upfront disputes over procedural matters.

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1. Bernt Elsner and Dieter Zandler are partners and Marlene Wimmer-Nistelberger is an associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH, Vienna.
2. OGH 8 October 2008, 16 Ok 5/08.
3. OGH 26 May 2014, 8 Ob 81/13i.
4. OGH 2 August 2012, 4 Ob 46/12m.
5. OGH 29 October 2014, 7 Ob 121/14s.
8. OGH 17 May 2018, 9 Ob 44/17m; the case is registered in the case register of the CJEU under C-435/18, \textit{Otis et al v. Land Oberösterreich et al}. 

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II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The Austrian Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017) implementing the EU Damages Directive (Directive)⁹ became effective on 1 May 2017. As the deadline for the implementation of the Directive expired on 26 December 2016, the provisions on the compensation of harm caused by infringements of antitrust law (Sections 37a to 37m Austrian Cartel Act (KartG) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines).

The new substantive provisions apply to harm incurred after 26 December 2016; for all damages arising before this date, the old regime has to be applied.

The KaWeRÄG 2017 amends the KartG, the Austrian Competition Act and the Austrian Act on Improvement of Local Supplies and Conditions of Competition. The provisions in Sections 37a et seq KartG introduced new rules for actions for private antitrust damages claims (PADCs). The ordinary civil courts are the competent courts for PADCs.

The rules prescribe a fault-based liability: thus, a claim for damages for antitrust infringements requires that an unlawful and culpable antitrust infringement caused the harm. Section 37i (2) KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities (NCAs) of other EU Member States establishing an infringement have a binding effect for the Austrian civil courts as regards illegality and culpability. Therefore, in a follow-on scenario, claimants only have to establish the damage incurred and a causal link between the infringement and such damage. However, in the case of a cartel (between competitors), a presumption of harm applies. This presumption is rebuttable, with the burden of proof resting with the infringer. As proving the occurrence of antitrust damages has been rather difficult for claimants in the past, the newly introduced presumption of harm should facilitate the enforcement of claims by parties who have suffered harm from a cartel. However, even with the new presumption, the quantum of damages still has to be established by the party claiming damages.

Section 37h KartG stipulates new rules on the limitation period for PADCs. PADCs are now time-barred five years after the injured party becomes aware of the damage and the identity of the infringer (the absolute period of limitation is 10 years after the occurrence of harm). The statute of limitation for PADC proceedings is suspended during pending proceedings before the cartel court, the European Commission or the NCAs of other EU Member States; investigations by the European Commission or NCAs into possible infringements of antitrust law; and settlement negotiations. In the case of proceedings before the cartel court, or proceedings or investigations by the European Commission or NCAs, the suspension of the statute of limitations ends one year after the decision on the proceedings has become legally binding or after the end of the investigation. Section 37g (4) KartG allows courts to suspend the proceedings for a maximum period of two years when it is likely that the parties will agree on a settlement. In the case of unsuccessful settlement negotiations, a claim has to be filed within a reasonable period of time (Section 37h (2) final sentence).

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III EXTRATERRITORIALITY

The application of the specific rules on PADCs in the KartG requires a domestic effect in Austria (effects doctrine). If no such domestic effect can be established, a claimant may only base its PADC on general tort law rules.

As regards jurisdiction, a PADC can, *inter alia*, be brought before Austrian courts against:

- a defendant domiciled outside Austria if the harmful event caused by an antitrust infringement occurred or is expected to occur in Austria;¹¹
- a defendant that is domiciled in Austria (with the potential to include the other cartel members as additional defendants in the same lawsuit¹²); or
- a defendant that is not domiciled in one of the Member States of the EEA if it holds assets in Austria.¹³

IV STANDING

Based on the decisions of the CJEU in *Courage v. Crehan*¹⁴ and *Manfredi*,¹⁵ anyone who has suffered damage from an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) is entitled to recoup his or her losses from the antitrust infringers. This case law also had a significant effect on PADCs solely based on an infringement of Austrian antitrust law.

To date, in cases of umbrella claims it has been held that under Austrian law (if EU law is not applicable), a claimant would not have standing against the antitrust infringers due to a lack of an adequate causal link between the infringement and the losses alleged by the claimant.¹⁶ Following the CJEU’s decision in *Kone*,¹⁷ however, it remains to be seen whether the OGH will uphold this approach in domestic cases that are not also based on an infringement of EU competition law.

V THE PROCESS OF DISCOVERY

Effective rules on the disclosure of evidence were only introduced into Austrian law with the KaWeRÄG 2017. These new (procedural) rules apply to all PADCs in which the action

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¹⁰ Section 24 (2) KartG; cf OGH 27 February 2006, 16 Ok 49/05; OGH 23 June 1997, 16 Ok 12/97.
¹² Ibid. Article 8 (1): ‘provided 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 separate proceedings.’
¹³ Section 99 Law on Court Jurisdiction (JN).
¹⁶ OGH 17 October 2012, 7 Ob 48/12b (ruling).
¹⁷ The OGH in this decision asked the trial court to establish the necessary facts with regard to umbrella pricing: OGH 7 Ob 121/14s.
initiating the proceedings is filed after 26 December 2016. Therefore, these new rules on the disclosure of evidence also apply to disputes over harm incurred prior to 26 December 2016 as long as only the proceedings are initiated after this date.

Apart from these new rules on disclosure of evidence after a PADC has been filed, general Austrian civil procedural law does not allow for (pretrial) discovery as found in Anglo-American legal systems. Rather, each party has to substantiate the facts favourable to its legal position by putting forward evidence (e.g., witnesses, documents, court-appointed experts).

Under the new provisions on disclosure of evidence (Section 37j (2) KartG), a party may submit a reasoned request for disclosure of evidence to the court together with, or after having lodged, an action for damages. Apart from requesting the disclosure of (certain) pieces of evidence, a request for disclosure may also cover categories of evidence.

However, to avoid a US-style discovery and fishing expeditions, evidence and categories of evidence need to be defined by the party requesting the disclosure as precisely and as narrowly as possible, taking into account the facts and information reasonably available to it. The court then may order the disclosure of evidence by third parties or the opposing party. The court has to limit a disclosure order to a proportionate extent, taking into account the legitimate interests of all parties (including third parties) concerned. The interest of companies in avoiding actions for damages caused by infringements of antitrust law is not relevant for this assessment. The disclosure may also comprise evidence containing confidential information. The confidentiality of the information has to be taken into account by the court when assessing the proportionality of a disclosure request. If necessary, special arrangements to protect the confidentiality of such information have to be ordered (e.g., excluding the public from the proceeding, redacting confidential information from documents or restricting the right of access to evidence to a particular group of persons).

Moreover, the party being ordered to disclose evidence can request that certain pieces of evidence are only disclosed to the court by invoking a legal obligation of secrecy (e.g., legal professional privilege) or any other right to refuse to give evidence (Section 157 (1) Nos. 2 to 5 Austrian Criminal Procedure Act (StPO). The court then may decide, without consulting the parties, whether to require the disclosure of the evidence. A court decision ordering disclosure may be appealed immediately, while a negative decision may only be appealed together with an appeal against the final judgment.

A party to the proceedings may also apply for disclosure of documents contained in the files of competition authorities (the European Commission, NCAs). However, certain documents – namely information prepared for the proceedings before the competition authority, information prepared during the proceedings by the authority and submitted to the parties, and settlement submissions that were withdrawn – may only be disclosed once the competition authority has completed its proceedings (Section 37k (3) KartG). Leniency statements and settlement submissions are not themselves subject to disclosure (Section 37k (4) KartG).18

So far, no published case law exists that applies the new rules on disclosure of evidence. It can be expected that courts will face a number of exciting and difficult questions when initiating the proceedings is filed after 26 December 2016. Therefore, these new rules on the disclosure of evidence also apply to disputes over harm incurred prior to 26 December 2016 as long as only the proceedings are initiated after this date.

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18 This provision (implementing Article 6 (6) of the Directive) will likely be subject to legal challenges, as arguably it conflicts with the CJEU’s decision in Donau Chemie, which determined that a general exclusion without any balancing of interest is contrary to the principle of effectiveness. According to the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of
dealing with such a new instrument, previously unknown to the Austrian legal system. In particular, the proportionality test, required for the assessment of every disclosure request, will be quite challenging, as the relevant evidence subject to the disclosure request will normally (with the exception of cases specified in Section 37j (7) KartG) not be inspected by the court, which will then have to base its assessment solely on the assertions of the parties.

The new provisions on disclosure will probably also lead to a prolongation of PADC proceedings due to the following grounds: several rounds for disclosure can be made during the same PADC proceeding (i.e., a party will often only be able to fulfil the requirement of precisely and narrowly defining the relevant pieces of evidence after other documents have been disclosed to it); and defendants will also file requests for disclosure (especially to try to prove that an overcharge was passed on to the next level of the supply chain).

According to standing case law before the KaWeRÄG 2017 came into force, the Supreme Court acted exclusively as a legal instance, which was widely criticised as market definition is a question of fact, not law. Therefore, results of expert reports were verifiable only to a very limited extent by the Austrian Supreme Court. However, the new Section 49 (3) KartG provides that appeals may now also be based on the fact that the file reveals considerable reservations as to the correctness of decisive facts on which the cartel court based its decision. Furthermore, a recent decision of the Austrian Supreme Court sheds some light on the interpretation of this Section and draws parallels to case law regarding a quite similar provision in the Austrian Criminal Procedure Act (StPO).19

VI USE OF EXPERTS

According to Section 351 (1) of the Austrian Civil Procedure Code (ZPO), courts can appoint experts to collect evidence. Such court-appointed experts can have an important role in PADCs, in particular as regards establishing whether an alleged loss has occurred and as regards the calculation of the quantum of damages (see Section VIII for more detail).

Although courts have the capacity to estimate the quantum of damages (see Section VIII) themselves, they often are not willing to make such estimates but rather prefer to appoint court experts, such as economists, to calculate the quantum of damages.

To establish loss and to calculate the quantum of damages, as well as the causal link between an infringement and such damages, parties can also instruct private experts and try to introduce their findings as evidence in the court proceeding. In addition, parties may also try to call their private expert as an expert witness. However, private experts appointed by the parties do not substitute court-appointed experts, and courts may disregard the findings of a party-appointed expert simply by relying on the findings and opinion of a court-appointed expert. Private party experts’ findings reports also do not have the same evidential value as reports of court-appointed experts (Section 292 ZPO).

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19 OGH 12 July 2018, 16 Ok 1/18k.
Austria

VII CLASS ACTIONS

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). However, the number of mass proceedings has increased recently (although still comprising a much lower proportion when compared with other countries such as the US).20 Recently, Austrian-style class actions have been brought before courts mainly by the VKI, the association for consumer protection, through individual consumers assigning their claims to the VKI, which then tries to combine these claims into a single court proceeding.21 However, as the ZPO does not contain any specific provisions for class actions, courts have differed in their treatment, either treating them as separate single proceedings, by joinder of claimants, or having one test proceeding (while staying the other proceedings), which then serves similar to a precedent for the other claims.22

Despite the growing number of such Austrian-style class actions, courts remain reluctant to accept the pooling of claimant actions for damages; Austrian civil procedural rules are rather based on an individual examination of each claim brought before the court, and actions for damages are tried in various separate court proceedings.

To our knowledge, there is no published case law in Austria that examines the potential of an Austrian-style class action in PADC proceedings. However, the models that have been used for combining individual consumer claims could theoretically also serve as a process for pooling PADCs, and such a model appears to have been successfully applied in 2007 by the Austrian Federal Chamber of Employees in a PADC against a driving school in Graz that had participated in a cartel with other local driving schools.23

VIII CALCULATING DAMAGES

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profit plus statutory default interest24 calculated from the date when the harm occurred. Thus, Austrian law does not allow a claim for punitive or treble damages, and also does not take into account possible fines imposed by competition authorities.

According to Austrian case law, antitrust damages are calculated by comparing the actual financial situation of the injured party after the infringement with the counterfactual hypothetical scenario without the damaging infringement.25 Often, injured parties have difficulties establishing the counterfactual hypothetical scenario that establishes proof of their damage.26

22 Kodek in Neumayer, p. 9.
23 See Ginner, Erstes österreichisches Urteil zum Private Enforcement – Fahrschulkartell Graz, ÖZK 2008, p. 110 et seq.
24 The applicable statutory default interest is 4 per cent (Section 1000 (1) General Civil Code (ABGB)), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code).
25 OGH 15 May 2012, 3 Ob 1/12m; see Csoklich, 185; Reischauer in Rummel (ed), ABGB 3rd edition (2007), Section 1293 ABGB Paragraph 2a; Karner in Koziol/P Bydlinksi/Bollenberger (eds), ABGB, 4th edition (2014), Section 1293, Paragraph 9.
26 For possible calculation methods see Csoklich, Ibid.; Abele/Kodek/Schäfer, Zur Ermittlung der Schadenshöhe bei Kartellverstößen – Eine Integration juristischer und ökonomischer Überlegungen, ÖZK 2008,
Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damage due to an antitrust infringement (i.e., the injured party has to prove the ‘first euro’ of its damages). However, for cartels between competitors, the new Section 37c (2) KartG contains a presumption that the cartel caused damage, thus already allowing an estimate if such presumption cannot be rebutted.

While Austrian civil procedural rules regarding the reimbursement of procedural costs generally are based on the loser pays principle, attorneys’ fees are only reimbursed on the basis of the (fixed) statutory fees for attorneys, which are largely dependent on the amount in dispute and not the actual amount of attorneys’ fees incurred by a party (e.g., on the basis of hourly rates). As a rule of thumb, the statutory attorneys’ fees are usually significantly lower than the actual attorneys’ fees (if an attorney does not charge his or her client on the basis of statutory fees) for smaller matters (as regards the amount in dispute), whereas the statutory attorneys’ fees for larger disputes (typically for an amount above €1 million) often exceed the actual attorneys’ fees incurred based on applicable market rates. The award of costs also includes court fees, including parties’ expenses for court-appointed experts.

IX  PASS-ON DEFENCES

Section 37f KartG provides that generally the defendant has the burden of proof for passing-on. However, in the case of a PADC by an indirect purchaser, there is a presumption of passing-on of the damage if it has been established that an antitrust infringement by the infringer caused a price increase for the direct purchaser and the products or services sold to the indirect purchaser were subject to this antitrust infringement. The antitrust infringer can rebut this presumption by way of prima facie evidence. Even if a passing-on can be established, a claimant can still claim lost profits from the antitrust infringers.

To prevent overcompensation, the defendant is allowed to summon the respective third party (e.g., the direct or indirect purchaser) to join a proceeding involving passing-on. In such case, the findings concerning passing-on will be legally binding for the third party irrespective of whether it joins the proceedings (Section 37f (4) KartG).

X  FOLLOW-ON LITIGATION

Owing to the binding effect of final decisions of the cartel court establishing an antitrust law infringement (see Section II) in Austria, PADCs are in almost all cases pursued in follow-on actions. However, other areas of private antitrust litigation (e.g., contractual disputes or disputes involving access to essential facilities or distribution systems) are often commenced on stand-alone claims.

27 In one case, the allegedly injured party was not able to establish that it had suffered damage in follow-on litigation from the Escalator cartel (due to a lack of contractual documentation) as it was only able to make estimates of the prices paid to the cartel members rather than establishing the actual prices paid (cf OGH 3 Ob 1/12m).
28 OGH 8 Ob 81/13i; see Kodek, footnote 26.
XI PRIVILEGES

The professional secrecy obligation of attorneys plays an important role in Austria when it comes to (defence) attorneys being used to provide evidence. According to Section 9 (2) of the Austrian Code of Lawyers (RAO), attorneys admitted to the Austrian Bar are obliged to keep confidential information that is entrusted to them by a client or is obtained in their professional capacity if the confidential treatment of such information is in the interest of the client. The obligation applies before courts as well as in administrative proceedings. Moreover, Section 9 (3) RAO stipulates that the obligation may not be circumvented by actions of the courts or administrative authorities (e.g., by questioning assistants of the attorney or ordering the disclosure or seizure of the attorney’s files). The obligation does not apply with respect to information or documents that are not attorney–client communication, but are rather just deposited with the attorney. Furthermore, the privilege does not apply to in-house counsel (as they are not admitted to the Austrian Bar).

In PADC proceedings, a person being ordered to disclose evidence can request that certain pieces of evidence are only disclosed to the court by invoking a legal obligation of secrecy (e.g., legal professional privilege) or any other right to refuse to give evidence (Section 157 (1) Nos. 2 to 5 StPO; see Section VIII for more detail). Additionally, an attorney may also refuse to give evidence as a witness if it violates confidentiality (Section 321 (1) No. 3 ZPO). However, clients have the right to release their attorneys from such obligation.

In FCA investigations, in particular as regards the seizure of documents during a dawn raid, attorney–client communications previously were not privileged if they were not in the hands of the attorney.29 This has been heavily criticised in legal writing, as it deviates from the standard applicable in investigations of the European Commission and circumvents the obligation.30 Based on a recent change to Section 157 (2) StPO, documents and information prepared for legal advice or defence may not be seized even if they are in the domain of a defendant or co-defendant in criminal proceedings.31 It remains to be seen whether this general criminal law provision will also be held to be applicable in the case of dawn raids by the FCA.

XII SETTLEMENT PROCEDURES

Austrian law permits parties to settle private antitrust damages litigation both prior to starting legal proceedings and during an ongoing court proceeding. As one of the main advantages of a settlement (often) is its lack of publicity, there is limited public information available on how frequently settlements concerning PADCs occur (although there are a number of prominent cases that it is publicly known were settled out of court). As out-of-court settlements may be subject to stamp duty in Austria, it is important to structure them in a tax-efficient manner while at the same time providing the parties with the necessary legal protection.

30 Metzler, ibid., 254 et seq. with further references.
31 However, the scope of this new provision is currently subject to several ongoing disputes in connection with the criminal investigations concerning alleged bid rigging in the construction sector.
In addition to private antitrust settlements, settlements of public antitrust proceedings\(^{32}\) currently play a very important role in Austria, in particular in cases involving resale price maintenance. This makes it more difficult for private claimants to pursue PADCs against antitrust infringers, as only limited information about the details of an infringement becomes public in the fine decisions that are published by the cartel court on the basis of Section 37 (1) KartG.\(^{33}\)

### XIII ARBITRATION

As PADCs generally fall under the jurisdiction of the civil courts, they may alternatively be adjudicated in arbitration proceedings\(^{34}\) provided that the parties mutually agree to such proceedings (Section 582 (1) ZPO). An arbitration agreement may be concluded for both contractual and non-contractual disputes (Section 581 (1) ZPO). Depending on the content of the arbitration agreement, the arbitration proceedings may be subject to national civil procedural rules or *ad hoc* rules, or administered under commonly used arbitration rules such as those of the ICC or the Vienna International Arbitral Centre. As Austrian law requires an arbitration agreement in writing, arbitration is rarely used for most follow-on PADCs and is confined to cases where the initial contract between the parties to the proceedings contains a (sufficiently broad) arbitration clause.

In cases where an effective arbitration agreement exists, Austrian courts have to reject a claim if the defendant does not engage in the court proceedings without contesting the court’s jurisdiction (Section 584 (1) ZPO). If a dispute that is already subject to arbitration proceedings is subsequently initiated before civil courts, the claim in general will also be rejected (Section 584 (3) ZPO).

### XIV INDEMNIFICATION AND CONTRIBUTION

According to Section 37e (1) KartG, the participants in an antitrust infringement are jointly and severally liable co-debtors for the losses culpably caused to injured parties (therefore, not requiring an intentional infringement and irrespective of whether the individual portion of the damages can be determined). The amount of contribution depends on the relative responsibility of the participant (e.g., market share, role in the infringement).

Section 37e (2) and (3) KartG contains specific provisions granting special protection from joint and several liability for immunity and leniency recipients (and redress for damage payments from immunity recipients) and small and medium-sized enterprises (SMEs), as well as for redress in the case of settlements (Section 37g).

In principle, immunity and leniency recipients are only liable for the damage caused towards their direct or indirect purchasers. Only in cases where other damaged parties are not


\(^{33}\) This aspect has been criticised in legal writing: see Kodek, *Absprachen im Kartellverfahren*, ÖJZ 2014, 443, 450.

\(^{34}\) For further details, see Wilheim, *Die Vorteile der Abhandlung von Follow-on Ansprüchen in kollektiven Schiedsverfahren*, ÖZK 2014, p. 49.
entirely compensated by the other parties to the infringement will the immunity recipient also have to step in and compensate those damaged parties that are not the immunity recipient’s direct or indirect purchasers.

SMEs having a market share of less than 5 per cent during the antitrust infringement period, and that would be in danger of losing their commercial viability and having their assets devaluated entirely, are also only liable for the damage caused towards their direct or indirect purchasers. This special protection of SMEs does not, however, apply to SMEs that organise an infringement or force other companies to participate in the infringement, or that are antitrust infringement reoffenders.

Where settlements between an injured party and one of the infringers are made, this infringer is in principle no longer liable for any claims of this injured party against any of the other parties to the infringement. Only in cases where the remaining claim of the injured party is not compensated by the other cartelists will the infringer who has concluded the settlement have to step in (such liability, however, can be contractually excluded, for example in a settlement agreement).

Redress for damages payments from other antitrust infringers is subject to the relative responsibility of the participant (see above). Redress from an immunity or leniency recipient is limited to the damage the immunity or leniency recipient caused to his or her direct and indirect purchasers.

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

The general impression on the market is that the new rules for PADCs so far have not resulted in a large number of new cases. Based on how the Directive was implemented, one could have the impression that there is little interest in establishing Austria as an attractive forum for (private) antitrust damages proceedings, with the federal government’s impact assessment even having assumed that the implementation of the Directive will not change the workload of the Austrian judiciary. It remains to be seen whether this assessment applies in practice, as the new provisions include some far-reaching changes as regards both substantive and procedural matters (e.g., regarding the new provisions governing the disclosure of evidence by the opposing party or by a third party). In addition, it is quite likely that Austrian courts will continue referring new legal questions in connection with PADCs to the CJEU for preliminary rulings.
Chapter 5

BELGIUM

Frank Wijckmans, Maaike Visser, Karolien Francken, Monique Sengeløv and Manda Wilson

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In 2017 and 2018, private antitrust litigation in Belgium was impacted by four developments. First, a limited number of private damages cases were brought before the Belgian courts in the aftermath of the European Trucks antitrust case. Secondly, the Cambridge Analytica data scandal culminated with the Belgian consumer organisation Test Aankoop lodging a case against Facebook before the Brussels Commercial Court. Thirdly, the Belgian railway infrastructure manager Infrabel initiated a private damages claim before the Commercial Court following a decision by the Belgian Competition Authority (BCA) on bid rigging. Lastly, the follow-on case that the European Commission initiated following the Lifts and Escalators case was brought before the Belgian Supreme Court.

While in certain other jurisdictions, multiple private damages cases are pending relating to the European Trucks antitrust case, the record before the Belgian courts to date is quite limited. With the exception of one interim judgment designating an expert, no court decisions have been rendered to date.

The Cambridge Analytica data scandal centred around a privacy breach by Facebook in March 2018, whereby the political consultant Cambridge Analytica was able to access personal data of Facebook users. This data was subsequently used to influence elections in various countries. In the aftermath of this scandal, Test Aankoop filed a claim before the Commercial Court in June 2018, claiming at least €200 of damages per Facebook user that had been the victim of the privacy breach. Considering that around 33,000 people joined the action, this case would result in Facebook potentially facing a damages claim of €6.6 million in total.

At the end of 2018, Infrabel brought a damages case before the Belgian court against five companies active in the sector of traction substations. This claim is based on a decision of the BCA adopted in 2017. The BCA found that the five companies that were acting as contractors in a framework agreement for the renewal of traction substations had fixed prices between August 2010 and June 2016. Infrabel is now claiming damages of between €4 million and €6 million for the harm it has suffered following these illegal practices.

1 Frank Wijckmans is a partner, Maaike Visser is counsel, Karolien Francken is a senior associate and Monique Sengeløv and Manda Wilson are junior associates at Contrast. Our special thanks go to the lawyers from the Association of Belgian Competition Lawyers who shared their experiences regarding publicly known Belgian private damages cases.

2 Decision of the Belgian Competition Authority No. 17-IO-16-AUD of 2 May 2017 in case CONC-I/O-13/0031.
The European *Lifts and Escalators* case dates back to 2008 when the European Commission found that four elevator and escalator companies (Kone, Otis, ThyssenKrupp and Schindler) had participated in a cartel. In June 2008, the Commission initiated a follow-on damages case before the Brussels Commercial Court to recover the damage it had suffered following the infringing conduct of the elevator companies. The Commercial Court dismissed the Commission’s claim due to lack of evidence on the Commission’s side. Subsequently, the Commission lodged an appeal before the Brussels Court of Appeal whereby the latter ordered the four companies to disclose documents from the Commission’s file on 28 October 2015 by interim judgment. The four companies appealed this judgment of the Court of Appeal before the Belgian Supreme Court. The Belgian Supreme Court dismissed the appeal against the interim judgment of the Brussels Court of Appeal and referred the case back to that Court on 22 March 2018. The case is currently pending before the Brussels Court of Appeal.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition enforcement in Belgium generally consists of four different types of actions. First, injured parties may seek cease-and-desist orders. These actions represent the majority of private enforcement actions brought under Belgian law. Cease-and-desist orders will generally be based on Articles XVII.1 et seq. of the Code on Economic Law (CEL). These Articles relate to a specific procedure to obtain cease-and-desist orders from the president of the Commercial Court competent in the matter of unfair trade practices. It is settled case law that competition law infringements are considered to fall within the scope of the notion of unfair trade practices as set out in Article VI.104 CEL. Second, it will also be possible to request an interim remedy from the president of the competent court to obtain urgent relief. Contrary to cease-and-desist orders, this judgment will only result in temporary relief, and not in a judgment on the merits. A third category of private enforcement actions available to claimants are private damages actions. These are dealt with in more detail below. Finally, competition law defences might also occasionally arise in contractual disputes.

With regard to the third category of (recovery) damages actions, a new set of rules has been made available as of 22 June 2017 to those persons that wish to claim damages on account of having suffered harm following an infringement of competition law. With the act of 6 June 2017 (Implementation Act), the Belgian legislator transposed the Private Damages Directive regarding actions for damages into the Belgian legislative framework. This was done by inserting a new Title 3, ‘The action for damages for infringements of competition law’, in Book XVII, ‘Particular judicial procedures’, of the CEL. Although private damages

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3 The judgment of 24 November 2014 of the Brussels Commercial Court can be consulted via the following link: [http://ec.europa.eu/competition/national_courts/cases/143115/143115_1_3.pdf](http://ec.europa.eu/competition/national_courts/cases/143115/143115_1_3.pdf).

4 In accordance with Article 584 Belgian Judicial Code, the claimant will have to prove that the action requires urgent relief.

5 Article 1039 Judicial Code.

6 In this respect, the nullity of the contract can be requested on the basis of Article 1184 Belgian Civil Code or a declaratory judgment can be sought on the basis of Article 18 Judicial Code.

7 The Implementation Act applies both to infringements of Article 101 and Article 102 Treaty on the Functioning of the European Union (TFEU), as well as to their counterpart under Belgian law, Article IV.1 and Article IV.2 CEL.

8 Directive 2014/104/EU.
actions were already possible prior to the transposition of the Private Damages Directive on the basis of general tort principles.\(^9\) Article XVII.72 CEL now explicitly provides that any natural or legal person who has suffered harm due to an infringement of competition law has the right to claim and to obtain full compensation for that harm, in accordance with the general tort principles under Belgian law. The Implementation Act provides a number of new substantive and procedural rules that facilitate the bringing of private damages actions by lessening the burden of proof on claimants. This is achieved through the introduction of various presumptions and by making access to evidence easier. At the same time, the Implementation Act also extends the scope of the Belgian class action regime to infringements of European competition law that can be brought before the Brussels courts.\(^10\)

Private damages actions can be brought by any natural or legal person, irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether there has been a prior finding of an infringement by a competition authority. A decision by a competition authority establishing a competition infringement is therefore not a prerequisite. Both standalone and follow-on actions for damages are available under Articles XVII.71 CEL to XVII.91 CEL.

As stated above, the general principles of Belgian tort law will remain applicable to private damages actions. This means that to bring a successful action for damages, the claimant must demonstrate a fault attributable to the defendant, the concrete and certain damage suffered by the claimant, and a causal link between the wrongdoing and the damage caused. With the new Implementation Act, however, the Belgian legislator has introduced a number of legal presumptions to lessen (or even reverse) the burden of proof to the benefit of claimants. One example is the rebuttable presumption that cartels cause harm.\(^11\) Within the new legal framework, it will be for the infringer to rebut the presumption. Private enforcement actions can be brought before the competent commercial court or the court of first instance.\(^12\) It is, however, important to flag that the Implementation Act does not quantify the presumed harm. The precise harm suffered will have to be demonstrated in each specific case. To the extent that the precise and concrete harm has been established, the claimant will be entitled to full compensation (i.e., actual loss, lost profit plus interest). The Belgian legislator does not allow for overcompensation or punitive damages.

For private enforcement claims brought under general tort law, the limitation period is five years following the day on which the claimant became (or should reasonably have become) aware of the harm suffered and of the identity of the person liable for such harm, or in any event 20 years from the occurrence of the facts that caused the harm.\(^13\) Article XVII.90 CEL provides, however, that the limitation period is five years after the day on which the infringement of competition law has ceased and the injured party knows (or should reasonably have known) of the infringement, the damage that was suffered and the identity of the infringer.\(^14\) To determine the start date of the limitation period, it will not be sufficient that the claimant is aware of the damage and the wrongdoing. The injured party must also

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\(^9\) Article 1382 Civil Code.
\(^10\) Article XVII.37, 33° CEL; Article XVII.35 CEL stipulates that the courts of Brussels will have jurisdiction to hear actions for collective redress.
\(^11\) Article XVII.73 CEL.
\(^12\) The provisions of the Judicial Code will apply.
\(^13\) Article 2262bis Judicial Code.
\(^14\) In the event of a single and continuous infringement, the infringement shall only be deemed to have ceased on the day on which the last infringement ended.
have (reasonable) knowledge of the fact that the wrongdoing constitutes an infringement of
competition law.15 Additionally, the limitation period will be interrupted if a competition
authority takes action to investigate or bring a proceeding for an infringement of competition
law for damages until a final infringement decision is taken.16 Such period will be suspended
in respect of the parties that are or were involved in an amicable settlement.17 For cease-and-
desist actions, the limitation period is one year after the termination of the cause of action.18

Finally, the liability for infringing competition law is administrative in nature. Infringements of competition law are not criminally sanctioned in Belgium. The only exception concerns bid-rigging practices, where the companies involved can be sentenced to pay fines, and the individuals concerned can face imprisonment up to six months, or the payment of fines, or both.

III EXTRATERRITORIALITY

Consistent with EU principles, the application of antitrust laws in Belgium is governed by the
effects doctrine. This means that antitrust laws in Belgium also apply to foreign companies
or to domestic companies that act outside Belgium if their actions have an adverse effect on
competition in the Belgian market.

For example, in 2013 the Belgian Competition Council sanctioned five Belgian and
German flour mills for having taken part in a cartel on the market for the production and
sale of flour in Belgium, thereby infringing the Belgian and EU competition rules.19 The
investigation started with leniency applications, which were triggered by inspections by the
German competition authority, the Bundeskartellamt, in 2008 at the premises of a number
of large German mills. The Dutch Competition Authority also carried out an investigation in
this sector, which led to the imposition of fines in December 2010 for most of the same mills
also involved in the Belgian case.20

There are no statutory or common law exemptions that apply to private antitrust
litigation.

The jurisdiction of the Belgian courts to hear private antitrust disputes is established
according to EU Regulation 1215/2012.21 Pursuant to Article 4(1) of this Regulation, Belgian
courts have jurisdiction when the defendant has its domicile or usual residence in Belgium.
The claimant can also bring private antitrust litigation before the Belgian courts if the event
giving rise to the harm or the harm itself occurred in Belgium (Article 7(2) EU Regulation
1215/2012).

15 I Claeys and M Van Nieuwenborgh, ‘De rechtsvordering tot schadevergoeding voor
16 Article XVII.90. §2 CEL.
17 Article XVII.91 CEL.
18 Article XVII.5 CEL.
19 Decision of the Belgian Competition Authority No. 2013-I/O-06 of 28 February 2013 in case
MEDE-I/O-08/0009.
20 Decision of the Dutch Competition Authority of 16 December 2010 in case 6306.
21 Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and

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IV STANDING

Article XVII.72 CEL provides that any natural or legal person who has suffered harm as a result of an infringement of competition law has the right to claim and obtain full compensation in accordance with the rules of ordinary law.

Both direct and indirect purchasers may have standing – as alleged injured parties – to bring an action for damages against infringers of competition law. Direct and indirect purchasers benefit from the rebuttable presumption that the cartel infringement caused harm. Indirect purchasers of goods or services affected by an infringement of competition law benefit from a rebuttable presumption that direct buyers passed on their overcharge.

Claimants can bring standalone or follow-on actions for damages (following a decision by a competition authority establishing an infringement). Claimants can be a natural person or a legal entity.

The ordinary provisions of the Judicial Code will apply to assess the standing of the claimant. A claimant needs to have the capacity of holding the right invoked in the claim and must have an acquired, personal and immediate legal interest when filing the claim. The claimant can act if its rights are harmed or under serious threat of being harmed. Given the requisite personal interest, claims cannot be filed in the general interest. Individual claimants that have suffered personal harm are not prevented from grouping their claims in a single summons, with any damages being awarded to each claimant separately. It is also conceivable that various individual claims are assigned to a single person.

Consumer associations and public interest groups have standing to bring an action for collective redress for infringements of competition law provided they comply with the applicable rules to act as a group representative.

22 Direct purchasers are defined as ‘a natural or legal person who acquired, directly from an infringer, products that were the object of an infringement of competition law.’ (Article I.22.2° CEL). Indirect purchasers are defined as ‘a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products that were the object of an infringement of competition law, or products containing them or derived therefrom.’ (Article I.22.21° CEL).

23 An action for damages is defined as ‘an action under Article XVII.72 by which a claim for damages is brought before a court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim’ (Article I.22.3° CEL).

24 Infringers are defined as ‘an undertaking or association of undertakings which has committed an infringement of competition law’ (Article I.22.2° CEL).

25 Infringement of competition law is defined as ‘an infringement of Article 101 or 102 TFEU and/or Article IV.1 or IV.2’ (Article I.22.1° CEL). Article IV.1 and IV.2 CEL are the Belgian equivalents of Article 101 and 102 TFEU.

26 Article XVII.73 CEL: ‘Cartel infringements are presumed to cause harm. The infringer shall have the right to rebut that presumption.’

27 Article XVII.84 CEL, see Section IX.

28 Articles 17 and 18 Judicial Code.

29 See Section VII.

30 Article XVII.39 CEL.
V THE PROCESS OF DISCOVERY

Private damages actions are generally characterised by an information asymmetry that exists to the detriment of the claimant trying to demonstrate its claim. Previously, the submission of evidence in this type of dispute was only governed by the general rules available in the Judicial Code. On the basis of Article 877 Judicial Code, judges are entitled to require the production of a specific document, including from third parties, provided that it can reasonably be assumed that the party (or a third party) has it in his or her possession and the document is considered relevant to the dispute.31 As opposed to common law countries, there is no pretrial discovery available under Belgian law.

Following the entry into force of the Implementation Act on 22 June 2017, new rules regarding the production of documents and access to evidence have come into force for private damages actions. It follows from the Implementation Act that the parties in private damages actions will have the possibility to request the production of certain (categories) of documents, including documents from the file of the competition authority. More precisely, Article XVII.74 CEL allows the court to order the disclosure of (categories) of documents kept by a party, following a motivated request (i.e., a reasoned justification) from one of the parties. This does not, however, mean that a request can be formulated broadly. Each request will still have to be described as accurately as possible, and should identify the category of documents by reference to common features such as the nature, object or content of the documents and the relevant time frame.32

When assessing the request for document production, the court must balance the legitimate interests of the parties and assess the proportionality of the request. Article XVII.74 CEL provides in particular that the court should take into account before ordering the disclosure the factual relevance, the costs of disclosure (in particular with relation to third parties) and whether the requested documents might hold any confidential information. To the extent that one of the parties is required to disclose documents holding confidential information, Article XVII.75 CEL grants the judge the power to order additional measures to ensure the confidential treatment of this information, such as allowing for the submission of non-confidential versions, having an expert draft a non-confidential summary or limiting the access to a select number of persons. In addition, Article XVII.76 CEL also provides that a (third) party that is ordered to disclose documents may submit written comments and be heard by the court, if the court gives him or her permission to do so, irrespective of whether the documents contain confidential information.

With regard to the information kept in the file of a national competition authority, there are likewise new rules facilitating access. In summary, the documents kept in the file of the national competition authority are divided into three categories: black-listed documents, grey-listed documents and white-listed documents (a residual category). With regard to documents that are black-listed (i.e., leniency statements and settlement submissions), the Belgian courts cannot order disclosure.33 The national judge can only verify whether the documents do in fact fall within this category.34 With regard to the documents on the grey

32 Consideration 16 of the Private Damages Directive.
33 Article XVII.79. §2 CEL; In accordance with Article XVII.79. §4 CEL, this protection will, however, only be granted to those parts containing the leniency declaration or the settlement proposal.
34 Article XVII.79. §3 CEL.
list, disclosure will only be possible as of the moment the competition authority has closed its proceedings. The grey list concerns the documents prepared with the specific purpose of being used for the proceedings of the competition authority, information drafted by the competition authority and sent to the parties during the proceedings, and settlement submissions that have been withdrawn. For the residual category (white list), production may be requested at any time during the proceedings, provided of course that the conditions required for the production of documents are met.

In any event and irrespective of the category of documents, the court will be required to assess the proportionality of an order to disclose documents from the file of the competition authority. Moreover, the court is obliged to consider whether the request is sufficiently specific, whether it is part of a claim for damages and whether it does not detract from the effective enforcement of competition law. The competition authority will be asked to provide written comments on the proportionality of the request. The disclosure can only be ordered from the competition authority to the extent that no (third) party is reasonably able to provide the requested evidence. Under no circumstances will the disclosure request provide the parties with access to the internal documents of the competition authority or letters exchanged between competition authorities.

In addition, the use of evidence obtained through access to the file of the national competition authority is restricted. Parties are prohibited from using the documents listed on the black list that were obtained through access to the file of a competition authority in a damages action. The same goes for documents listed on the grey list until the proceedings have been closed by the competition authority. In the event that such evidence is put forward, the court will deem the evidence inadmissible.

Under general procedural law, strict sanctions apply to parties and third parties not complying with the court’s instructions on document production. In this respect, the court may impose a compensation or penalty payment if parties or third parties do not produce the required documents. In addition, since the entry into force of the Implementation Act, the court will be able to impose on (third) parties or their legal representatives a fine ranging from €1,000 to €10 million, depending on the specific circumstances of the case when they fail to comply with the rules set out above relating to the production of documents, the confidentiality of documents or the use of information gathered via the discovery process. Moreover, the court is also allowed to draw inferences that are detrimental to the party that breached the above rules. For example, the court will be able to establish that a discussion point has been proven or that claims and defences are rejected in whole or in part, or to

35 Article XVII.79. §1 CEL.
36 Article XVII.79. §5 CEL.
37 Article XVII.78. §1 CEL.
38 Article XVII.78. §2 CEL.
39 Article XVII.77. §2 CEL.
40 Article XVII.77. §1 CEL.
41 Article XVII.80. §1 CEL.
42 Article XVII.80. §2 CEL.
43 Article XVII.80 CEL.
44 Article 882 Judicial Code.
45 Article XVII.81. §1 CEL.
order payment of the costs of the proceeding. Finally, the Belgian procedural rules also allow for parties to produce witnesses or to seek an order that some witnesses be heard. A cross-examination of the witnesses is, however, not allowed.

VI USE OF EXPERTS

Article 962 Judicial Code permits a judge to appoint an expert. The judge can do so *ex officio* or with the consent of the parties. The parties can also produce their own expert reports. It is common that experts are used in complex litigations. Due to the (econometric and even economic) complexity of private damages cases, courts are expected to require the assistance of an expert, for example to quantify the harm.

The interlocutory judgment in which the judge appoints the expert will also contain a description of the assignment of the expert. The parties must cooperate with the expert. The costs relating to the expert’s activity are borne by the parties.

The report produced by the expert is not legally binding on the court. The court can deviate from the advice of the expert. However, in practice the expert report will have significant evidentiary value.

In the *Lifts and Escalators* case, the Brussels Commercial Court refused to appoint an expert. The Court found that the European Commission had failed to establish its harm with sufficient certainty to justify the cost and effort of expert proceedings.

VII CLASS ACTIONS

As of 1 September 2014, it is possible in Belgium to bring an action for collective redress for a number of violations of both Belgian and EU rules. With the law of 6 June 2017 implementing the Private Damages Directive, the grounds to bring an action for collective redress were extended to infringements of European competition law. On the basis of Book XVII.17 – Title 2 CEL ‘Collective recovery actions’, it will be possible for groups of consumers or for groups of SMEs to initiate a legal action for collective recovery. This possibility was introduced for SMEs as of 1 June 2018.

In general, actions for collective redress will be governed by the same provisions as private enforcement actions, with only two exceptions. First, it is not possible to invoke a passing-on defence in collective redress actions, and second, the court is not able to suspend the proceedings if the parties engage in consensual dispute resolution negotiations. The procedural organisation of the class action is characterised by some particular points. To start, it is not possible for the injured parties to bring the collective action themselves. The collective claim must be brought by a group representative. Only consumer associations and public bodies that meet the conditions listed in Article XVII.39 CEL may act as such a

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group representative. The very specific nature of these criteria has *de facto* resulted in only the Belgian consumer protection organisation Test Aankoop being able to initiate collective actions for damages.51

The Belgian rules do not provide a certification stage. The first stage in an action for collective redress consists of assessing the admissibility of the claim.52 The group representative must state its choice for the opt-in or the opt-out formula, and provide a reasoning as to why the proposed system should be applied.53 Article XVII.43 CEL provides that the court will subsequently have to decide on the admissibility of the action within two months and determine the term for customers to exercise their option rights. The law provides furthermore for a mandatory negotiation phase that starts immediately after the decision of the court on the admissibility of the action.54 Following the final decision of the court, a court-appointed administrator will be assigned with the task of paying the compensation to the members of the group under the court’s supervision.55

Other specific Belgian legislation exists that may provide a legal basis for collective actions. In this respect, a collective interest action exists for injunctive relief against practices that harm consumer interests. It will not be possible for these organisations to recover damages for their members, but only for themselves to the extent that their own personal interests have been harmed. Finally, it is also possible under Belgian law to consolidate private damages actions when they are interconnected such that it is deemed appropriate to assess them together.56 From a substantive perspective, these actions will, however, remain individual actions.

**VIII CALCULATING DAMAGES**

The principle of full compensation applies to private antitrust litigation in Belgium. Article XVII.72 CEL provides that any natural or legal person who has suffered harm as a result of a competition law infringement has the right to claim and to obtain full compensation for such harm. The person who suffered harm must be reinstated in the position he or she would have been in if the infringement had not taken place. This implies that the claimant can seek compensatory damages that cover both the actual loss suffered and the profit forgone, plus (compensatory) interest. There is no limit as to the amount of damages that may be awarded.

The damages that can be sought are purely compensatory in nature. The Belgian courts are not entitled to award punitive or treble damages.

Article XVII.73 CEL includes a rebuttable presumption that a cartel infringement causes harm. Book XVII does not, however, quantify the presumed harm. It is up to the claimant to prove the amount of damage that it has suffered. This is a costly and fact-intensive process that requires complex economic modelling. The claimant can use any method it finds appropriate to calculate the damages. It is the court that will ultimately decide upon the adequate level of compensation. The European Commission has provided the courts and the

52 Article XVII.42 CEL.
53 Article XVII.43, §2 CEL.
54 Article XVII.45 CEL.
55 Article XVII.57 CEL – Article XVII.62 CEL.
56 Article 30 Belgian Civil Code.
parties with tools to assist them with the quantification of the damages. The courts have the option to request the assistance of the BCA to determine the quantum of the harm. Courts also heavily rely upon expert reports to determine the amount of damages, even though the reports themselves are not binding on the court. If the court is unable to determine the amount of the damages in an accurate way, it has the discretionary power to award compensation *ex aequo et bono* (i.e., based on a good faith assessment). The court effectively used its discretionary power in the *Honda* case. The judge decided that it was excessively difficult to determine the amount of damage suffered, given that the facts dated back more than 20 years. The judge awarded the claimants €20,000 each, based on an *ex aequo et bono* assessment.

When setting the amount of the damage suffered, the court does not take into account the fine that the defendant had to pay in the context of public enforcement. However, Article IV.70 CEL provides the BCA with the ability to consider the amount paid in the context of a consensual settlement as a mitigating factor when determining the fine.

The losing party will in principle be ordered to pay the costs of the proceedings. These costs include the costs of service, filing and registration as well as the legal representation costs. The costs relating to legal representation are a fixed amount determined by law, based on the value of the claim, and do not correspond to the actual lawyers’ fees paid.

**IX PASS-ON DEFENCES**

Pursuant to Article XVII.83 CEL, the defendant may invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. Hence, following the transposition of the Private Damages Directive, it is clear that the defendant has a right to invoke a passing-on defence (as a defensive tool or shield). Article XVII.70 CEL provides as an exception that defendants in an action for collective redress cannot invoke a passing-on defence.

The definition of overcharge is identical to that stated in the Private Damages Directive: the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law.

The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant and third parties. Given that the burden of proof is placed on someone who will in fact not hold the necessary evidence, the defendant

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57 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, O.J. 13 June 2013, 167, 19; Practical guide regarding quantifying harm in actions for damages based on breaches of Article 101 or 102 of the treaty on the functioning of the European Union, SWD (2013) 205; Study on the passing-on of overcharges (http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf).

58 Article IV.77 CEL juncto Article 962 Judicial Code.


62 Article I.22.17° CEL.
has the ability to reasonably request access to the relevant information in accordance with the rules on the disclosure of evidence. Where a passing-on defence is raised, it will be up to the claimant to demonstrate not to have passed on the overcharge to its own customers.

The passing-on defence is without prejudice to the right of an injured party to claim and obtain compensation for loss of profit due to a full or partial passing-on of the overcharge. This is an acknowledgment of the fact that an injured party who has (fully or partially) passed on the overcharge may still be confronted with harm. Such harm can take the form of a loss of profit due to the fact that the increase of the price has caused a reduction in demand.

Article XVII.84 CEL provides that indirect purchasers of goods or services affected by an infringement benefit from a rebuttable presumption that direct buyers have passed on their overcharge. An indirect purchaser is deemed to have proven that passing-on has occurred if he or she has demonstrated that the defendant has committed an infringement of competition law, the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant, and the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

If the indirect purchaser has demonstrated each of these three points (cumulatively), then a rebuttable presumption exists that the indirect purchaser has prima facie shown the existence of a passing-on of an overcharge to its detriment. The scope of such overcharge is still to be quantified. The presumption is rebutted if the defendant (the infringer) can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Article XVII.85 CEL transposes Article 15 of the Private Damages Directive, relating to actions for damages by claimants from different levels in the supply chain in a passing-on context. Where actions for damages are introduced by claimants from different levels of the supply chain, the court can take due account of any of the following: (1) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain; (2) judgments resulting from actions for damages as referred to in point (1); and (3) relevant information in the public domain resulting from the public enforcement of competition law.

In accordance with Article 16 of the Private Damages Directive, the European Commission has launched a public consultation on guidelines for national courts on how to estimate the share of the overcharge that was passed on to indirect purchasers and final consumers.

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63 Article XVII.74 and following CEL.
64 Article XVII.83 CEL.
X FOLLOW-ON LITIGATION

The majority of damages actions brought are follow-on claims relating to a decision rendered by either a national competition authority or the European Commission establishing an infringement of competition law. A decision by a competition authority establishing a competition law infringement is, however, not a prerequisite. It is possible to bring a standalone action for damages. Belgian law does not foresee, in general, limitations on or immunities from follow-on damages actions. In principle, private enforcement actions can be brought against both companies and individuals, including leniency applicants.

That being said, Article XVII.86, Section 2 CEL does provide that an infringer that received full immunity and small and medium-sized enterprises (SMEs) that fulfill three specific and cumulative conditions can only be held liable for the amount of harm caused to their own direct or indirect customers. In the event, however, that a claimant would not be able to obtain full compensation from the other infringers, the recipient that received full immunity or an SME will still be held fully liable. When a settlement is reached between the injured party and an infringing party, the injured party will only be able to address its remaining claim for compensation to the non-settling co-infringers.

Furthermore, a number of presumptions will apply to follow-on actions, depending on which competition authority has taken the decision establishing a competition law infringement. In the scenario that the decision was taken by the BCA or the Brussels Court of Appeal (i.e., the Market Court), an irrefutable presumption that an infringement took place will exist and the fault will be established. Although the CEL does not mention decisions taken by the European Commission, the same irrefutable presumption will apply on account of Article 16 of Regulation No. 1/2003, which grants the same binding nature to decisions from the European Commission as to decisions rendered by a national competition authority. Decisions adopted by a national competition authority other than the BCA will only serve as prima facie evidence that an infringement of competition law has occurred, and the court will have to assess the decision together with any other evidence provided by the parties.

An important question is the scope of the binding nature of a decision and of the presumptions based on the decision. For instance, will the binding nature and the presumption extend only to the infringers themselves or also to their parent companies? In this respect, the Brussels Commercial Court has explicitly confirmed that a decision of the European Commission does not qualify as evidence of a fault attributable to a party that is not an addressee of the decision. The Court has stipulated that the binding nature of a decision only extends to the infringements and the infringing parties identified in

69 The three cumulative conditions are at any time during the infringement the SME had a market share below 5 per cent; the economic viability of the SME could be jeopardised and cause its assets to lose all their value; and the SME cannot have been the leader or coercer of the infringement, and is not a repeat offender.
70 Article XVII.86. §2 and §3 CEL.
71 Article XVII.86. §2 and §3 CEL.
72 Article XVII.88. §1 CEL.
73 Article XVII.82. §1 CEL.
75 Article XVII.82. §2 CEL.
the decision. This cannot be extended to other facts or parties.\textsuperscript{76} This is supported by the Private Damages Directive itself, which states explicitly that the ‘effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction’.\textsuperscript{77} The same question is currently also under review with the European Court of Justice, following a preliminary question raised by the Finish Supreme Court as to how the corporate net should be cast when reviewing private damages claims and whether the principles established to attribute liability in EU antitrust investigations must also be applied to assess liability in private enforcement actions.\textsuperscript{78}

XI PRIVILEGES

The principle of attorney–client privilege is widely recognised in Belgium. Similarly, correspondence by in-house lawyers and their employers is also covered by legal privilege, provided that the in-house lawyers are members of the Belgian institute of in-house lawyers.\textsuperscript{79} In 2010 the European Court of Justice decided that communications to and from in-house counsel are not protected by legal professional privilege in the context of a European Commission investigation.\textsuperscript{80} Legal professional privilege for in-house lawyers therefore only applies to proceedings before the Belgian authorities, and not when the Belgian authorities assist the European Commission in an investigation.

On the basis of the right to private life,\textsuperscript{81} a party can refuse to produce confidential documents when they contain business secrets. The Belgian courts have a wide discretion to decide whether the reason given for the refusal of production is legitimate. Courts can also take certain additional measures to ensure that business secrets are treated confidentially (e.g., by redacting or imposing confidentiality rings).\textsuperscript{82}

The Belgian law transposing the Private Damages Directive introduced the potential to obtain evidence from the file of the competition authorities. If certain conditions are fulfilled, the courts can order the disclosure of the file.\textsuperscript{83} Certain documents can only be disclosed after the competition authority has closed its investigation or has taken a decision. Certain documentation of the file of the competition authority can never be disclosed, such as leniency applications.\textsuperscript{84} The CEL has thus significantly facilitated the disclosure of the file of the competition authority compared to prior practice.

\textsuperscript{76} Commercial Court Brussels 24 April 2015, TBM 2015, No. 3, (212) 216.
\textsuperscript{77} Consideration 34 of the Private Damages Directive.
\textsuperscript{78} Skanska Industrial Solutions ea, C-724/17, O.J. C 5 March 2018, 83, 14.
\textsuperscript{79} Article 5 Act of 1 March 2000 establishing an institute for in-house lawyers.
\textsuperscript{80} Akzo v. Commission, case C-550/07 P, ECLI:EU:C:2010:512.
\textsuperscript{81} Article 8 of the European Convention on Human Rights.
\textsuperscript{82} Article XVII.75 CEL.
\textsuperscript{83} Articles XVII.77-78 CEL.
\textsuperscript{84} Article XVII.79 CEL.
XII SETTLEMENT PROCEDURES

Articles 2044 to 2058 Civil Code give parties the right to settle disputes at all times at their own initiative. Settlement procedures are not judicial procedures as such. Parties can settle a dispute outside any court action or during an ongoing procedure before court.

Articles 2044 to 2058 Civil Code contain four conditions and characteristics of settlements. First, settlements can terminate existing disputes and prevent future claims. Secondly, settlements must be made in writing. Thirdly, parties can renounce certain rights or claims, but only in relation to the dispute that they aim to settle. Lastly, settlements are deemed the final adjudication of the dispute between the parties. A settlement can only be repealed for fraud or coercion, or when the cause of the settlement is or becomes void.

Article XVII.43, Section 2, 8° CEL imposes a mandatory negotiation phase for collective settlements. During this negotiation phase the parties must attempt to reach a settlement of their dispute. This negotiation phase starts after the decision of the court on the admissibility of the request for collective redress. The duration of this period will be determined by the court, but can be extended if the parties jointly request to do so.85

Settlements that are reached in the mandatory negotiation phase are binding on all members of the group. Parties can also ask for judicial approval of the settlement they have reached.86 Such judicial approval does not entail acknowledgment of guilt or liability with regard to the facts underlying the settlement.

In the majority of cases, settlements are kept confidential.

XIII ARBITRATION

Alternative dispute mechanisms are available in Belgium for private antitrust claims. These mechanisms are not legal proceedings. Arbitration procedures are conventional in nature,87 and an arbitration agreement must determine the modalities thereof.

Article I.22.18° CEL defines consensual dispute resolution as any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages, such as out-of-court settlements (including those where a judge can declare a settlement binding), mediation or arbitration. Article I.22.19° CEL defines consensual settlement as an agreement reached through consensual dispute resolution as well as an arbitral award.

The Implementation Act encourages – as does the Private Damages Directive – to a certain extent the use of consensual dispute resolution processes. During a consensual dispute resolution process (excluding arbitration), the limitation period is suspended for the duration of the process.88 When parties opt for consensual dispute resolution concerning a claim covered by an action for damages in which the court has been seized, the proceedings can be suspended by the court for up to two years.89 Finally, the CEL provides for specific effects of consensual settlements on subsequent actions for damages.90

85 Article XVII.45, Section 1 CEL.
86 Article XVII.47 CEL.
87 Arbitration is governed by Articles 1676 to 1723 Judicial Code.
88 Article XVII.91 CEL.
89 Article XVII.89 CEL.
The interplay between arbitration clauses and private damages claims remains an outstanding issue. To date, there is no guiding (Belgian) case law. Given the increasing trend for private damages cases and the growing emphasis on alternative dispute resolution, the Belgian courts are expected to provide guidance on this outstanding issue in the near future.

Various initiatives have been taken in Belgium to bring competition law and arbitration closer together. Contacts have been established between DG Competition of the European Commission, CEPANI91 and the Brussels School of Competition.92 These contacts have been externalised into seminars where arbitrators and competition lawyers have the chance to meet and exchange thoughts.

**XIV INDEMNIFICATION AND CONTRIBUTION**

Following the transposition of the Private Damages Directive into Belgian law, undertakings that are found to have infringed competition law through joint behaviour will be held jointly and severally liable for the harm caused by such wrongdoing.93 In other words, each of the undertakings will be bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he or she has been fully compensated.

As stated above, Article XVII.86 CEL provides for two exceptions to the principle of joint and several liability: where the infringer has received full immunity, and for SMEs that fulfil three specific and cumulative conditions. For these two categories of infringers, the contribution will be limited to the amount of harm caused to its own direct or indirect customers.94 When a claimant is not able to retrieve full compensation from the other co-infringers, the recipient that received full immunity or an SME may be held liable, so as to ensure that the injured party receives full compensation.95

In turn, the addressed co-infringer will be able to bring contribution claims against the other co-infringers for their share of the liability, including interest.96 These contribution claims can be brought against co-infringers in separate contribution proceedings, or the co-infringers can be ordered to join the private damages proceeding initiated by the claimant by way of forced intervention. Here too, the Implementation Act provides for two exceptions, in the sense that the contribution from the recipient that received full immunity will be limited to the amount of harm caused to its own direct or indirect customers and, with regard to claimed umbrella losses, its share will be determined in light of its relative responsibility for the harm caused.97 Overall, it will not be possible for the non-settling infringers to recover contribution from the settling co-infringers.98 In this regard, the court is also required to take into account the amount of any damages paid pursuant to a prior consensual settlement by an infringer, when determining the amount of contribution that a co-infringer may recover from any other co-infringers.99

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92 More information on the Brussels School of Competition can be found at http://bsc.brussels/.
93 Article XVII.86 CEL.
94 Article XVII.87 CEL.
95 Article XVII.86 CEL.
96 Article XVII.87. §1 CEL.
97 Article XVII.87. §2 CEL.
98 Article XVIII.88. §1 CEL.
99 Article XVII.88. §3 CEL.
FUTURE DEVELOPMENTS AND OUTLOOK

Following the transposition of the Private Damages Directive, Belgian judges will increasingly be faced with specific challenges that are to be dealt with *de novo* as they will require departing from the classic litigation culture. The following challenges come to mind.

First, it remains to be seen when the CEL will be applied fully in practice in a specific case. This will in particular require an assessment of which stipulations are considered of a substantive or procedural nature, including the presumptions that have been put in place.

The second challenge ahead is the actual quantification exercise of damages and the submission of economic evidence. It can be expected that this will be a complex exercise in practice, including specific econometric analysis. In addition, economic experts will need to gain experience in performing this exercise and a procedural court practice will need to be established.

A third development that will be monitored is the extent to which judges will depart from the classic application of the rules on evidence held by third parties (the classic application being established under Article 877 Judicial Code). The CEL allows for broader discovery requests in accordance with the stipulations of the Private Damages Directive.

A fourth question is whether an actual culture of assignment of claims will be established in Belgium, this not being the case to date.

A final consideration that comes to mind is to what extent decisions of the BCA and its findings will be taken into account by Belgian judges when assessing the question of the attribution of liability for certain conduct and causality.

It remains to be seen how the above challenges will be handled before the Belgian courts. Given the increased tendency of private damages cases in Belgium, it can be expected that several of the outstanding questions will be dealt with in the near future.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Historically, Brazilian antitrust practice relied heavily on public enforcement. As a consequence, private antitrust litigation activity is still incipient in Brazil, although in recent years some turning points have contributed to enhance local practice in private antitrust enforcement. These turning points, an outline of judicial precedents and the local legislative framework served as an introduction for the current status of Brazilian private competition enforcement.

The former Competition Act already set forth that injured parties could actively go to court to defend their individual or collective interests, to end anticompetitive practices and to seek redress of losses and damages, regardless of an administrative process, which would not be stayed by the filing of a lawsuit. This same provision is reproduced in Article 47 of the Competition Act.

However, the first known private antitrust action for recovery of losses caused by cartel behaviour was only filed in 2006, before the Minas Gerais State Court of Justice. It was related to the Long Steel cartel case, under which the Cobraco Group sued ArcelorMittal and obtained a preliminary injunction compelling the latter to adopt the same price (adjusted by inflation) effective before the cartel period (the independent Long Steel Distributors case). The courts also ruled favourably on redress of losses from the cartel’s overpricing policy. This lawsuit followed a decision handed down by CADE, the Brazilian antitrust agency, in 2005, which fined the long steel manufacturers for price-fixing, customer allocation and resale price maintenance.

In 2010, CADE innovated by recommending that a copy of a cartel decision (in the Industrial Gases cartel case) be sent to potentially injured parties with the purpose of enabling and encouraging them to seek recovery for damage caused by the anticompetitive conduct.

Therefore, from 2010 CADE has started to encourage victims to file follow-on claims in Brazil for damage caused by cartels. The resulting increase in terms of the economic cost of business misbehaviour has contributed to the deterrent effect of competition law enforcement. It was in 2016, however, that the fiercest discussions about private antitrust
litigation activity and its balance with local public enforcement occurred, when a landmark
decision from Brazil’s Superior Court of Justice (STJ) ordered CADE to disclose confidential
documents originating from a leniency agreement (2016 STJ decision).

The 2016 STJ decision relied on the following assumptions: the documents in point
could support claims for compensation; the legal framework for leniency programmes only
provided for administrative and criminal immunity (and not civil immunity); and there
is a mandatory rule of publicity for acts of the Brazilian public administration. Therefore,
the STJ’s rationale was that keeping the documents obtained under a leniency programme
confidential and extending such status to the civil sphere, even after the end of CADE
investigations, would perpetuate the harm to third parties and, by extension, give leniency
applicants a benefit that is not backed by law.

In response, and again in 2016, CADE issued a draft resolution (CADE 2016 draft
resolution) stating that it will pursue a balance between public and private enforcement by
respecting third-party rights of access to documents originating from leniency agreements,
settlement agreements and dawn raids. In addition, the CADE 2016 draft resolution
suggested certain changes to Article 47 of the Competition Act concerning the civil aspects
of private antitrust actions.

In 2018, significant developments related to private antitrust investigations came into
effect. To better detail how third parties affected by anticompetitive practices could claim
their rights, the Seprac, an entity under the Brazilian Treasury Ministry, issued guidelines
describing methods and tools that could be used to detect cartels, quantify overcharges and
quantify the passing on of overcharges.\(^5\)

In addition, following appeals filed by CADE in connection with the 2016 STJ
decision, in 2018 the court clarified that, as a general rule, documents obtained under a
leniency agreement could be made available, while respecting business secrets and relevant
information for competitive purposes, but only after a final ruling by CADE.

Finally, the CADE 2016 draft resolution was finally issued as CADE resolution
21/2018, which regulates the procedures for accessing documents and information through
administrative proceedings commenced by CADE to investigate anticompetitive practices,
including those arising from leniency agreements, settlement procedures and search and
seizure lawsuits; and promotes private antitrust litigation.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR
PRIVATE ANTITRUST ENFORCEMENT

Article 47 of the Competition Act generically establishes that those injured by an
anticompetitive conduct may go to court to defend their individual or collective interests, to
seek an injunction to cease the anticompetitive practice and to recover damages.

Private lawsuits can be brought regardless of the existence of an administrative decision
on an anticompetitive practice, and even before an administrative proceeding itself is instated.
In addition, the existence of a private claim does not stay the administrative proceeding,
which develops independently.

\(^5\) An English version of the Seprac guidelines may be accessed at http://www.fazenda.gov.br/centrais-de-
Both individuals and corporations can be sued, either individually or collectively. Private antitrust lawsuits can also take the form of individual enforcement actions or collective actions.

Coupled with the provisions in the Competition Act, the Brazilian Civil Code and the Brazilian Civil Procedure Code (CPC) also set out general rules governing private lawsuits. Moreover, collective actions are further governed by a specific legal system that brings together several laws and regulations, such as the Brazilian Consumer Protection Code and the Public Class Actions Law.

### III EXTRATERRITORIALITY

As established in Article 2, the Competition Act applies (without conflicting with the conventions and treaties to which Brazil is a signatory) to any anticompetitive conduct that is fully or partially performed in Brazil, or that produces or may produce effects locally.

Therefore, foreign entities responsible for anticompetitive conduct abroad, if somehow causing effects within the Brazilian territory, could in principle be sued locally, either by CADE or through a national judicial authority.

In addition, CADE resolution 21/2018, which came into effect in 2018, also contains a provision strengthening the extraterritorial effects of the Competition Act on private antitrust litigation by stating that confidential documents may be exceptionally disclosed, among other hypotheses, when there is international judicial cooperation, as long as the disclosure is authorised by CADE and the leniency or settlement agreement applicant.

### IV STANDING

Private antitrust litigation can take the form of individual enforcement actions or collective actions.

Any aggrieved individual or company may bring a civil lawsuit for redress of damages arising from anticompetitive practices. In addition, in public class actions, the following, among others, have standing to represent the interests of those aggrieved by anticompetitive conduct (under Article 5 of Law No. 7,347 of 1985, as amended):

- the Public Prosecutor’s Office;
- the Public Defender’s Office;
- the federal government, federal district, states and municipalities;
- independent government entities, government-owned companies, foundations and mixed-capital companies; and
- an association established for at least one year to engage, among other institutional purposes, in the protection of consumer rights, the economic system or free competition.

Moreover, private enforcement claims can be taken to state or federal courts in connection with private suits for damages filed by individuals or companies (or by legitimised institutions for public class actions) aggrieved by anticompetitive practices.

Notwithstanding this extensive list of eligible persons, a possible deterrent to private competition lawsuits following CADE’s conviction of antitrust conduct (follow-on litigation)

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6 The Law disciplines public class actions for, *inter alia*, damage caused to the environment, consumers or historical patrimony.
is the cost (both financial and other costs) of litigating in Brazil. For instance, defeated parties must pay court costs and expenses, plus statutory attorneys’ fees, totalling as much as 10 to 20 per cent of the value of the claimed damages (except in public class actions). In addition, from filing a claim until a final decision is rendered, a lawsuit may take 10 to 15 years on average, during which time legal costs will accrue to both litigants. Senate Bill No. 283 of 2016, which was recently approved by the Senate and which will be sent for approval to the House of Representatives, aims to bring more celerity to claims by allowing CADE decisions to ground the concession of evidence-supported relief.

V THE PROCESS OF DISCOVERY

The Brazilian legal system envisages a wide array of elements to prove allegations in court, and the CPC provides a non-binding list of means of proof by expressly stating that ‘all legal means, as well as morally legitimate ones, even if not specified in this Code, may apply to prove a fact’ (CPC Article 369).

It should be noted that in Brazil, evidence may sometimes be produced even before a lawsuit is brought (usually in cases of urgency). In addition, before a lawsuit is brought or during its development, the judge can order (on his or her own initiative, or at a litigant’s request), among others, that:

a documents be produced by the litigants themselves or by third parties;

b government entities provide certifications or records of an administrative proceeding if so necessary to prove an allegation; or

c specific evidence be put forward by a litigant.

Regarding (a), for instance, if a party refuses to show a document, a presumption against it on the question of fact can be raised. In addition, in some private enforcement claims, the burden of proof (which usually lies with the accuser) may be shifted. This usually occurs when the concept of a reverse burden of proof is applied to consumers, and especially if these are legally, economically or technically vulnerable. As another example, the specificities of a case could render it impossible or excessively difficult for a given party to produce evidence (or, otherwise, it could be easier to prove a contrary fact).

Regarding (b), CADE is also subject to this provision, but has expressly raised concerns that private enforcement litigation demanding access to such type of evidence may pose risks for the future of successful leniency programmes. CADE resolution 21/2018 provides for the specific situations in which documents produced through investigations conducted by the authorities may be disclosed to third parties interested in seeking their rights through private antitrust claims.

Regarding (c), it is worth noting that the production of evidence can entail significant costs for the parties, either individually or jointly.

Finally, concerning discussions on the weight of evidence that applies to cases in which the underlying anticompetitive conduct has already been analysed and convicted by CADE, there is no common ground among the different local judicial authorities. The easiest position to defend is that this should be taken as relative evidence, since an administrative decision can be reviewed by a court. On the other hand, three trial courts and the Minas Gerais
State Court of Appeals have ruled that CADE final decisions are ‘unequivocal evidence’ of an antitrust violation, granting injunctions to displace the collusive equilibrium and halt overcharging.7

VI USE OF EXPERTS

Parties can request (and the judge can order on his or her own initiative) a wide range of means of proof, including the use of experts. The CPC devotes an entire chapter specifically to regulate the procedure and the possibility of using experts.

There is a high chance of expert opinions being required as evidence in a private antitrust litigation due to the intrinsic economic nature of the matters at issue and in response to the need for a full understanding of the market concerned. Expert witnesses would also be instrumental in defining whether an antitrust infringement has occurred, and in ascertaining the harm and ensuing compensation.

Finally, economic evidence originally produced under a CADE administrative proceeding can also serve as proof in a lawsuit.

VII CLASS ACTIONS

According to research carried out by Giovana Vieira Porto8 and based on data collected by the Brazilian Institute for Competition, Consumer Affairs and International Trade Studies (IBRAC), class actions outnumber individual enforcement actions in private antitrust litigation.

VIII CALCULATING DAMAGES

Calculating the damages payable to a plaintiff is one of the most challenging aspects of private competition litigation. A decision on the occurrence of damage serves as grounds for ultimately calculating the compensation payable. Consequently, ascertaining damage is one of the cornerstones in a private competition claim.

One of the main findings of the research conducted by Giovana Vieira Porto9 is that the criteria adopted by trial and appellate courts in calculating damages currently lack uniformity.

In calculating property damage (and, by extension, the resulting compensation), they have identified at least five distinct methodologies:

a the use of experts in the award calculation;

b the difference between the price paid by consumers and the price that was effective before the anticompetitive conduct, doubled;

c an arithmetic average of the profit made during the anticompetitive conduct;

d the amount to be set at the award calculation stage; and

e the values stated in an expert report during the discovery phase.

9 Ibid.
For its part, moral damage (pain and suffering) is mostly calculated in reliance on:

a. the defendant’s socioeconomic conditions;
b. the nature of the injury;
c. the consequence of the injury to victims;
d. the repercussions in the personal lives of the aggrieved persons; and 
e. the reasonableness and proportionality of the compensation in relation to the damage caused.

In view of the above, and with the aim of providing more certainty in estimating cartel damages, in 2018 the Seprac issued guidelines that provide an economic analysis of the law, the value of the compensation and deterrence, as well as a general overview related to quantifying damage. The authorities clearly recognise that compensation for harm imposed on society does not refund the victims of a cartel, and that an effective antitrust enforcement framework must involve a complementary mechanism that entitles victims to demand compensation for damage. For this to be feasible, however, it is important to overcome one of the main obstacles for private antitrust actions: credibly proving and quantifying damage.

In this context, the guidelines detail concepts related to cartel practices, including methods of detection and, most importantly, possible methods for quantification of overcharges and the passing-on of overcharges, which includes, on a non-exhaustive basis, comparison-based methods and market or firm structure-based methods.

IX PASS-ON DEFENCES

Article 25 of the Consumer Protection Code could reasonably suggest that pass-on defences are not allowed in consumer-related claims. In brief, the Consumer Protection Code states that a clause precluding, exonerating or otherwise alleviating the obligation to indemnify for product and service defects is void, and further imposes joint and several liability on the manufacturer, builder, importer or assembler.

In Brazil, it still under discussion whether a pass-on defence assertion would be accepted before a Brazilian court as an argument to exclude the obligation to indemnify.

In addition, the Seprac guidelines explicitly consider the passing-on of overcharges, recognising the higher challenge of quantifying damages in this situation. According to this approach, the passing-on of overcharges must be deducted from the compensation that must be paid to intermediate consumers, and the final consumer is entitled to compensation.

X FOLLOW-ON LITIGATION

In the first follow-on litigation involving a global cartel case, direct purchasers of compressors for refrigeration filed a lawsuit that was ultimately ruled on by the STJ in 2016 (as already stated, the decision compelling CADE to disclose documents obtained under a leniency agreement, which was further clarified in 2018 through establishing that disclosure should occur after a final ruling by CADE’s Tribunal).
Notwithstanding, as the parties to a lawsuit can challenge every piece of evidence, even when it has been produced by CADE within an administrative proceeding, this can also be a significant obstacle to the development of private enforcement in Brazil, as it in practice means having to re-litigate the existence of a cartel. This is the case because CADE’s decisions are not binding before the courts and, therefore, it could be a good strategy for defendants to (at least) delay a final decision.

XI PRIVILEGES

Attorney–client privilege and other related aspects arising from the attorney–client relationship are regulated by the Brazilian Bar Association Statute\(^{10}\) and its regulations.

The Brazilian Bar Association Statute and its regulations apply to all Brazilian lawyers. As a rule, attorneys are assured of their right to protect and have a duty of not disclosing information received within the context of an attorney–client relationship. This privilege covers every piece of oral or written information in physical or electronic format, which renders it inviolable. It also extends to an attorney’s office, files, data, mail, email and other communications. In this respect, there is a controversy concerning whether the attorney–client privilege is applicable to both external attorneys and in-house counsel, or only to external attorneys. Although the prevailing opinion of jurists has been that there is no limitation to the privilege based on this, some public authorities may have a contrary opinion in practice.

It has been argued that some in-house counsel now have a role in a company’s business that is more similar to a manager or officer’s role, rather than being an attorney *stricto sensu*. Consequently, in some situations involving information in the possession of an in-house counsel, there is a possibility of the attorney–client privilege being relativised, and thus the information disclosed.

XII SETTLEMENT PROCEDURES

Settlement procedures are usually promoted by private and public attorneys, and are officially encouraged by the judiciary. The CPC establishes that mediators and conciliators are aides in the administration of justice. Therefore, before or during the course of private antitrust claims, the use of alternative dispute resolution mechanisms should be facilitated.

However, parties are not under an obligation to engage in an alternative dispute resolution process before trial, and may expressly inform the judge that it is not in their interest to engage in mediation or conciliation (without any implications for the court dispute or their otherwise suffering any personal retaliation for that decision).

Parties may resort to arbitration only in disputes involving disposable economic rights; see below.

XIII ARBITRATION

Article 47 of the Competition Act clearly reads that the parties can take antitrust claims to court, but it remains controversial whether they can dispute antitrust matters through arbitration.

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\(^{10}\) Brazilian Bar Association Statute, Law No. 8,906 of 1994.
Under Law No. 9,307 of 1996, a discussion can be settled through arbitration as long as it revolves around disposable economic rights, which means that the relationship has to be financially based. Since an antitrust discussion involves both economic and constitutional rights, it is hard to ascertain whether antitrust claims are arbitrable in Brazil.

Anticompetitive conduct can harm both society as a whole as well as the companies and individuals directly affected by it. The damage inflicted upon society refers to the collective rights of free competition and free enterprise, which constitute inalienable rights and which cannot be referred to arbitration. However, the damage inflicted upon companies and individuals that have suffered a measurable loss may indeed be subject to arbitration.11

One of the advantages of arbitration is that the parties may have their dispute settled confidentially by a trustworthy arbitrator (instead of a judge). In addition, it is probable that an arbitral decision will be more precise and faster than a court ruling. Arbitration has been debated in the context of Senate Bill No. 283 of 2016, and whether its adoption could for instance allow for a reduction in potential damages to be paid by defendants who accept the mechanism in favour of procedure celerity.

As the Competition Act expressly allows parties to look to the judiciary for redress of any injury from anticompetitive practices, such claims also qualify for alternative dispute mechanisms, such as arbitration or negotiation. However, parties do not often resort to these mechanisms in Brazil on account of the existing obstacles to indemnification, as further explained below.

**XIV INDENIFICATION AND CONTRIBUTION**

Under Article 47 of the Competition Act, those harmed by an anticompetitive conduct may resort to the judiciary12 for redress of their losses. However, there are obstacles that might hinder indemnification. In this regard, the following three are worth mentioning:

- as indicated by CADE Commissioner Cristiane Alkmin in an institutional presentation,13 litigation costs are high and the process is time-consuming. As such, when assuming that a party agrees to litigate under those conditions, there might be a chance it will not be fairly indemnified if it eventually wins the case;
- a plaintiff can probably expect retaliation from the cartel members, which are probably its main suppliers. This might conceivably pose an extremely risky strategy, as the plaintiff might not be interested in rupturing its commercial relations with the cartelist; and
- there are procedural difficulties in proving the conduct, a causal relation and its ensuing damage, which might also discourage plaintiffs from seeking redress in court.

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12 As provided above, there is a controversy on whether alternative dispute resolutions such as arbitration apply to cases of private competitive enforcement.
As a result, enough incentives might not exist for victims to seek indemnification against cartelists. Even though CADE has persisted in its efforts to promote private antitrust litigation, there has still only been a handful of lawsuits to that end.\textsuperscript{14}

CADE is keen to encourage lawsuits as a powerful mechanism to fight cartel schemes. Leniency agreements do not reach the civil sphere, focusing instead on the criminal and administrative spheres. As a result, companies signing such agreements are not protected against civil lawsuits, which may encourage individuals to pursue indemnification claims against companies that engage in anticompetitive conduct (serving, by extension, as a deterrent to anticompetitive practices).

\textbf{XV FUTURE DEVELOPMENTS AND OUTLOOK}

CADE is increasing its efforts to crack down on anticompetitive conduct in Brazil, and especially cartel behaviour. In 2018 there were several developments, including the following:

\textit{a} a new ruling by the STJ clarifying the access to confidential documents obtained through administrative proceedings commenced by CADE to investigate anticompetitive practices;

\textit{b} guidelines issued by the Seprac providing methods to quantify damage caused and advantages taken by undertakings as a result of a cartel; and

\textit{c} the publication of CADE resolution 21/2018, which aims at regulating access to documents obtained by the authorities and to foster private antitrust litigation.

In another attempt to promote private competition enforcement, Senate Bill No. 283 of 2016, which is about to be approved, proposes, among other things, that CADE final rulings should be given due consideration by the courts to ensure more expeditious decisions in private antitrust litigations. In keeping with the principle of the separation of powers, however, CADE decisions would not be binding on the courts. The bill of law provides for a set of very important mechanisms, which should foster private antitrust litigation, and it should be a landmark that will complete the Brazilian legal framework for combating cartels.

Clearly, Brazil and CADE are tending towards aligning with other, more mature jurisdictions as regards private competition enforcement.

Chapter 7

CANADA

David Vaillancourt, Michael Binetti and Fiona Campbell

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Worldwide class gets green light

The Court of Appeal for Ontario permitted claims by ‘absent foreign claimants’ to proceed in *Airia Brands Inc v. Air Canada*, opening the door to worldwide classes in price-fixing class actions. The 2017 *Airia* case concerns allegations of price fixing in the market for air cargo services into and out of Canada. Class counsel sought to certify a global class consisting of anyone purchasing such services regardless of where such purchasers were domiciled or any direct presence-based connections to Canada.

The defendants brought a preliminary motion challenging the Court’s jurisdiction over absent foreign claimants – those proposed class members that were outside of Canada and had no presence in Canada. At first instance, a judge of the Superior Court of Justice granted the motion, finding that Ontario courts did not have jurisdiction over absent foreign claimants because the territorial limits in the Constitution prohibit the Court from assuming jurisdiction over absent foreign claimants who do not have a Canadian presence or do not consent to the jurisdiction of the Court.

The Court of Appeal overturned this lower court decision, holding that the motions judge had erred by disregarding the traditional test for the assumption of jurisdiction: the real and substantial connection test. In the case of absent foreign plaintiffs, an Ontario court will assume jurisdiction where:

a. there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;

b. there are common issues between the claims of the representative plaintiff and absent foreign claimants; and

c. the procedural safeguards of adequacy of representation, adequacy of notice and the right to opt out are provided, thereby serving to enhance the real and substantial connection between absent foreign claimants and Ontario.3

1 David Vaillancourt and Michael Binetti are partners and Fiona Campbell is an associate at Affleck Greene McMurtry LLP.

2 2017 ONCA 792.

3 2017 ONCA 792 at paragraph 107.
On the facts of *Airia*, the Court of Appeal found that the Ontario Court did have jurisdiction, and also rejected an argument that Ontario was *forum non conveniens*. In 2018, the Supreme Court of Canada (SCC or Supreme Court) denied leave to appeal the decision of the Court of Appeal.4

ii Class counsel cannot discover Bureau investigator

The Supreme Court has held that the Crown, including the Competition Bureau and its investigators, is immune from examinations for discovery in litigation in which it is not a party.

*Canada (Attorney General) v. Thouin*5 involved a price-fixing class action against oil companies and retailers. The plaintiffs consisted of purchasers of gasoline in Quebec, who alleged the defendants conspired to fix gasoline prices. The Bureau had conducted a prior investigation into gasoline price fixing that yielded over 220,000 private communications.

The plaintiffs moved for an order permitting them to examine the Bureau’s chief investigator, and requiring the Attorney General of Canada, as the Bureau’s legal representative, to produce all documents in the Bureau’s investigation file. The Attorney General argued that the Crown had immunity from discovery under the Crown Liability and Proceedings Act (CLPA) because it was not a party to the litigation.

The Quebec Superior Court granted permission to examine the chief investigator and ordered production of the investigation documents, and the Court of Appeal affirmed. The Court of Appeal reasoned that Section 27 of the CLPA, which provides that ‘the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings’, did not contain clear language expressly limiting Section 27 to proceedings against the Crown. According to the Court of Appeal, Section 27 therefore lifted the Crown’s immunity even in litigation in which the Crown was not a party.

The Supreme Court had to decide whether a court may require a Bureau investigator to be examined for discovery under a province’s rules of civil procedure in litigation in which none of the Crown, Bureau or chief investigator is a party. Historically, the Crown’s immunity exempted it from discovery in civil litigation, even in litigation in which it was a party. According to Section 17 of the Interpretation Act, the Crown continues to have immunity unless the immunity is clearly lifted. The question, then, was whether Section 27 of the CLPA lifted the Crown’s immunity in cases in which it was not a party.

The Supreme Court held that provincial discovery rules do not apply to the Crown in proceedings in which it is not a party. The Supreme Court explained that the CLPA does not reflect a clear intention by Parliament to lift the Crown’s immunity from discovery in litigation in which it is not a party. The Bureau’s chief investigator could therefore rely on the Crown’s discovery immunity to refuse to submit to an examination for discovery.

The practical result of the *Thouin* decision is that it blocks parties from examining the Competition Bureau for discovery in price-fixing class actions.

Following the *Thouin* decision, the Bureau released a position statement on requests for information from private litigants explaining that it will not voluntarily provide information to private litigants, and that it will oppose subpoenas for production of information if disclosure might interfere with an ongoing investigation.6

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5 2017 SCC 46.
iii The uncertainty of umbrella purchasers

Umbrella purchasers are purchasers that did not buy a price-fixed product from an alleged conspirator, either directly or indirectly (that is, as part of a vertical distribution chain); they bought it from firms that are not part of the conspiracy or through distribution chains descending from those firms. Class counsel typically argue that umbrella purchasers have a claim against conspirators because the alleged conspiracy created an umbrella of supra-competitive prices, enabling non-cartel members to raise prices, causing their customers to pay an overcharge. Canadian courts have not taken a unified approach to the claims of umbrella purchasers, and the issue is expected to be clarified by the Supreme Court in 2019.

In 2017, the Ontario Divisional Court held in *Shah v. LG Chem Ltd* that umbrella purchasers do not have a cause of action under Section 36 of the Competition Act, and further that no claims (including common law claims) by umbrella purchasers should be permitted to proceed. The Divisional Court held that umbrella purchaser claims would open defendants up to indeterminate liability for the pricing decisions of non-defendant manufacturers over which the defendants have no control. The spectre of indeterminate liability is contrary to the common law principles governing recovery for pure economic loss. This decision was overturned on appeal to the Court of Appeal for Ontario in 2018, as the Court held that umbrella purchasers did have a viable cause of action.

Also in 2017, in *Godfrey v. Sony Corporation*, the British Columbia Court of Appeal permitted umbrella purchaser claims to proceed. The Court rejected the reasoning by the Divisional Court in *Shah*, holding that if a conspirator impacts the market dynamics, causing non-conspirators to raise prices and overpayments to be made by umbrella purchasers, then the conspirators should not be permitted to shield themselves behind the doctrine of indeterminate liability for losses consequentially caused by their conduct. The Supreme Court granted leave to appeal the *Godfrey* decision in 2018, with a decision expected at some point in 2019 that should resolve the umbrella purchaser issue once and for all.

iv Application of discoverability as applied to Competition Act claims under review

Civil claims under Section 36 of the Competition Act are subject to a two-year limitation period running from the later of the last day on which the conduct was engaged in or the day on which any criminal proceedings relating thereto were finally disposed of. The limitation period provided in the Competition Act makes no reference to the common law principle of discoverability – a delaying mechanism which provides that a limitation period does not begin to run until the material facts of a claim have been discovered or ought to have been discovered. Although the better interpretation of the Act is that discoverability should not apply, courts have recently taken the opposite view.

The Court of Appeal for Ontario, in the 2016 decision of *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp*, held that the principle of discoverability does apply to claims under Section 36 of the Competition Act. The Court of Appeal held that as a general interpretive principle, statutory limitation periods that run from the accrual of a cause of action are subject to the principle of discoverability, while statutory limitation periods that run from a fixed event unrelated to the injured party’s knowledge are not subject

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7 2017 ONSC 2586.
9 2017 BCCA 302.
10 2016 ONCA 621.
to the principle. The Court of Appeal held that the conduct referenced in Section 36 is the conduct that gives rise to the right to damages under Section 36, therefore the triggering event for the limitations period is related to the actual accrual of the cause of action. As a result, the Court held, the discoverability principle applies. The Court of Appeal for Ontario reiterated this holding in the 2018 decision of Mancinelli v. Royal Bank of Canada,11 where it permitted two new defendants to be added to a price-fixing class action in a circumstance where the plaintiffs only learned of the alleged participation of the proposed defendants years after the claim had been commenced. The British Columbia Court of Appeal applied the same principle in deciding the appeal in Godfrey v. Sony Corporation.12

The conduct in Section 36 is the conduct of the defendants, which is arguably ‘unrelated to the injured party’s knowledge’. The reasoning of the Court of Appeal is difficult to square with the general statement of law that discoverability does not apply in such circumstances. As noted above, the Supreme Court granted leave to appeal the Godfrey decision, and the final word on the discoverability of Competition Act claims is expected in 2019.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Like most competition regimes, Canada’s Competition Act13 deals with three broad areas: coordinated conduct among competitors, unilateral conduct by firms with market power and mergers. Somewhat unusually, the Competition Act also deals with a variety of marketing practices, such as false advertising.

The Competition Act applies a mix of criminal and civil (administrative) approaches to the areas it covers, as well as both public and private remedies.

Private actions for damages are only available for breaches of the Competition Act’s criminal provisions. The key criminal provisions are conspiracies to fix prices, allocate markets or reduce output,14 bid rigging15 and false advertising.16

Importantly, unilateral conduct by firms with market power, such as abuse of dominance,17 exclusive dealings,18 tied selling19 and refusal to deal,20 are not subject to criminal sanction. In fact, they are not even prohibited unless they cause a substantial lessening or prevention of competition, in which case the Competition Tribunal can prohibit the conduct. Agreements between competitors that are not hardcore cartels and price maintenance are subject to the same treatment.

Section 36 of the Competition Act creates a civil cause of action for damage caused by breaches of the criminal provisions of the Competition Act.21 To succeed, the plaintiff must

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11 2018 ONCA 544.
12 2017 BCCA 302.
13 RSC 1985, c C-34.
14 Section 45.
15 Section 47.
16 Section 52.
17 Section 79.
18 Section 77.
19 Section 77.
20 Section 75.
21 Section 36 is also available to recover damages caused by violations of orders made under the Competition Act by the Competition Tribunal or a court. Indirect purchaser class actions under this branch are unlikely.
prove that the defendant committed a criminal offence under the Competition Act, and that he or she suffered damage caused by the criminal offence. The standard of proof is on a balance of probabilities.

A conviction is, in the absence of proof to the contrary, sufficient to prove that the defendant committed the offence. The plaintiff must show actual damage, and that the damage was caused by the offence.

Section 36 itself specifies two remedies: damages and costs. The amount of damages is limited to the actual loss suffered by the plaintiff, plus the costs of investigation and of the proceeding.

Actions under Section 36 are subject to a two-year limitation period that commences on the last day on which the offence was engaged in, or from the day on which criminal proceedings were finally disposed of. Whether discoverability applies to extend this limitation period is an issue currently before the courts. Both the Ontario Court of Appeal and the British Columbia Court of Appeal have ruled that it can, and the issue will be taken up by the Supreme Court in 2019.

Both direct and indirect purchasers can sue and recover damages for price fixing. 

Section 36 actions can be brought in the superior courts of any province, as well as the Federal Court of Canada. They can be structured as class actions under the class proceedings statutes or rules in most Canadian provinces, as well as the Federal Court. In Ontario, for example, the Class Proceedings Act, 1992 (CPA) provides for certification of class actions,

Section 36 provides in part as follows:

Recovery of damages
36. (1) Any person who has suffered loss or damage as a result of
(a) conduct that is contrary to any provision of Part VI, or
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Moreover, rules against collateral attacks on the result of proceedings that are concluded would likely bar any attempt by a person convicted of a criminal offence under the Competition Act to establish that no offence was, in fact, committed.

2016 ONCA 621.
2017 BCCA 302.
Pro-Sys Consultants Ltd v. Microsoft Corporation, 2013 SCC 57.

Section 36(3) grants jurisdiction to the Federal Court of Canada to hear Section 36 actions. The superior courts in each province are courts of inherent jurisdiction. They hear virtually all civil and important criminal matters, whether they are local, interprovincial or even international, and whether they involve provincial or federal law. The Federal Court of Canada has only limited statutory jurisdiction, mainly involving federal statutes, income tax, immigration and the like. It does not have jurisdiction over common law claims between private parties. The only significant private law jurisdiction of the Federal Court is over intellectual property, admiralty law and actions under Section 36 of the Competition Act. Because the Federal Court does not have jurisdiction over the common law claims typically associated with Section 36 private actions, such claims are only rarely advanced in the Federal Court.

and several other provinces have similar legislation. Historically, plaintiffs typically started at least three class actions for each case: one in Quebec, for a class of consumers and small businesses; one in British Columbia, for British Columbia consumers and businesses; and a national class in Ontario covering Ontario and the rest of the country. In 2018, British Columbia changed from being an opt-in class action regime for out-of-province class members to being an opt-out jurisdiction for such class members. It remains to be seen whether this changes the filing strategy among the plaintiff class action bar going forward.

Ontario’s class action legislation is similar to (and indeed, modelled on) Rule 23 of the US Federal Rules of Civil Procedure. In contrast to Rule 23’s requirement that the common issues predominate over individual issues, however, the CPA sets a lower threshold, requiring that a class proceeding be ‘the preferable procedure for the resolution of the common issues’.

The following provinces have class proceedings legislation similar to Ontario’s: British Columbia (Class Proceedings Act, RSBC 1996, c 50), Alberta (Class Proceedings Act, SA 2003, c C-16.5), Saskatchewan (Class Actions Act, SS 2001, c C-12.01), Manitoba (Class Proceedings Act, CCSM c C130), Quebec (Code of Civil Procedure, RSQ, c C-25, Book IX), New Brunswick (Class Proceedings Act, RNBA 2006, c 125), Nova Scotia (Class Proceedings Act, SNS 2007, c 28), and Newfoundland and Labrador (Class Actions Act, SNL 2001, c C-18). The Federal Court rules allow class actions within the court’s limited jurisdiction. In Western Canadian Shopping Centres v Bennett Jones Verchere, [2001] 2 S.C.R. 534, the Supreme Court ruled that a class action could be brought even in the absence of class action legislation. Although Quebec was the first province to enact class action legislation, in 1978, its legislation limits the plaintiff classes to individuals and small corporations or associations (fewer than 50 employees).

Ontario had been the jurisdiction of choice for national class actions because it has an opt-out regime for national classes, whereas British Columbia required out-of-province members to specifically opt in. British Columbia has a ‘no costs’ regime, and may become the forum of choice for the plaintiff class action bar, given the procedural change. Alberta, Saskatchewan and Newfoundland and Labrador have adopted opt-in regimes.

CPA Section 5 contains the test for certification. It reads in part as follows:

\[
\text{Certification}
\]

5. (1) The court shall certify a class proceeding on a motion under section 2.3 or 4 if:

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c 6, s 5 (1).

The test in Manitoba (Section 4), Alberta (Section 5), Saskatchewan (Section 6) and Newfoundland & Labrador (Section 5) is almost identical to CPA Section 5, except that these three statutes add ‘whether or not the common issue predominates over issues affecting only individual prospective class members’ (or similar) after the equivalent of CPA Section 5(1)(c). The impact of this additional language has yet to be considered judicially, but it is unlikely to have much effect on the test. The British Columbia Class Proceedings Act expressly makes whether the common issues predominate over individual issues a factor in determining whether a class proceeding would be preferable (Section 4(2)(a)). The test in Quebec has

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The court considers the proposed class action in light of the three goals of class actions: judicial economy, access to justice and behaviour modification. The importance of the common issues in relation to the claim as a whole is a factor in this analysis. If resolution of the common issues would not significantly advance the litigation, and individual trials for each class member would be required, the action will not be certified.

III EXTRATERRITORIALITY

Price-fixing class actions potentially raise two different jurisdictional issues. The first is whether the court has jurisdiction over the claim. Courts have generally held that if an international price-fixing conspiracy has caused losses in Canada, Canadian courts have jurisdiction. Courts in most Canadian provinces will take jurisdiction over matters that have a ‘real and substantial connection’ with that province. The party asserting that the court should assume jurisdiction has the burden of identifying the connecting factors that link the subject matter of the action to the jurisdiction. Certain connecting factors are considered presumptive: that is, if they exist, the court will have jurisdiction. These presumptive factors are:

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.

However, these factors are merely presumptive, and do not preclude an action against a foreign defendant that never had any business presence in the jurisdiction if the defendant allegedly participated in a conspiracy that impacted the jurisdiction, a British Columbia court recently confirmed.

Because of the presumptive factors, and the court’s consideration of the impact of the conduct, it is generally difficult for defendants to be successful on a jurisdictional challenge. However, in an April 2015 decision, two defendants successfully had a price-fixing claim.

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35 Vitapharm Canada Ltd v. Hoffmann-La Roche Ltd [2002] O.J. No. 298 (SCJ); Sun-Rype Products Limited v. Archer Daniels Midland Company, 2013 SCC 58 at paragraph 46; Fairhurst v. Anglo American PLC, 2012 BCCA 257; but see Bouchard v. Ventes de véhicules Mitsubishi du Canada Inc, 2008 QCCS 6033, where the Quebec Superior Court held that an overcharge suffered in Quebec as a result of price fixing is a pure economic loss that is not damage suffered in Quebec for purposes of Article 3148(3) Quebec Civil Code. In addition, in Shah v. LG Chem, Ltd, 2015 ONSC 2628, the fact that damage was suffered in Ontario was insufficient to establish jurisdiction where the plaintiffs failed to show a ‘good arguable case’ that the defendant was a party to that conspiracy.

36 Club Resorts Ltd v. Van Breda, 2012 SCC 17. This rule applies in Canada’s common law provinces and territories.

dismissed against them for lack of jurisdiction. The judge found insufficient evidence showing a connection to Ontario, including insufficient evidence that the defendants did business in Ontario or were parties to the conspiracy, or that the product at issue would have made its way through the normal channels of trade to Ontario. 38

Quebec has codified a similar set of connecting factors that allow its courts to assume jurisdiction. 39

With respect to class members, the Court of Appeal for Ontario has held that Ontario courts have extraterritorial jurisdiction over absent foreign class members when:

a there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;

b there are common issues between the claims of the representative plaintiff and absent foreign claimants; and

c the procedural safeguards of adequacy of representation, adequacy of notice and the right to opt out are provided, thereby serving to enhance the real and substantial connection between absent foreign claimants and Ontario. 40

The second jurisdictional issue goes to the criminal offence under the Competition Act that serves as the basis for a claim. The offence of conspiracy under Section 45 is complete as soon as a prohibited agreement is reached. Implementation of the agreement is not one of the elements of the offence; nor are the effects of the agreement on competition. Where a price-fixing conspiracy is entered into outside Canada, it is at least arguable that the offence took place outside Canada, and thus outside of the reach of Canada’s criminal law jurisdiction, which is territorial in nature. 41 The presence of Section 47 of the Competition Act, which makes it an absolute liability offence for Canadian subsidiaries to implement conspiracies entered into by their foreign parents, reinforces this argument. Against this, Canadian courts now take an expansive approach to criminal jurisdiction. 42 The question of whether a price-fixing conspiracy entered into outside Canada by foreign entities is an offence in Canada under Section 45 has yet to be determined.

Parties wishing to contest jurisdiction are required to bring their jurisdiction motions promptly, as their participation in any further steps in the proceeding (such as responding to the certification motion) will constitute attornment. 43

Because class actions have a preclusive effect against potential plaintiffs, the question of whether a court validly assumes jurisdiction over the entire plaintiff class also arises. It is well established that a class in, say, Ontario, can include plaintiffs from other Canadian provinces, even on an opt-out basis. Ontario’s Class Proceedings Act expressly allows this, and other Canadian provinces will enforce any judgment arising out of the Ontario proceedings. Where a plaintiff class is proposed that includes members from outside Canada, the question becomes more difficult.

38 2015 ONSC 2628.
39 Civil Code of Quebec, CQLR c C-1991, Article 3148.
40 2017 ONCA 792 at paragraph 107.
41 Criminal Code, RSC 1985 c C-46, Section 6(2) provides that no one shall be convicted of an offence outside Canada.
IV STANDING

i Standing with respect to criminal practices or breach of orders
Canada has an expansive concept of standing in private actions for damages in instances where there is an alleged violation of the criminal provisions of the Competition Act or breach of an order of the Tribunal or other court made under the Act. Section 36 of the Competition Act provides that any person who has suffered loss or damage as a result of such conduct may commence a private action to seek redress.

The SCC has recently made clear that indirect purchasers have standing to sue and seek damages in price-fixing cases, subject to the caveat that indirect purchasers must be able to prove that they have actually suffered loss or damage as a result of the complained-about conduct.44 A class member cannot recover merely based on the fact that there has been a price-fixing conspiracy, and that somewhere down the distribution chain the class member purchased a good that contained the price-fixed component.45 Proof of loss is required for each member of the class. This is typically done by way of expert economic evidence, as discussed below.

ii Standing with respect to non-criminal restrictive trade practices
Canada has a very limited scope for the private enforcement of non-criminal restrictive trade practices. Private party prosecution of such trade practices is limited to instances of refusal to deal (Section 75 of the Competition Act), price maintenance (Section 76 of the Competition Act), and exclusive dealing, tied selling and market restriction (collectively, Section 77 of the Competition Act). To commence a private prosecution before the Competition Tribunal, a party must first obtain leave of the Tribunal, which pursuant to Section 103.1 of the Competition Act will only be granted where the Tribunal has reason to believe that the party is directly and substantially affected in its business by the trade practice in question.

Leave to commence a private prosecution under Section 103.1 is rarely sought and even more rarely granted.

V THE PROCESS OF DISCOVERY
In Canadian class actions, the discovery process occurs after the class action has been certified. The certification motion is procedural in nature, and there is no thorough probing of the merits at the certification hearing and no right to pre-certification discovery.

The discovery process occurs in two stages. The first stage is documentary discovery, wherein parties must disclose and produce all non-privileged relevant documents that are in their power, possession and control. ‘Documents’ is very broadly defined, and includes all relevant electronic data. As a general principle, the obligation to produce documents is tempered by the principle of proportionality, which is directed by the size and complexity of the case at hand. Since price-fixing class actions are typically factually complex with plaintiffs seeking a large quantum of damages, documentary production is usually extensive.

Recently, in Imperial Oil v. Jacques,46 the SCC held that plaintiffs in a price-fixing class action were permitted to obtain as part of the production process wiretap evidence obtained

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45 Ibid.
46 2014 SCC 66.
by the Competition Bureau in the course of the Bureau’s criminal price-fixing investigation. This decision will make it easier for plaintiffs to obtain information disclosed to a criminal defendant in the Crown brief in follow-on price-fixing class actions. However, plaintiffs do not have carte blanche to obtain production of the entire investigatory file of the Bureau, and the Bureau has stated that it will oppose such requests.47

A British Columbia court held that information provided to the Bureau by third parties uninvolved in the litigation was protected from disclosure in a civil action by way of public interest privilege.48

Oral discovery follows the production of documents. In some jurisdictions, such as Ontario, a party is limited to having to produce one representative to be discovered, who must take steps to inform him or herself about matters within the collective corporate knowledge in advance of being examined. Even with such preparation, there are generally questions at discovery that go beyond the knowledge of the corporate representative, necessitating the need for the examinee to give undertakings to seek information and documentation from other sources within the corporation. In some instances, members of the class beyond just the representative plaintiff will be subjected to oral discovery, for example in a situation where different groups of class members are differently situated than the representative plaintiff, and the defendants require access to such evidence to properly present a defence.49

Other Canadian jurisdictions, such as Alberta, have a more expansive right of discovery covering multiple corporate representatives, which is more in line with the American deposition process. Oral discovery of non-parties is typically available only with leave of the court. Members of the Competition Bureau investigatory team are not obligated to attend discoveries in follow-on civil litigation to answer questions about criminal investigations under the Competition Act.50

The process of discovery is similar for matters before the Competition Tribunal. Parties in proceedings before the Tribunal are required to make documentary production and participate in oral discovery.51

VI USE OF EXPERTS

The use of experts is commonplace in Canadian competition proceedings, both in class actions in the civil courts and in reviewable matters before the Competition Tribunal. The most common types of experts put forward in competition proceedings are expert economists and industry-specific experts.

In class actions, experts are used at the certification stage, and also at trial. On the certification motion, the plaintiff bears the burden of demonstrating some basis in fact to

48 Pro-Sys Consultants Ltd v. Microsoft Corp, 2016 BCSC 97.
50 Canada (Attorney General) v. Thouin, 2017 SCC 46.
51 Competition Tribunal Rules, SOR/2008-141, Sections 60–64.
show that all members of the class have suffered harm as a result of the alleged criminal conduct.52 This is typically done by way of economic modelling and proposed methodologies by an expert economist.

On the certification motion, the plaintiff’s expert does not need to actually quantify the overcharge paid by indirect purchasers: the quantification of the overcharge is done at trial with a full evidentiary record. Rather, on certification the expert must present a methodology that establishes that the overcharge has been passed down through the distribution chain to the indirect purchaser level.53 On the certification motion, the expert’s methodology must only offer a realistic prospect of establishing loss on a class-wide basis.

Defendants on a certification motion have a high hurdle in refuting a plaintiff expert’s methodology, and will only succeed if they are able to show that the plaintiff expert’s methodology is implausible. The SCC has held that on the certification motion, it is not the role of the certification judge to resolve conflicts between experts, which makes it difficult (although not impossible) for defendants to succeed in an economist-versus-economist battle at certification.54

One strategy employed by defendants in responding to a certification motion is to put forward evidence from an industry expert to demonstrate that, contrary to the theoretical approach of the plaintiff’s economic expert, based on how the industry actually works (including the mechanics of the distribution chain) any overcharge would not have been uniformly or consistently passed on through various points of the distribution chain, or would not have made it to the ultimate end purchaser of a price-fixed good. The strategy here (as well as with an economics expert) is to demonstrate that there are complexities in pass-on that the plaintiff expert has not, and indeed cannot, consider or capture such that the class would include those who have suffered no harm.

In proceedings before the Competition Tribunal, complex economic evidence is tendered by both sides geared at demonstrating the effect on competition (or lack thereof) concerning the reviewable practice at issue in a given proceeding. The Tribunal itself is also empowered to appoint independent experts to assist it regarding ‘any question of fact or opinion relevant to an issue in a proceeding’.55

VII CLASS ACTIONS

In Canada, class action legislation has been enacted by all provinces except Prince Edward Island, although not in the territories.56 In 2002, the Federal Court also created specific class proceeding provisions; however, this was not done through independent legislation, but rather through the amendment of the Federal Court Rules.

52 Pro-Sys Consultants Ltd v. Microsoft Corporation, 2013 SCC 57, at paragraph 114.
53 Ibid. at paragraph 115.
54 Ibid. at paragraph 126.
55 Competition Tribunal Rules, SOR/2008-141, Section 80.
56 Class actions are permitted to proceed in jurisdictions without class action legislation under local rules of court.
i Requirements for certification

While there are some differences in the precise language used in the class action legislation enacted in the various jurisdictions, generally speaking a class action will be certified if the following criteria are met:

a the pleadings disclose a cause of action;
b there is an identifiable class of two or more persons;
c the claims of the class members raise common issues;
d a class proceeding is the preferable procedure for the resolution of the common issues; and
e there is a representative plaintiff who can fairly and adequately represent the interests of the class, and a workable plan for advancing the proceeding.

In Quebec, which is a civil law jurisdiction, there are two primary distinctions: a numerosity requirement, and no specific requirement that the proposed class action meet the preferable procedure test.

ii Notice

Notice to class members is an important component of the class proceeding process. Because individual class members are not active participants in the conduct of the action, notice provides the only real mechanism to inform class members of decisions made by the court in respect of major steps in the litigation. Notice is typically provided through publication in national media, industry magazines, distribution to industry associations, direct mailings to persons involved in the industry and on class counsel websites. The extent and types of notice will vary depending on the nature, scope and value of the claims. While not an exhaustive list, notice is given in the context of certification and settlement, and in respect of the claims process.

Notice of certification is particularly important in jurisdictions that have an opt-in process. In these jurisdictions, class members who fall within the defined class of persons have to take steps to become part of the action. This is distinct from opt-out jurisdictions where, once a class has been certified, any member of the defined class is presumed to be part of the proceeding unless they take steps to opt out of the proceeding.

When one or more defendants in an action settle with the plaintiff, a notice of settlement will be published in advance of the settlement approval hearing to permit people to consider the settlement and allow a class member to object to the settlement. Objectors may make submissions in writing or at the hearing. While objectors may make submissions, they do not gain party status with accompanying rights of appeal. Settlements must be approved by the court, which must satisfy itself that a settlement is fair, reasonable and in the best interests of the class.

iii Settlements in class proceedings

Settlements before trial are the norm in competition class actions. Settlements are negotiated between the parties, often using settlements of related proceedings in the United States as benchmarks for settlement quantum. Where the settlement amount owed to each individual class member is quite small, distribution of the settlement funds may be made cy-pres to organisations such as charities.

Unlike the United States, there is no procedure similar to a multi-district litigation process. The effect of this is that where class actions are commenced in various provinces
(often with plaintiff counsel working cooperatively in the different jurisdictions), settlements must be approved in each jurisdiction. There is a growing trend to conduct these hearings via video conference with the different jurisdictions participating at the same time. In these circumstances, each judge sits within his or her own jurisdiction, with all participants linked by video (or telephone) conference. In its 2016 decision in *Endean v. British Columbia*,57 the Supreme Court ruled that superior court judges can sit outside their home provinces. This decision will facilitate the management of national class actions, including private antitrust class actions.

**VIII CALCULATING DAMAGES**

Section 36 of the Competition Act provides for the recovery of damages, by individuals or companies, incurred as the result of a violation of the Act’s criminal provisions.58 The damage recovery permitted by Section 36 is compensatory in nature only; class members must have suffered actual loss or harm as a result of the alleged breach of the Act by the defendant. This means that it is not sufficient for a private defendant to simply point to anticompetitive conduct that did not affect it. It also permits the plaintiff to recover the costs of any investigation into the matter.

Plaintiffs’ claims for damages under Section 36 of the Competition Act are often accompanied by claims grounded in tort based on breaches of the Act. These claims permit, in principle, the recovery of punitive damages as well as damages through restitutionary principles. The ability of plaintiffs to rely on these avenues of recovery has been called into question. In *Watson*, the British Columbia Supreme Court held that the Competition Act is a complete code that was intended by Parliament to provide exhaustively the remedies available to plaintiffs for breaches of the Competition Act.59 However, the British Columbia Court of Appeal held that while claims in restitution (such as waiver of tort) are not available for breaches of the Competition Act, claims for unlawful means conspiracy or unlawful interference with economic relations (now simply called unlawful means) are available, and Section 36 was not intended to replace the tort.60

To date, none of the contested actions based on Section 36 has made it to trial. Consequently, there are no decisions providing judicial guidance on the appropriate methodology for damages calculations or other damages-related issues. Most judicial commentary in respect of damages has been in the context of class certification and settlements.

The most common approach used for damages calculations is based on an analysis of the difference in price between the alleged cartel pricing and a competitive price that would have been in play but for the cartel. That price differential is used to estimate the amount of the ‘overcharge’. Typically, expert evidence, including regression analysis (or, in the case of an expert’s report at certification, regression modelling), is relied upon to estimate the quantum of overcharge as well as to address pass-through (or pass-on) issues.

57 2016 SCC 42.
58 Part VI, Sections 45–62.
60 2015 BCCA 362.
IX PASS-ON DEFENCES

The SCC, in 2013, heard a trilogy of cases that addressed, among other things, the availability of indirect purchasers to maintain a cause of gain against alleged cartel members, particularly given that the pass-on defence had earlier been rejected by the Supreme Court. Until the trilogy, lower courts had generally avoided dealing with the problems associated with indirect purchaser claims. The Court held that the rejection of the defensive use of pass-on did not entail, as a necessary corollary, the rejection of the offensive use of pass-on. Both direct and indirect purchasers can make a claim and, unlike in the United States, for example, such claims can be joined in one action.

X FOLLOW-ON LITIGATION

The Competition Act creates a statutory cause of action for anyone who has suffered loss as a result of a criminal breach of the Act. Damages under this provision are limited to actual damages suffered, plus costs.

The Competition Act provides that proof of a criminal conviction can be used as proof of the offence in a subsequent private action. While a plaintiff can obtain evidence disclosed to a criminal accused as part of a crown brief during the discovery process, a plaintiff will not have access to the Bureau’s investigatory file and does not have the ability to summons members of the Bureau for oral discovery.

When there is no prior criminal conviction, a plaintiff can still bring a civil claim against the defendant, but must prove all elements of the case on a civil standard (i.e., on a balance of probabilities). Plaintiffs typically also plead various ancillary common law and equitable causes of action in bringing private actions under the Competition Act. Since these other causes of action are not available in the Federal Court, private actions are almost always commenced in provincial superior courts.

Private actions are commonly structured as a class action under provincial class proceedings statutes. Private actions can be structured as class actions in any of Canada’s 14 legal jurisdictions (10 provinces, three territories and the Federal Court), although each jurisdiction has its own particular rules.

Some of the Competition Act’s civil provisions, notably refusal to deal, tied selling, exclusive dealing and market restriction, allow for private enforcement by affected firms; however, before commencing an application, the injured party must obtain leave (permission) from the Competition Tribunal. One of the requirements for obtaining leave is a certification by the Commissioner of Competition that the matter is not the subject of an inquiry or application by the Commissioner to the Tribunal.

There is no right of private action under the abuse of dominance, anticompetitive agreements or merger provisions of the Competition Act.

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63 Section 36(1).

64 Section 36(2).

XI PRIVILEGES

i Solicitor–client privilege

Solicitor–client privilege protects communications between solicitor and client that are made in confidence for the purpose of giving or receiving legal advice. This privilege belongs to the client and is a permanent right; it survives the retainer and even past the client’s death. Communications with in-house counsel containing legal advice or for the purpose of obtaining legal advice are subject to solicitor–client privilege so long as the communications are made in the context of performing the function of legal counsel to the company. This privilege does not apply when the communications are made while in-house counsel is acting in some other non-legal capacity.

ii Litigation privilege

Litigation privilege applies to work product and communications that are made specifically in contemplation of existing or anticipated litigation. Litigation privilege also applies to communications with third parties where the dominant purpose of the communication is to assist with existing or anticipated litigation. This privilege, and the protections flowing therefrom, ends with the resolution of the action.

iii Settlement privilege

Settlement privilege attaches to communications between parties made on a without prejudice basis that relate to settlement or were made for the purpose of attempting to resolve a dispute. In these circumstances, communications will be protected from disclosure to the court by settlement privilege, subject to certain exceptions.66

iv Case-by-case privilege: the Wigmore test

Communications or documents that do not fall within one of the class privileges discussed above can nonetheless subject to privilege if the party claiming privilege can demonstrate that the communication or document should remain confidential based on four criteria, known as the Wigmore test:

a the communications must originate in a confidence that they will not be disclosed;

b this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

c the relation must be one that in the opinion of the community ought to be sedulously fostered; and

d the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.67

The onus is on the party seeking to prevent disclosure to demonstrate on a balance of probabilities that each criterion has been met.

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66 For example, if there is a dispute about the existence, interpretation or enforceability of a settlement agreement, the privilege will not apply, and the relevant documents, including settlement communications, will be producible before the court.

XII SETTLEMENT PROCEDURES

Settlements are actively encouraged by Canadian courts, and many jurisdictions have mandatory mediation requirements in their civil procedure rules. Most class actions commenced to date have not proceeded to trial, and are settled before and after class certification. Moreover, due to the multi-jurisdictional nature of class actions in Canada, we are seeing an increased use of global settlement agreements, which serve to resolve the actions in each of the jurisdictions by way of one settlement agreement.

Settlements of class actions require court approval (with some exceptions). With respect to class actions, the settlement process usually occurs in two stages: certification as against a party for the purpose of settlement and notice to class members regarding the settlement hearing, and approval of the settlement agreement itself. Objectors, including non-settling defendants and class members, can make submissions at each stage, and can voice their concerns about the fairness or reasonableness of the agreement or to ensure that certain protections are included within the order to appropriately protect their interests.

There is generally close judicial scrutiny of class action settlement agreements in Canada, and Canadian courts have not hesitated to refuse to provide their approval if they deem an agreement to be unfair. While provincial legislation does not specify criteria for approving a settlement, the test at common law is whether the settlement is ‘fair, reasonable and in the interests of all those affected by it’.

In determining whether to approve a class action settlement, the court will consider a number of criteria, including:

a. the likelihood of recovery or success if the case were litigated;

b. the amount and nature of discovery or investigation;

c. the terms and conditions of the settlement;

d. recommendations of counsel;

e. future expense and likely duration of litigation;

f. recommendations of neutral parties or experts;

g. the number and nature of objections from class members;

h. the presence of good-faith bargaining; and

i. the absence of collusion.

XIII ARBITRATION

So long as all litigants consent – or at least those who are willing to have their portions of a litigated case determined – parties may submit a matter to a private arbitrator or panel of arbitrators.

68 In Ontario and Quebec, prior court approval, even prior to certification, is required for a proposed class action to be settled or discontinued. The same is true for actions commenced in Federal Court. In the other statutory jurisdictions, court approval is required only after certification has been granted.

69 For example, the Ontario Superior Court recently refused to approve a settlement agreement between Quiznos franchisees, the defendant franchisers and food supplier, Good Food Service Inc, finding that the scope of the release was too broad given the nominal amount of damages.


Submitting a matter to arbitration would afford litigants the latitude to select the arbitrator or arbitrators, maintain confidentiality, and tailor evidentiary and procedural rules, although not all of these options are mandatory or provided for at law. The key, however, is that the process must be a voluntary one. Most provincial consumer protection statutes forbid terms in consumer contracts that require disputes to be submitted to arbitration.

A note about class actions: a private antitrust claim has never been submitted to or attempted to be submitted to arbitration. Much as would be the case with class settlements, the courts would have to approve any request to submit a matter to arbitration as being in the interests of the class members. Instead of arbitration, lawyers have been engaging mediators in an attempt to resolve class actions during the early stages, such as before a class certification motion or prior to certification, but before further substantive steps are undertaken, such as discovery.

XIV INDEMNIFICATION AND CONTRIBUTION

Generally, rules of court, or the Rules of Civil Procedure in Canadian provinces that govern the administration of justice, specifically permit claims for cross and third-party claims for contribution and indemnity. Limitation statutes sometimes prevent such claims from being advanced after the expiry of the applicable limitation period, such as two years, but parties are usually permitted to extend, or toll, limitation periods by agreement. Tolling a limitation period in Quebec, to the extent that such a notion is permissible under Quebec’s Civil Code, is not so straightforward.

In the case of private antitrust cases, plaintiffs’ counsel have argued that civil defendants should not be permitted to make claims for contribution and indemnity. While no court has specifically dealt with this issue, and despite the provisions specifically permitting such claims in the various rules of court, the argument for denying contribution and indemnity is premised on the fact that where conduct complained of is covered by the criminal provisions of the Competition Act, and because in the criminal context defendants are not permitted to claim contribution and indemnity among themselves, then the same rule should apply in civil courts. Differing burdens of proof between civil and criminal acts will have to be considered by the courts if this issue is decided, along with the fact that private competition claims also allege various common law torts, such as the tort of civil conspiracy, which obviously does not rise to the level of criminal conduct in and of itself.

Further complicating the issue is that defendants who settle competition class actions usually, as part of their settlement, require and obtain an order from the court barring any future proceedings against them, including any cross-claims or claims for contribution and indemnity. The trade-off that is usually satisfactory to the courts is that the plaintiffs will be precluded from seeking from any non-settling defendants the proportionate share of the settling defendants’ liability. If the non-settling defendants are precluded by way of a court order from seeking contribution and indemnity, the logic holds, then they should not be burdened with the liability of the settling defendants.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Despite the growing number of private antitrust class actions in Canada, none have proceeded to a concluded trial on the merits. Many Canadian competition class actions are commenced in tandem with, or very closely related to, other global or United States-based antitrust
matters. Very few cases proceed before the Competition Tribunal. Many lawyers in Canada expect the Competition Bureau to take a more aggressive stance on the enforcement of the Competition Act given amendments that have now been in effect for over nine years that deem certain conduct – conspiracy for example – a *per se* criminal offence, with the follow-on effect of more private antitrust actions.
Chapter 8

CHINA

Susan Ning, Kate Peng and Sibo Gao

OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Since the enactment of the PRC Anti-Monopoly Law (AML), the use of private litigation has grown rapidly. According to the latest information disclosed by a judge of the Supreme People’s Court at a conference to celebrate the 10th anniversary of AML’s implementation, up to the end of 2017, about 700 antitrust private actions were heard by courts all over the country, and 630 cases were closed within this time frame.

Private antitrust litigation in China has involved industries in cutting-edge areas, such as the internet, telecommunication and standard-essential patents (SEPs), and has covered all three types of monopolistic conduct under the AML regime (i.e., horizontal monopoly agreements, vertical monopoly agreements and abuse of dominance). Furthermore, two new types of private antitrust actions have arisen in the past couple of years: follow-on litigation and litigation against the abuse of administrative power. With respect to follow-on litigation, a consumer had filed an antitrust litigation against Abbott Laboratories following the National Development and Reform Commission’s (NDRC) penalty decision in the resale price maintenance (RPM) investigation into nine infant formula companies. In that case, the plaintiff claimed to have bought a tin of Abbott milk powder and thereby had suffered damage due to the higher price paid as a result of the RPM arrangement. After the appeal, Beijing IP Court considered that although the NDRC penalty decision could prove that an RPM arrangement existed, the decision did not specify that Carrefour, from whom the plaintiff had bought the milk powder, was involved in the arrangement. Beijing IP Court held that the evidence submitted by the plaintiff could not prove the existence of an RPM arrangement between Abbott and Carrefour, and therefore issued a decision favouring Abbott. With respect to antitrust litigation against the abuse of administrative power, on 26 April 2014, Thsware Technology Corporation brought a lawsuit against the Guangdong Education Department for its appointment of certain software as the exclusive software for a government-organised competition event. On 2 February 2015, the Guangdong Intermediate People’s Court issued its judgment in favour of the plaintiff. The judgment was finally affirmed by the Guangdong Higher People’s Court in August 2017.

Besides these two new types of antitrust litigation, several local consumer associations have brought, or have been planning to bring, public interest litigations recently. Consumer associations could be more active in the future in bringing public interest litigation, including litigation premised upon monopolistic conduct.

1 Susan Ning is a senior partner, Kate Peng is a partner and Sibo Gao is an associate at King & Wood Mallesons.
Some notable cases are summarised in chronological order below.

i  **Rainbow v. Johnson & Johnson**
On 1 August 2013, the Shanghai Higher People’s Court made a final judgment overruling the first-instance decision, and held that Johnson & Johnson had violated the AML by entering into and enforcing an RPM agreement with Rainbow.

ii  **Huawei v. IDC**
On 28 October 2013, Guangdong Higher People’s Court announced its final judgment, which upheld the first instance judgment, that IDC had abused its market dominant position by engaging in excessive pricing and tying SEPs with non-SEPs.

iii  **Lou Binglin v. Beijing Aquatic Product Wholesale Association**
On 9 April 2014, the Beijing Higher People’s Court announced its final judgment, which upheld the first instance judgment that concluded that the Association should be held liable for organising aquatic product sales companies to reach monopoly agreements to fix or change prices.

iv  **Qihoo 360 v. Tencent**
On 16 October 2014, the Supreme People’s Court announced its final judgment, which upheld the first instance judgment that Tencent did not have a market dominant position and its conduct did not have the effects of eliminating or restricting market competition.

v  **Thswave v. Guangdong Education Department**
On 2 February 2015, the Guangdong Intermediate People’s Court ruled that the Guangdong Education Department violated the AML by handpicking the exclusive software for a government-organised competition event. The defendant appealed to Guangdong Higher People’s Court. In August 2017, Guangdong High People’s Court finally affirmed the intermediate people's court’s verdict.

vi  **Yunnan Yingding Bio-energy Co, Ltd v. Sinopec Sales Co, Ltd and its Yunnan branch**
On 8 October 2016, Yunnan Kunming Intermediate People’s Court rejected a claim raised by Yunnan Yingding Bio-energy Co, Ltd against Sinopec Sales Co, Ltd and its Yunnan branch, where the plaintiff alleged that the defendants had abused their dominant market position to refuse to deal with the plaintiff. The Court rejected the case on the ground that the defendant’s refusal to deal was justifiable. On 28 August 2017, the Yunnan Higher People’s Court upheld the intermediate court’s judgment. The plaintiff has filed the case with the Supreme People’s Court for a retrial proceeding.

vii  **Dongguan Hengli Guochang Electrical Appliance Store v. Dongguan Shengshi Xinxing Gree Trading Co, Ltd and Dongguan Heshi Electrical Appliance Co, Ltd**
On 19 July 2018, Guangdong Higher People’s Court, as the court of appeal, ruled that the distributors of Gree air conditioners (i.e., Dongguan Shengshi Xinxing Gree Trading Co, Ltd...
and Dongguan Heshi Electrical Appliance Co, Ltd) did not violate Article 14(2) of the AML, because the RPM arrangement was not made with the intention of obtaining monopolistic profit and would not result in restricting or eliminating market competition.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

In China, the substantive law governing monopolistic activities and regulating monopolistic conduct is the AML, which took effect as of 1 August 2008.

At its core, a monopolistic civil dispute could be either a tort law issue or a contract law issue, and thus the PRC Tort Law (Tort Law) (effective as of July 2010) and the PRC Contract Law (Contract Law) (effective as of October 1999) are also applicable in a monopolistic civil dispute. In addition, the General Provisions of the Civil Law (effective as of October 2017) applies where the above-mentioned laws do not provide for particular scenarios.

The PRC Civil Procedure Law (Civil Procedure Law) and its corresponding judicial interpretations issued by the Supreme People’s Court provide rules for a civil lawsuit proceeding. Considering the particularity of antitrust disputes and to facilitate the resolution of growing antitrust private actions, the Supreme People’s Court issued the Provisions of the Supreme People’s Court on Application of Laws in the Trial of Civil Disputes Arising from Monopolistic Practices (AML Judicial Interpretation) on 3 May 2012, which provide specific rules on procedures concerning antitrust civil actions.

In summary, the legislative framework for monopolistic civil disputes is as follows:

a regarding monopolistic violations:
- the AML (issued by the Standing Committee of the National People’s Congress on 30 August 2007, effective as of 1 August 2008);

b regarding legal liabilities:
- the General Provisions of the Civil Law (adopted at the fifth session of the Twelfth National People’s Republic of China on 15 March 2017, effective as of 1 October 2017);
- the Tort Law (adopted at the 12th session of the Standing Committee of the Eleventh National People’s Congress on 26 December 2009, effective as of 1 July 2010); and
- the Contract Law (adopted at the second session of the Ninth National People’s Congress on 15 March 1999, effective as of 1 October 1999); and

c regarding legal procedure:
- the Civil Procedure Law (amended at the 28th session of the Standing Committee of the Twelfth National People’s Congress on 27 June 2017, effective as of 1 July 2017);
- the Provisions of the Supreme People’s Court on Application of Laws in the Trial of Civil Disputes Arising from Monopolistic Practices (adopted at the 1,539th session of the Judicial Committee of the Supreme People’s Court on 30 January 2012, effective as of 1 June 2012);
- Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law (adopted at the 1,636th session of the Judicial Committee of the Supreme People’s Court on 18 December 2014, effective as of 4 February 2015); and
• Several Provisions of the Supreme People’s Court on Evidence in Civil Proceedings (adopted at the 1,201st meeting of the Judicial Committee of the Supreme People’s Court on 6 December 2001, effective as of 1 April 2002).

According to Article 16 of the AML Judicial Interpretation, the limitation period for private antitrust claims is two years from the date when the plaintiff becomes aware or should have become aware of the monopolistic conduct that gives rise to the action. If the alleged monopolistic conduct is continual by nature and has continued for more than two years from when the plaintiff files the lawsuit, the defendant’s statute of limitations defence will not bar the plaintiff’s claims. In this situation, however, the compensation for damages should be calculated for the two years before the lawsuit filing date. The newly issued General Provisions of the Civil Law further extend the statute of limitations to three years.

Further, according to the AML Judicial Interpretation, where a plaintiff reports the alleged monopolistic conduct to the AML enforcement agency, the statute of limitations is interrupted from the date of such report. If the AML enforcement agency decides not to open a case, or decides to revoke a case or terminate an investigation, the statute of limitations shall be recalculated from the day when the plaintiff becomes aware or should have become aware of the decision not to open a case, to revoke a case or to terminate an investigation. If the AML enforcement agency determines after an investigation that the alleged monopolistic conduct exists, the statute of limitations shall be recalculated from the day when the plaintiff becomes aware or should have become aware that the decision of the AML enforcement agency affirming the existence of monopolistic conduct has come into force.

Under the authorisation of the Anti-Monopoly Commission of the State Council, the State Administration for Market Regulation (SAMR), which is the new antitrust regulator consolidating the former antitrust bureaus of the NDRC, the State Administration for Industry and Commerce and the Ministry of Commerce, is drafting four guidelines (see Section XV). Although these guidelines are being drafted to provide guidance on AML enforcement activities, they may also be referred to by the people’s court during private antitrust litigation. In particular, guidelines on the leniency programme and the commitment programme also provide rules concerning the relationship between the programme and antitrust litigation.

III EXTRATERRITORIALITY

Pursuant to Article 2 of the AML, the AML will apply to monopolistic conduct occurring overseas if the conduct has the effect of restricting or eliminating competition in the Chinese market. Due to the extraterritorial application of the AML, the people’s courts have the authority to apply the AML when ruling on monopolistic conduct occurring in other countries if the conduct has affected the domestic Chinese market.

In practice, monopolistic conduct may involve foreign sovereigns or may be engaged under the requirements of foreign sovereigns. In this instance, the defendant may try to invoke the sovereign immunity principle or foreign state compulsion immunity principle to defend its behaviour. However, as we have not seen antitrust litigation invoking these principles, how these principles will be implemented in China remains untested.
**IV  STANDING**

According to the Civil Procedure Law, to bring a civil lawsuit, the following requirements should be met:

- **a** the plaintiff must be a citizen, legal person or other organisation with a direct interest in the case;
- **b** there must be a specific defendant;
- **c** there must be a specific claim and a specific factual basis and grounds; and
- **d** the action must fall within the range of civil actions accepted by the people's courts and within the jurisdiction of the people's court with which it is filed.

Moreover, Article 1 of the AML Judicial Interpretation provides that any natural person, legal person or other organisation that has suffered losses from monopoly conduct, or that has a dispute over contractual provisions, charters of trade associations or other documents, may file a civil lawsuit before the competent people's court. Based on the above, both direct purchasers and indirect purchasers who have suffered due to the monopolistic conduct would have standing to bring a civil lawsuit.

In fact, indirect purchasers are usually the ultimate victims of monopolistic conduct, and it is relatively easy for indirect purchasers to identify and reveal the monopolistic conduct. Therefore, granting indirect purchasers, especially customers, the right to file civil disputes greatly increases the possibility of exposing monopolistic conduct, preventing such conduct and awarding monetary remedies to the victims. In light of the above consideration, Article 1 of the AML Judicial Interpretation does not provide special restrictions on the qualification of the plaintiff as long as the plaintiff can prove that it has suffered losses caused by monopoly conduct. Regardless of whether the plaintiff is a direct or indirect purchaser, it can bring a civil lawsuit against the defendant.²

**V  THE PROCESS OF DISCOVERY**

**i  General rules**

There is no discovery system under the Chinese legal regime. Parties do not have the right to request any documents, information or admission from the opposing party, or to conduct a deposition of any person of the opposing party. Instead, the parties can either collect and prepare evidence by themselves, or apply to the court for evidence collection or evidence preservation. Moreover, according to Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings (Provisions on Evidence), if there is evidence demonstrating that one party is in possession of evidence but refuses to provide it without good cause and the other party claims that such evidence is unfavourable to the party in possession of the evidence, the court may order the party in possession to provide the evidence or to pay the other party a penalty. However, if the evidence is not crucial to the case, the court may decide not to order the party in possession to provide the evidence or to pay the penalty.

² See Xiangjun Kong, *Comprehension and Application of the Relevant Judicial Interpretation Regarding Intellectual Property* (China: Legal Publishing House, 2012), 265–266. This book was edited by Mr Xiangjun Kong, the then-Chief Judge of the IP Division of the Supreme People's Court, in 2012, right after the issuance of the AML Judicial Interpretation. It includes relevant judicial interpretations and guidance regarding intellectual property disputes and competition disputes, as well as the explanation and illustration from the drafters of certain official documents and the chiefs of certain adjudication divisions from the Supreme People's Court.
evidence, it can be presumed that the other party’s claim is valid. Similar to the evidence collection and evidence preservation mechanisms, the provision aims at facilitating a party’s fulfilment of its burden of proof when it does not have possession of certain information.

According to the Provisions on Evidence and the Interpretations of the Supreme People’s Court on Application of the Civil Procedural Law (Judicial Interpretation of the Civil Procedural Law), a party to a civil case shall be responsible for producing evidence in support of its own claims or its rebuttal to the claims of the opposing party. Where no evidence is produced or the evidence produced is insufficient to support the claims purported, the party that bears the burden of proof shall face unfavourable consequences. Therefore, plaintiffs in monopolistic civil lawsuits shall bear the burden of proof regarding the AML violation of the defendant, their losses and the causal link between the two. The defendant shall bear the burden of providing evidence to prove its arguments or rebut the alleged claims.

Moreover, the AML Judicial Interpretation provides more detailed rules on the burden of proof. Specifically, regarding the monopoly agreements prohibited by Article 13(1) to 13(5) of the AML, the defendant shall have the burden of proving that such agreements do not have the effects of eliminating or restricting competition. Regarding the abuse of dominance prohibited by Article 17, the plaintiff shall have the burden of proving that the defendant has the dominant position in the relevant market and has abused such dominance, whereas the defendant bears the burden of proving the legitimacy of its activities. As for vertical monopoly agreements prohibited by Article 14, although there are no specific rules on the allocation of the burden of proof and thus the general principle provided in the Provisions on Evidence mentioned above shall apply, in *Rainbow v. Johnson & Johnson*, the judge took the position that the plaintiff shall bear the burden of proving that the vertical agreement has eliminated or restricted market competition.

### Evidence collection

Regarding the application of evidence collection by the court, pursuant to Article 94 of the Judicial Interpretation of the Civil Procedural Law and Article 17 of the Provisions on Evidence, a party may request the court to investigate and collect evidence if:

- such evidence is kept by relevant governmental agencies, and the party or its counsel cannot access such evidence;
- concerns state secrets, trade secrets or privacy; or
- it is impossible for that party or its counsel to obtain due to objective circumstances.

For example, plaintiffs cannot by themselves obtain access to a competition authority’s files or documents that the authority collected during its investigations; therefore, a plaintiff may file applications to the people’s courts to gain access to such files and documents. As for materials submitted for the purpose of applying for leniency, according to the Draft Guidelines on the Leniency Programme, this material should not be used as evidence in relevant civil proceedings unless otherwise stipulated by law. Further, in cases where the court believes that the facts of the case may damage the interest of the state, the public interest or the lawful rights and interests of any other person, or the evidence may relate to procedural matters that have no bearing on the substantive dispute, such as the addition of a party, the adjournment of the case, the conclusion of the case or the withdrawal of the case, on the basis of the authority of the court, the court should collect evidence on its own initiative.
iii Evidence preservation

Evidence preservation applies to circumstances where the evidence may be extinguished or may be more difficult to obtain at a later time. The parties may apply for evidence preservation during the litigation proceedings or even before an action is initiated. In the former situation, the people’s court may also take preservation measures on its own initiative, while in the latter situation, the applicant must prove to the court that the circumstances are urgent and that therefore pre-action evidence preservation is necessary.

iv Witness testimony

The Civil Procedure Law provides that an entity or individual who has information about a case shall appear in the court as a witness. In practice, however, witnesses are rarely summoned by the court to attend court hearings. It is provided in the Provisions on Evidence that if a witness fails to appear in the court, his or her testimony shall not be used independently as a basis for confirming the facts of a case.

VI USE OF EXPERTS

According to the Judicial Interpretation of the Civil Procedural Law, the Provisions on Evidence and the AML Judicial Interpretation, a party can apply to a people’s court for up to two people with professional knowledge to appear in court and explain professional questions that are relevant to the case. In the court hearing, the judge and the parties can question this person with professional knowledge when he or she appears in court. In addition, with the approval of the court, the person with professional knowledge hired by one party can question the other person with professional knowledge hired by the other party or the appraiser.

In practice, economic experts are hired in private antitrust litigation in China to provide economic analysis mainly for market definition, dominance and the effects on market competition. For example, in Qihoo 360 v. Tencent, both parties hired economists to appear in court to provide support for their arguments, especially concerning the definition of the relevant market. Legal experts may also be hired to appear in court to provide their professional opinion on relevant legal issues. For example, in Tshware v. Guangdong Education Department, Professor Sheng Jiemin, an antitrust law specialist, and Professor Zhan Zhongle, an administrative law specialist, both from Peking University, appeared in court to present their opinions with respect to whether the conduct of the Guangdong Education Department constituted administrative monopolistic behaviour and whether it was a specific administrative act that was justiciable. It is rare, however, for parties to hire experts to assist with the calculation of damages. The damages calculation is mainly argued by the parties, and the court will decide on the issue based on the evidence provided before it.

VII CLASS ACTIONS

There is no exact equivalent to the class action in the Chinese litigation system. Instead, China’s Civil Procedure Law provides for a joint action mechanism. If plaintiffs have a common object of action or if their object of action belongs to the same category, they may file a case to a court jointly. The right to file a joint action is contingent upon the court’s approval of the joint action and upon the plaintiffs’ agreement to file an action together.

Where there are numerous plaintiffs in a joint application, representatives may be selected by and from the group of plaintiffs. After obtaining special authorisation from the
plaintiffs that they represent, the representatives may change or waive claims, recognise claims of the opposing party, settle with the opposing party or enter into a settlement agreement with the opposing party, or lodge a counterclaim or appeal. Actions undertaken by such representatives will be effective for all joint plaintiffs.

In joint actions, if the number of plaintiffs is uncertain upon institution of the action, the court possesses the right to issue public notices that state the particulars and claims in respect of joint applications, instructing other potential plaintiffs to file with the court within a certain time. Judgments or orders rendered by the court are effective for all joint applicants. 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.

The Civil Procedure Law further stipulates provisions for public interest litigation which state that for conduct that pollutes the environment, infringes upon the lawful rights and interests of a large number of consumers, or otherwise damages the public interest, an authority or relevant organisation as prescribed by law may institute an action in a people's court. Correspondingly, the Law on the Protection of Consumer Rights and Interests, which was amended in 2013, provides that for behaviour that infringes the legitimate rights of numerous consumers, the China Consumers' Association and its local branches may institute legal proceedings with a people's court. However, whether other trade or professional associations are qualified to bring such claims on behalf of their members remains to be tested in practice.

Since the mechanism is not well established in China, it is still unclear how the mechanism would be implemented in practice, especially with respect to the calculation of damages.

In 2015, the Shanghai First Intermediate People's Court accepted a public interest litigation filed by the Shanghai Consumers' Association against Samsung and Oppo, asserting that the companies harmed consumer welfare by pre-installing apps on their smartphones. This is the first public interest litigation that was accepted by a people's court. However, the plaintiff later withdrew the case after the two companies pledged to take rectification measures.

VIII CALCULATING DAMAGES

According to the AML Judicial Interpretation, if a defendant carries out monopolistic conduct and causes loss to a plaintiff, the people's court may, according to the plaintiff's claims and the facts presented, order the defendant to bear the civil liabilities, such as ceasing the infringement and indemnifying the loss. Punitive damages are not available under Chinese law.

The AML Judicial Interpretation, the General Provisions of the Civil Law and the Tort Law do not provide detailed rules on how to calculate damages if a plaintiff is injured by monopolistic conduct. Therefore, the principle of recovery of losses suffered by the plaintiff should be applied to determine damages resulting in the plaintiff being placed in the same position he or she was in before the infringement occurred. For example, in Rainbow v. Johnson & Johnson, 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 clause (i.e., a profit margin of 23 per cent). Instead, the court deemed the loss of profits should be calculated based on the profits that the company could normally earn in the relevant market (i.e., a profit margin of 15 per cent).
In addition, according to the AML Judicial Interpretation, upon the request of the plaintiff, the court may include in the damages any reasonable expenses of investing or preventing the monopolistic conduct incurred by the plaintiff.

IX PASS-ON DEFENCES

Although there is a lack of clear provisions, the passing-on defence should be applicable considering that both direct and indirect purchasers are allowed to file an antitrust action under the AML.

In light of Section VIII, regarding the principle of calculating damages, if the defendant can prove that the plaintiff has not actually suffered any loss due to the pass-on effect, the court would then not support the plaintiff’s claim for a damages award. However, other non-monetary relief such as cessation of the infringement could still be awarded.

X FOLLOW-ON LITIGATION

A claimant can bring a follow-up action where a breach of the AML has already been established in an infringement decision taken by the administrative enforcement authority. In a follow-on litigation, subsequent litigation proceedings may be affected by the preceding administrative enforcement procedures in the following aspects.

First, with respect to the statute of limitations, as mentioned in Section II, according to the General Provisions of the Civil Law, the limitation period for private antitrust claims is three years from the date the plaintiff becomes aware or should have become aware of the monopolistic conduct that gives rise to the action. Where the AML enforcement agency determines after an investigation that the alleged monopolistic conduct exists, the three-year statute of limitations shall be recalculated from the day the plaintiff becomes aware or should have become aware that the decision of the AML enforcement agency affirming the existence of monopolistic conduct has come into force.

Second, in relation to the influence of administrative decisions made by antitrust enforcement authorities, according to Article 114 of the Judicial Interpretation of the Civil Procedural Law, the facts stated in the administrative decisions shall be presumed to be true unless there is evidence to the contrary. Although the findings and conclusions of antitrust enforcement authorities are not binding on the court, such findings and conclusions are more likely to be adopted by the people’s court compared with other documented evidence in accordance with Article 77(1) of the Provisions on Evidence, which provides that the documents formulated by state organs or social bodies according to their respective functions are, as a general rule, more forceful than other written evidence. Therefore, a valid decision finding the defendant in violation will be a persuasive, influential and valuable piece of evidence in the follow-on litigation.

Third, with regard to evidence collection, a plaintiff in a follow-on litigation may apply for the court to collect evidence in the possession of an antitrust enforcement agency that has been considered by the agency in the preceding investigation, and may use such evidence to support its arguments. With regard to the materials submitted by the leniency applicant, however, as mentioned above, according to the Draft Guidelines on the Leniency Programme, such material should not be used as evidence in relevant civil proceedings unless otherwise stipulated by the law.
XI PRIVILEGES

Attorney–client privilege is not recognised under Chinese law: in other words, confidential communications between an attorney and a client, attorney work product or joint work product are not privileged or protected. Theoretically speaking, attorney–client communications and attorney work product could be used as evidence in civil proceedings. Nevertheless, in practice, it is rare to see such privileged information disclosed in court proceedings, and applications to collect such information are rarely granted by courts.

In some investigations, administrative agencies request target companies to turn in the files of in-house counsel, which contain their correspondence with outside counsel and with other employees of the company. If a court successfully collects evidence from administrative agencies, such privileged documents may be disclosed and used in litigation proceedings. However, according to public resources, there have not been any precedents in this regard.

XII SETTLEMENT PROCEDURES

There are two kinds of settlement procedures under the Civil Procedure Law: court mediation and settlement by the parties. court will not compel parties to settle or to use other forms of alternative dispute resolution during a proceeding. Instead, courts will normally inquire as to the intention of the parties to settle the case at the end of a court hearing or at other stages of the proceedings. If the parties are willing to settle the case, the court may conduct mediation under the principle of free will and legality. Generally, mediation is encouraged by courts.

Mediation can be conducted by a judge or by the collegiate bench. Once a settlement is reached, courts will issue a bill of mediation signed by the judge and the court clerk that will be affixed with the seal of the people's court. Such a bill of mediation will be legally binding and enforceable by courts once properly signed for by the parties.

In addition to mediation, the parties may reconcile of their own accord. However, the conclusion of a settlement agreement does not automatically lead to the termination of proceedings: the plaintiff needs to withdraw its complaint to close the litigation. Since a settlement agreement is only signed by the two parties, it cannot be enforced by the court directly. For the settlement agreement to have the same binding effects as a valid judgment or order issued by the court, the parties may apply for the court to confirm the terms of the settlement agreement in accordance with the law and work out a bill of mediation in accordance with Article 4 of the Provisions of the Supreme People's Court on Several Issues Concerning the Civil Mediation in the People's Courts, so that the settlement agreement can be directly enforced by the court if a party fails to comply with it.

XIII ARBITRATION

There are no clear provisions as to whether antitrust disputes are arbitrable in China. According to Article 2 of the Arbitration Law of the People's Republic of China, disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organisations with equal standing may be submitted for arbitration. Considering that antitrust claims are generally contractual disputes or disputes over property rights and interests between parties with equal standing, there is a possibility that they can be resolved through arbitration. However, in an antitrust case where a multinational electronics company sought to use arbitration to resolve a dispute with its Chinese distributor over allegations that it committed a violation concerning a vertical monopoly agreement, the Jiangsu Higher
People’s Court rendered a final verdict that due to the close relationship between antitrust issues and public policy and public interest, the arbitration clause agreed to by the parties could not be regarded as the basis for determining the jurisdiction of an antitrust dispute.

**XIV INDEMNIFICATION AND CONTRIBUTION**

Under the Chinese legal regime, where two or more persons jointly commit a tort that causes harm to another person, they shall be liable jointly and severally. Nevertheless, a defendant can seek contribution or indemnity from other defendants. Pursuant to the Tort Law, the compensation amounts corresponding to the tortfeasors who are jointly and severally liable shall be determined according to each tortfeasor’s degree of responsibility. If the degree of responsibility of each tortfeasor cannot be determined, the tortfeasors shall evenly assume the compensatory liability. A tortfeasor who has paid an amount of compensation exceeding his or her contribution shall be entitled to reimbursement by the other tortfeasors who are jointly and severally liable.

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

Under the authorisation of the Anti-Monopoly Commission of the State Council, the SAMR is drafting four antitrust guidelines on the following:

a the automotive industry;
b abuse of IP rights;
c the commitment programme; and
d the leniency programme.

i **Draft Leniency Guidelines**

It is provided in the Draft Guidelines for the Application of the Leniency Programme to Cases Involving Horizontal Monopoly Agreements 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 obtain access to this information, and the documents shall not be used as evidence in relevant civil proceedings unless otherwise stipulated by the law.

ii **Draft Guidelines on Commitments in Anti-Monopoly Cases**

The Draft Guidelines for Commitments in Anti-Monopoly Cases provide that the AML enforcement agencies’ decisions on suspension or termination of an 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 the relevant conduct concerned constitutes monopoly conduct.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

England and Wales saw another busy year for private antitrust litigation in 2018, with a number of important developments, including the first judgment in a follow-on cartel damages claim (previous follow-on claims have all settled before judgment). There were no major legislative developments, with the rules implementing the EU Competition Damages Directive having already entered into force in 2017.

One of the most significant developments of the year was the judgment of the High Court in BritNed v. ABB. This was important in particular because of the judge’s approach to the calculation of BritNed’s loss, and his treatment of the expert evidence – issues that send important signals for future claims.

BritNed operates the BritNed interconnector, a 1,000MW undersea cable connecting the GB and Dutch systems. BritNed procured the cable element of the interconnector from ABB. In April 2014, the European Commission issued a decision in the Power Cables case, fining international manufacturers of high-voltage power cables €302 million for taking part in a cartel that shared markets and allocated customers between them from 1999 to 2009. ABB was the successful immunity applicant, and did not appeal against the Commission’s decision.

BritNed claimed damages for the loss suffered under three heads:

a. overcharge: BritNed argued that the price that it paid for the cable was higher than it would have been in the absence of the cartel;

b. lost profit: in the absence of the cartel, BritNed would have bought a cable of higher capacity (1,320MW rather than 1,000MW), which would have generated greater revenue and profits; and

c. interest: as a result of the overcharge, BritNed incurred higher capital costs in commissioning the interconnector, and claimed compound interest.

The judge made some interesting initial observations about the approach to calculating damages. First, while the fact of the damage caused by a cartel must be established on the
balance of probabilities (the English standard of proof in civil cases), the measure of the loss takes into account a wide range of risks and possibilities, and the court may take a ‘broad brush’ approach and adopt various estimates, assumptions and approximations. Secondly, the loss that the court was required to assess was the difference between the price agreed between BritNed and ABB and the price that would have been agreed – whether with ABB or another supplier – in the absence of the cartel. Thirdly, while the judge was prepared to bridge gaps in the evidence with his broad brush, he rejected BritNed’s invitations to draw adverse inferences from the absence of material, and also to presume that harm had resulted from the infringement (the claim predated the requirement in the Competition Damages Directive to make such a presumption).

BritNed’s economic expert compared the price of projects during the cartel with the price of projects after the cartel. The judgment explains clearly and thoroughly the economic and statistical analysis used, also drawing on the European Commission’s staff working document on quantifying harm. BritNed’s expert estimated the overcharge at 25.4 per cent. In contrast, ABB’s expert compared the price of BritNed alone with the price of other projects after the cartel, focusing in particular on ABB’s costs of supply. He found no overcharge.

The judge preferred ABB’s approach to BritNed’s. He noted that the approach adopted by BritNed’s expert was significantly more complicated than that of ABB’s expert, and therefore inherently more prone to error. It relied heavily on proxies rather than actual figures because of concerns about the reliability of ABB’s costs.

Although the judge concluded that some individuals within ABB knew of the cartel and knew that ABB would face limited competition when tendering for BritNed, that knowledge did not translate into a direct influence on the direct costs of the project, which were compiled honestly and competently with a view to putting together a competitive bid. While those involved in the cartel had the opportunity to influence the common costs, in fact critical pricing decisions were taken by an individual who, the judge was satisfied, was not aware of the cartel and who priced the project competitively. However, the judge concluded that the effect of the cartel was to insulate ABB from inefficiencies in its own product. Had there been a properly competitive environment, ABB would have faced technical solutions from others involving less copper and perhaps less insulation. This ‘baked-in inefficiency’ resulted in an overcharge, corresponding to the cost of the additional copper that ABB would have absorbed to retain the bid. The appropriate measure of this overcharge was 15 per cent of the cost of the copper. This amounted to some €7.5 million. The judge then found a further overcharge in the form of a saving in ABB’s costs resulting from the cartel, amounting to a further €5.5 million. The court later reduced this figure to a total of €11.7 million, reflecting the risk of overcompensation due to BritNed’s regulatory arrangements. Each party was required to bear its own costs: although the usual rule is that the loser pays the winner’s costs, in this case BritNed’s award was significantly less than it had claimed (around €180 million).

BritNed claimed compound interest on the basis that it had incurred higher capital costs than it would have done in a competitive market. ABB countered that this loss was not BritNed’s but that of its parents, who had provided the funding. The judge accepted ABB’s argument, but awarded simple interest to BritNed.

The judgment offers encouragement to both claimants and defendants, and will be perused very carefully in future claims. Both parties intend to appeal, and other claims in respect of the same cartel are still pending.
Throwing a lifeline to the prospects of further collective competition claims after they were damaged by the refusal of collective proceedings orders in the first two applications, the Court of Appeal ruled in November that it had jurisdiction to hear an appeal against one of these judgments. This was the judgment of the Competition Appeal Tribunal (CAT) in Walter Merricks v. Mastercard, refusing to issue a collective proceedings order in a claim involving credit card multilateral interchange fees. The proposed class included all persons who had, between 22 May 1992 and 21 June 2008, bought goods or services from businesses selling in the UK that accepted Mastercard (and who also satisfied a couple of other conditions). The value of the claim was stated to be £14 billion. In this case, the CAT had concerns about the breadth of the class: there would be so many variations in the extent of pass-through that it would not be an issue common to all members of the class. The CAT was also concerned about the methodology for calculating the compensation to which each member of the class would be entitled: it would inevitably result in significant under or over-payment to any given member of the class. The CAT also provided guidance on the proposed funding arrangements.

The CAT refused leave to appeal on the basis that a judgment refusing a collective proceedings order was not a judgment ‘as to the award of damages’ for the purposes of Section 49(1A)(a) of the Competition Act 1998, which lists those categories of judgment capable of appeal. The Court of Appeal held that it was, and the appeal will go ahead in 2019.

The Court of Appeal addressed another important issue in its iiyama judgment in February 2018. This was an appeal against two judgments of the High Court, both in claims brought by computer monitor manufacturer iiyama against members of the LCD and CRT cartels. Iiyama bought cathode ray tubes (CRTs) and liquid crystal display (LCD) panels outside the EU and incorporated them into monitors, also outside the EU, before supplying them to the claimant subsidiary companies within the EU, which sold them on to resellers within the EU. The High Court had doubts as to whether iiyama’s losses fell within the scope of Article 101 TFEU. In the CRT claim, it held that the cartel was not implemented within the EU for the purposes of the Woodpulp test, and that the conduct had no ‘substantial and immediate effect’ within the EU for the purposes of the Gencor test. In the LCD claim, it held that there was no EU implementation of the cartel in relation to the sales of CRTs outside the EU.

The Court of Appeal relied heavily on the judgment of the European Court of Justice in the Intel case in September 2017. It noted that:

*Intel is an important decision in the context of the present cases, and that it provides substantial support for the argument that a worldwide cartel which was intended to produce substantial indirect effects on the EU internal market may satisfy the qualified effects test for jurisdiction. Whether or not the test is satisfied will depend on a full examination of the intended and actual operation of the...*
such an examination can only take place in light of the full facts as they emerge and are assessed at trial. The exercise is not one suitable for summary determination on the basis of assumed facts.

The Court of Appeal also held that it was:

at least arguable with a real prospect of success that intended effects within the EU internal market of a worldwide cartel fall within the scope of Article 101, and that the production of such effects on the EU market, if substantial and of a systemic nature, may properly be characterised as immediate effects of the offending agreements.

The fact that the sales within the EU came at the end of a chain of sales outside the EU was not necessarily an obstacle to the claim.

The Court of Appeal found in favour of the claimants. The claims will therefore proceed.

Resolving another conflict between judgments at first instance, the Court of Appeal ruled in July on a series of appeals pitching merchants against card issuers. It held that their interchange fee arrangements constituted restrictions of competition. The correct counterfactual was that there was no default multilateral interchange fee (MIF) and that there was instead no or a zero rate MIF. The Court of Appeal also remitted back to the courts the question of whether the conditions for exemption were satisfied. It also commented (although not as a binding part of the judgment) that it believed that it was not necessary, to establish pass-on, to identify other claimants to whom the overcharge had been passed on. The level of damages will now be assessed by the first instance courts.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

It has long been accepted that those who have suffered loss as a result of competition law infringements are entitled to claim damages. The House of Lords acknowledged the possibility of damages for breaches of competition law in 1984 in Garden Cottage Foods v. Milk Marketing Board. In 2002, the Enterprise Act 2002 inserted Section 47A into the Competition Act 1998, giving the CAT (a specialist competition tribunal that already heard appeals against decisions of the competition authorities) the power to hear follow-on damages claims based on infringement decisions of the European Commission and the UK competition authorities. Section 47B of the Competition Act 1998 also provided for limited opt-in collective claims brought by certain designated representative bodies on behalf of consumers. A number of claims under Section 47A followed. However, this procedure had a relatively low level of uptake because of deficiencies in the drafting of the legislation and rules that limited the scope of Section 47A to strict follow-on claims, and that created very restrictive limitation rules. Claims were constrained by the ‘clearly identifiable findings of infringement’ in the underlying decision of the competition authority and could not be based on any sort of inference from a decision.

As claimants often wish to claim that an infringement went on for longer, or was wider in scope, than expressly found in an infringement decision, this was a significant restriction...
of the usefulness of the CAT. The Court of Appeal also held that claimants could not bring
proceedings against defendants that were not specifically named as addressees of a decision,
which presented a further obstacle to claims as it is often useful to be able to claim against
other members of corporate groups in order to anchor jurisdiction in the UK.\textsuperscript{13} Claimants
had a period of two years after the end of appeal proceedings in respect of the underlying
decision, or after the date on which the cause of action accrued, if later, in which to bring
their claims.

Meanwhile, the High Court had become one of the most popular forums in Europe for
competition damages claims following cartel decisions of the European Commission. Claims
in the High Court are brought under the common law jurisdiction of the Court, generally
as claims for breach of statutory duty.\textsuperscript{14} They were subject to the standard six-year limitation
period under the Limitation Act 1980. However, the Claims in respect of Loss or Damage
arising from Competition Infringements (Competition Act 1998 and Other Enactments
(Amendment)) Regulations 2017 have now implemented the relevant provisions of the
Competition Damages Directive. They inserted Section 47F into the Competition Act 1998,
which in turn introduced a new Schedule 8A to the Act. Paragraphs 17 to 26 of Schedule 8A
set out the new rules on limitation periods. They differ in a number of important respects from
the general rule in England and Wales, set out in the Limitation Act 1980. The general rule
under the Limitation Act 1980 is that the limitation period starts when the cause of action
accrued. However, where the defendant deliberately concealed from the claimant any fact
relevant to the claimant’s right of action, the limitation period does not start to run until the
claimant has discovered the concealment or could with reasonable diligence have discovered
it. For competition claims, while Paragraph 19 introduces rules that are very similar to those
set out in the Directive (under which time does not start to run until the claimant first knew
or could have known of certain specified facts relating to the infringement), it also introduces
the other key requirement of the Directive: namely, that the limitation period does not start
until the infringement has ceased. In its judgment in \textit{Arcadia v. Visa}\textsuperscript{15} in 2015, the Court of
Appeal held that a claim by retailers in respect of losses resulting from credit card interchange
fees was out of time in respect of losses suffered before 2007 (six years before the date of
the claim) because sufficient facts to allow the claimants to plead their claim were available
to them before that date. The Court of Appeal concluded that the Directive did not have
retrospective effect, but it appears that had it done so, the entirety of the claim might still have
been in time (because the infringement continued until less than six years before the date on
which the proceedings were started). As such, Paragraph 19(1)(a) has potentially far-reaching
effects. Paragraphs 20 to 25 set out a number of situations in which the limitation period is
suspended, including while an investigation by a competition authority is ongoing, while
a consensual dispute resolution process is in progress and while collective proceedings are
pending.

In 2015, the provisions of Chapter 2 of Part 3 of the Consumer Rights Act 2015
entered into force. They amended Sections 47A and 47B, and introduced Sections 47C
to 47E and 49A to 49E, of the Competition Act 1998. They introduced a number of
refinements to proceedings before the CAT. First, Section 47A extended the jurisdiction

\textsuperscript{13} \textit{Emerson Electric Co & Others v. Mersen UK Portslade Ltd} [2012] EWCA Civ 1559.

\textsuperscript{14} Although there have also been attempts to characterise such claims as various forms of conspiracy – with
varying degrees of success.

\textsuperscript{15} \textit{Arcadia Group Brands Ltd & Ors v. Visa Inc & Ors} [2015] EWCA Civ 883.
of the CAT to permit stand-alone as well as follow-on claims, addressing one of the key concerns about the previous arrangements. However, Section 47A provided only a partial fix, because there remains some doubt as to whether it provides for stand-alone claims for infringements occurring before 1 October 2015. Secondly, Section 47E aligned limitation periods in the CAT with those in the High Court. Thirdly, Section 15A of the Enterprise Act 2002 provided for fast-track competition claims where one of the parties is a small or medium-sized business and the claim is relatively straightforward. Fourthly, Section 47B introduced collective competition damages claims. These were intended to resolve the obstacles faced by small claimants bringing claims individually. Section 47B introduced the possibility of both opt-out and opt-in collective proceedings (where all those falling within an identified class of potential claimants are included in the claim unless they opt out, or where the claim is brought on behalf only of those claimants who have expressly chosen to participate, respectively). In both cases, the claim is brought on behalf of the claimants by a representative.

The CAT must certify a claim before it proceeds. The certification process considers the suitability of the class representative who brings the claim on behalf of the class. The CAT Rules set out a number of factors that the CAT must take into account in assessing the suitability of the representative, including whether he or she will act adequately and fairly in the interests of the class, and whether there is a conflict of interest. In practice, the CAT has also considered the level of remuneration of the representative, and the arrangements with the funders.

The CAT must also consider whether the claims ‘raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings’ (Section 47B(6) Competition Act 1998). This is the central issue in the ongoing Merricks v. Mastercard proceedings, now on appeal following the refusal by the CAT to issue a collective proceedings order.

III EXTRATERRITORIALITY

Conduct and agreements that affect trade within the UK, or that affect trade between EU Member States, are capable of infringing the UK and EU competition rules, respectively, wherever the undertakings engaging in the conduct or entering into the agreements are located.

In practice, one of the key battlegrounds in private enforcement in the English courts has been the extent to which foreign defendants can be sued in the English courts for losses resulting from international cartels. This issue remained the subject of litigation before the English courts in 2018, addressed both in the judgment of the Court of Appeal in iiyama (see Section I), on the subject of the circumstances in which purchases of cartelised products outside the EU can be said to fall within the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU), and in Vattenfall v. Prysmian. In the latter, the High Court rejected an application to strike out another claim following the Commission’s

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16 See, e.g., Socrates v. Law Society [2017] CAT 10, the first fast-track claim.
17 In Merricks v. Mastercard in Section I.
18 Sections 2 and 18 of the Competition Act 1998, and Articles 101 and 102 of the Treaty on the Functioning of the European Union.
High-Voltage Cable cartel decision, on the basis that there was a realistic prospect that the UK anchor defendants had knowingly implemented the cartel through sales of the cartelised products and the provision of support in respect of the sale of cartelised products. The judgment usefully develops the principles established some years previously in Cooper Tire and Rubber v. Dow and others20 and KME Yorkshire and others v. Toshiba Carrier and others.21

IV STANDING

Any person suffering loss as a result of an infringement of competition law has standing to bring a claim.22 It was clear even before implementation of the EU Competition Damages Directive that, subject to issues of causation, pass-through, etc., both direct and indirect purchasers from infringing parties could claim damages for their loss resulting from an infringement. This is now confirmed in the UK rules implementing the Directive, which set out the treatment of pass-through in the case of both direct and indirect purchasers. In accordance with the Kone judgment of the European Court of Justice,23 a number of proceedings in the English courts have included claims for umbrella losses: overcharges resulting from non-members of a cartel increasing their prices in line with the ‘market’ price set by cartel members. Class representatives in collective proceedings, once certified by a collective proceedings order, have standing to claim on behalf of all members of the class even if they do not themselves fall within the class.

V THE PROCESS OF DISCOVERY

The introduction, in Article 5, of a requirement for disclosure of relevant evidence was an important and novel aspect of the Competition Damages Directive in most EU Member States. However, disclosure in English court proceedings is well-established and extensive (and has historically been one of the main attractions of the English courts in competition damages proceedings), going some way towards addressing the information asymmetry that claimants commonly encounter. Schedule 8A of the Competition Act 1998, which implements the Directive in English law, therefore introduced no additional disclosure requirements, as the implementing rules did in most other Member States. Instead, it is concerned chiefly with setting out the exceptions to disclosure, reflecting the requirements of Articles 6 and 7 of the Directive, in the case of leniency and settlement materials, and other materials generated during the course of an investigation by competition authorities. These rules are set out in Paragraphs 27 to 35 of Schedule 8A.

The basic principle in English litigation is that each party must carry out a reasonable search for material currently or previously under its control that supports or is adverse to its case. It must disclose those documents by exchange of lists to the other party and then, subject to exceptions for privilege, must provide copies of those documents and allow the other party to inspect any original documents.24 In follow-on private competition claims in the English courts it is very common for the parties to seek disclosure of specific categories

20 Cooper Tire & Rubber Company Europe Ltd & Ors v. Dow Deutschland Inc & Ors [2010] EWCA Civ 864.
22 This is expressly provided, in the case of claims before the CAT, by Section 47A Competition Act 1998.
of documents, for example documents provided to competition authorities, at an earlier stage than would usually be the case. The judgment in National Grid v. ABB provides a good example of this. There is also scope for the parties to request further information from each other in relation to issues set out in their pleadings. In addition, it is possible, subject to certain conditions, to obtain disclosure from third parties. The parties will also have to exchange detailed witness statements setting out the evidence that their witnesses will rely on at trial and upon which they will be cross-examined. There is no deposition process pretrial in English proceedings.

VI USE OF EXPERTS

The use of expert economic evidence is almost universal in private competition enforcement proceedings. Other experts are also often brought in, particularly in abuse of dominance cases, to testify as to the operation of a particular market or other technical issues.26

Although expert economists generally submit their reports when the proceedings are well advanced, it is common to involve them from the outset to provide initial advice on the scope and shape of a claim. In 2017, expert economists also appeared in the collective proceedings order hearings in the two collective actions that were heard. Their evidence was decisive in the determination of whether there were sufficient common issues as between the members of the class of prospective claimants to justify certifying the collective proceedings.27

While the standard arrangement is for each party to call its own expert witnesses separately, for them to be cross-examined by the other party’s counsel, competition damages claims in the English courts are starting to see the emergence of hot-tub arrangements, in which each party’s economists appear concurrently and are then questioned by both sets of counsel and by the judge, allowing their evidence to be more easily compared and tested.28 The court’s assessment of the parties’ expert evidence was central to the outcome of the BritNed v. ABB claim, described in Section 1.

VII CLASS ACTIONS

As explained in Sections I and II, collective proceedings for competition damages claims may be brought before the CAT. Collective proceedings are subject to certification by the CAT. If properly formulated, collective proceedings allow a much wider range of victims of anticompetitive activity to claim damages for their loss. Bringing individual claims would simply not be feasible for the value of loss typically suffered by an individual consumer. It is clear from the failure of the two collective claims to date (although the Merricks v. Mastercard claim is now being appealed) that there is and will remain a tension between increasing the efficiency of collective proceedings by framing a class as widely as possible, thereby increasing the number of members of the class, and ensuring that the class is not so wide that the issues in the claims are no longer common to all of the members of the prospective class.

26 See for example the useful description of the expert witnesses relied on in paragraphs 47 to 49 of Streetmap EU Limited v. Google Inc and others [2016] EWHC 253 (Ch).
28 First used in the High Court in Streetmap v. Google [2016] EWHC 253 (Ch); a hot-tub arrangement was also employed in the CAT in Socrates v. Law Society, see footnote 16.
There are a number of other mechanisms for class actions available in the courts of England and Wales, including group litigation orders (GLOs) and representative actions (which are comparatively rarer than GLOs).

VIII CALCULATING DAMAGES

Damages in private competition claims are intended to compensate for the loss resulting from an infringement of competition law. Nearly all competition damages claims to date have settled, with little or no visibility of the basis or extent of any damages agreed. However, the calculation of competition damages will typically involve an assessment of the counterfactual or ‘but for’ position: that is, what prices would have prevailed in the absence of the infringement. To assess what would have happened in the absence of a cartel, prices before and after the cartel period, prices of other comparable products, prices of raw materials or components, and the level of profitability of the cartel members will all be taken into account to build up a picture of the but for price. There will also generally be an assessment of the losses resulting from any reduction in sales resulting from increased prices, as well as of the run-off effect of the time taken for prices to return to a non-cartelised level after the end of the cartel. In Sainsbury’s v. Mastercard,\(^29\) the CAT assessed the overcharge as the difference between the MIFs paid and the bilateral interchange fees that would have been paid in the counterfactual situation. In BritNed v. ABB,\(^30\) the High Court assessed the overcharge as the increased cost resulting from baked-in inefficiency (i.e., the fact of being shielded from more efficient competitors) and cost-savings. There is no provision for multiple damages as seen in the US, for example. Exemplary or punitive damages are also not available. However, in contrast to the position in the US, interest on damages runs from the date when the loss was suffered. This may be many years before payment of any damages, and interest can therefore be a very significant component of any award.

IX PASS-ON DEFENCES

There is no pass-on defence in English law. The impact of any pass-on is assessed as part of the assessment of loss generally. The rules implementing the EU Competition Damages Directive set out the treatment of pass-on in claims by both direct and indirect purchasers (see Section I). Paragraphs 8 to 11 implement the provisions of Articles 12 to 15 of the Directive that set out rules relating to overcharges, underpayments and pass-on. They provide that, if the claimant was an indirect purchaser, once it has established that there was an overcharge or underpayment to a direct purchaser, the burden of proof lies on the defendant to prove that it was not passed on to the claimant. They also provide that the burden of proof lies on the defendant to prove that any overcharge or underpayment to the claimant was passed on to the claimant’s customers. The English courts have already considered this latter aspect of pass-on,\(^31\) but Schedule 8A Competition Act 1998 is useful in its treatment of pass-on to an indirect purchaser claimant.

\(^{29}\) See Section I and footnote 11.
\(^{30}\) Footnote 4.
\(^{31}\) Most recently in the credit card appeals: see footnote 11.
X FOLLOW-ON LITIGATION

By virtue of the principle first set out in the *Masterfoods* judgment of the European Court of Justice, and then codified in Article 16 of Regulation 1/2003, national courts may not take decisions ‘running counter to the decision adopted by the Commission’. They must also ‘avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated’. In the English courts, in *National Grid v. ABB*, for example, this principle was interpreted to mean that while the trial should not be fixed until three months after all appeals by the defendants against the Commission’s decision had been determined, the parties should proceed with the exchange of pleadings, disclosure and other preparatory steps. A similar approach has been adopted in other cases since then.

The Competition Damages Directive and the UK implementing rules set out restrictions on the use of evidence developed in the course of European Commission investigations, and on the extent to which immunity recipients and other classes of participant in enforcement proceedings by competition authorities may be liable to pay damages in subsequent private damages claims.

XI PRIVILEGES

The English courts recognise legal advice privilege, covering advice by lawyers to their clients provided in a relevant legal context, and litigation privilege, covering communications between a client and a lawyer or between either of them and a third party where litigation is underway or reasonably in contemplation, which have been made for the dominant purpose of litigation. In its judgment in *SFO v. ENRC* in September 2018, the Court of Appeal overturned the controversial and narrow approach taken by the High Court regarding the remit of litigation privilege in the context of a contemplated criminal investigation. It declined to rule on the scope of legal advice privilege (and specifically the restrictive rule in *Three Rivers (No. 5)*, commenting that it is for the Supreme Court to decide this issue. Further clarification is to be hoped for; meanwhile, care should be taken in this area.

English law does not recognise joint work product defences as such. In some circumstances, two parties may have a joint interest in the subject matter of a privileged communication such that they may share the document without loss of privilege. Similarly, communications that are already subject to legal advice privilege or litigation privilege may in some circumstances be shared with a third party (in the context of private competition enforcement, typically a co-defendant) without automatically losing that privilege where the two parties have a common interest. Again, this is a complex area and specific advice should be sought.

XII SETTLEMENT PROCEDURES

Most competition damages claims before the English courts settle – some at an early stage and some at trial – with the result that there have only been two final judgments awarding

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32 Case C-344/98 Masterfoods Ltd v. HB Ice Cream Ltd: ECLI:EU:C:2000:689.
33 The Director of the SFO v. Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006.
damages in competition damages claims to date. Settlement is encouraged. Part 9 of Schedule 8A Competition Act 1998 implements the rules in the Competition Damages Directive on settlements, providing for the value of claims to be reduced by a settling infringer’s share of the loss. It also prohibits non-settling defendants from seeking a contribution from the settling defendant, so an early settling defendant that settles for less than its share of any overall damages pot cannot then be required to indemnify defendants that settle or are ordered to pay a higher proportion later. This seems likely to incentivise early settlement.

XIII ARBITRATION

Competition damages claims can be, and are, the subject of arbitration and other forms of alternative dispute resolution. This may in some circumstances be agreed at the time a claim is first contemplated. In Microsoft v. Sony, the High Court stayed proceedings because it concluded that the dispute was covered by a pre-existing arbitration clause.

XIV INDEMNIFICATION AND CONTRIBUTION

The general principle is that liability for losses caused by infringement of the competition rules is joint and several, and that defendants may seeks contributions from each other. However, Schedule 8A Competition Act 1998, implementing the EU Competition Damages Directive, sets out rules that limit the liability of certain parties to make contributions.

XV FUTURE DEVELOPMENTS AND OUTLOOK

A key development that is certain to affect competition litigation in the English courts is Brexit. Estimates of its impact vary considerably, and are heavily dependent on the future relationship between the UK and the EU. The advantages of litigating in the English courts are sufficiently significant that claimants and their lawyers are likely to seek to continue to bring their claims in London. What legal routes are available to them will depend on the outcome of the current Brexit negotiations.

36 Microsoft Mobile OY (Ltd) v Sony Europe Ltd & Others [2017] EWHC 374 (Ch).
I  OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

To date, the level of private antitrust litigation activity has been relatively low in France as compared to a number of other EU Member States. The transposition at the end of last year of EU Directive 2014/104 on follow-on actions, which led to the creation of a comprehensive set of rules specifically dealing with damages claims in relation to anticompetitive practices, and which significantly improved the position of claimants in France, has not led to a surge of damages claims in France. Note, however, that it is always difficult to have an accurate view of the actual level of activity since, as in most countries, claims for damages resulting from a competition law infringement are often settled before the final decision without the details of such settlements being publicly reported.

The first damages decisions rendered in France, including the landmark *Mors v. Labinal* decision, which is the first case in which significant damages (over €5 million) were awarded, were often based on stand-alone actions where practices were held anticompetitive by the court and not by a prior decision by competition authorities.

Claims following an infringement decision have remained relatively rare in recent years, and most of them have been brought by competitors in relation to abuses of a dominant position or exclusionary practices in vertical relationships, as opposed to cartel cases. There has, for example, been a series of follow-on actions in the telecommunication sector following abuse of dominant position decisions against the incumbent operator.

II  GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The legislative framework for private antitrust enforcement in France has been recently further modified through the adoption of Ordinance 2017-303 and Decree 2017-305 of 9 March 2017 implementing EU Directive 2014/104 on actions for damages for infringements of competition law provisions. The Ordinance and the Decree have introduced new sections in the French Commercial Code specifically dealing with damages actions resulting from anticompetitive practices.

These provisions intend to help the victims of anticompetitive practices to seek redress. They provide that individuals or companies are liable for the harm they have caused as a
result of their involvement in anticompetitive practices. The competitive practices concerned include anticompetitive agreements and abuses of dominant position prohibited by French and EU competition law, and also certain types of infringements that are specific to French law, such as abuse of economic dependency, the granting of exclusive importation rights in French overseas territories or abusively low pricing.

It is up to the claimant to prove that it has suffered a loss as a result of anticompetitive practices. It can be difficult for victims to gather evidence to prove that anticompetitive practices have taken place without a pre-existing decision identifying an infringement. Due to the difficulty of proving the existence of the practices, which are often secret, there are relatively few damages actions, and they tend to be more and more often based on an infringement decision of a competition authority.

The statute of limitation is five years as from the date that the claimant was aware or should have been aware of all of the following: the existence of the infringement, the fact that it has caused harm to the claimant and the identity of the infringer. In practice, claimants may argue that they discovered the cause of action only upon publication of the decision issued by the competition authority confirming that a company has engaged in anticompetitive practices, in particular in relation to secret horizontal practices such as cartels. The limitation period starts running only when the infringement has ended.

The limitation period is not opposable to victims of an infringer having benefited from full immunity in the context of leniency proceedings so long as they have not been in a position to bring an action against the other co-infringers.

III  EXTRATERRITORIALITY

French competition law applies to any anticompetitive practice that took place in France or caused harm in France.

Damages claims can be initiated before French courts, based on the French liability regime, if the harm has been suffered in France or if the defendant is located in France. Thus, a foreign claimant may initiate an action before French courts if the company having infringed the competition law is a company established in France. Likewise, a claimant may sue a foreign infringer before French courts if the claimant has suffered harm in France.

IV  STANDING

Any person or company having suffered harm as a result of anticompetitive practices may initiate an action to obtain compensation. There is no restriction as to the type of person or company entitled to seek compensation. It could typically be consumers, purchasers, distributors or competitors. Direct as well as indirect victims (typically purchasers) can bring an action.

Damages claims can be brought against legal entities or individuals who may in certain circumstances be liable if they have played a personal and decisive role in the design and implementation of anticompetitive practices. The recently introduced specific rules on antitrust damages actions only apply, however, in the case of an action brought against an undertaking (i.e., an economic unit carrying out a commercial activity). As far as groups of companies are concerned, there is a rebuttable presumption that the parent company is liable for the conduct of its wholly owned subsidiaries.
Damages claims can be brought before commercial or civil courts, with specific courts specialised to hear competition damages claims. They can also be brought before the administrative courts if the author or victim of the anticompetitive practice is a public entity.

Actions for damages for infringement of competition law (EU law or domestic law) were traditionally tortious actions based on the general liability regime set forth in the French Civil Code. They will in the future probably be based on the most recent provisions of the Commercial Code specifically dealing with damages actions following competition law infringements.

V THE PROCESS OF DISCOVERY

Under French law, parties must disclose all documents upon which they rely. They do not have to disclose documents that would adversely affect their case or support the other party’s case.

In the course of proceedings, a party may, however, request the court to order the other party to disclose documents relevant to the case that are not already within the control of the requesting party. Such requests should normally identify expressly the documents requested; fishing expeditions are not permitted under French law.

Specific rules have, however, been introduced regarding disclosure in the context of damages actions following competition law infringements, which allow a claimant to request the disclosure of relevant categories of evidence. The category of evidence in question must be circumscribed as precisely and as narrowly as possible, by reference to common relevant features of its constitutive elements such as the nature, object, date or content of the documents that are being requested.

The main exception to disclosure ordered under these provisions is that documents covered by business secrets and privileged documents, as well as certain categories of evidence submitted or held by the competition authority, cannot be disclosed.

When a claimant requests the disclosure of evidence that is alleged by the defendant or a third party to contain business secrets or otherwise confidential information, the court may decide that only part of the documents or a redacted or summarised version will be disclosed, restricting the persons allowed to see the evidence and adapting the content of its decision to take due account of the necessity to protect business secrets or other confidential information. The court may also decide to conduct hearings in camera.

Persons having been granted access to evidence considered by the court to be likely to contain business secrets are bound by an obligation of confidentiality preventing them from using or disclosing the relevant information in their relationships with third parties. This obligation remains enforceable as long as the court has not waived it, or as long as the information has not lost its confidential nature or has not become easily available.

Parties, third parties and their legal representatives may be exposed to a fine of up to €10,000 if they fail or refuse to comply with the disclosure order of the court, destroy relevant evidence, or fail or refuse to comply with the obligations imposed by a court order protecting confidential information. Courts may also draw adverse inferences from the above conduct of the party.
VI  USE OF EXPERTS

The court may request, at its own initiative or upon request from any of the parties, the assistance of an expert to clarify factual elements of the case.

The use of experts generally mostly relates to an assessment of the harm and the corresponding amount of damages. In this respect, it is common for the parties to submit their own expert reports in support of the case, generally prepared by economic consulting firms.

Although experts hired by the parties must provide accurate information, they do not have as strong a duty to the court as in certain other jurisdictions. This may lead the court to decide to appoint a third-party expert independent from the parties who will have a legal duty to be impartial.

VII  CLASS ACTIONS

A specific class action procedure related to competition and consumer law infringements has been adopted by the Law of 17 March 2014 (Hamon Law) and is set forth in the French consumer code.4 Class actions are possible to repair the individual harm caused by the infringement of competition law provisions to consumers placed in an identical or similar situation. They can only be initiated by authorised consumers’ associations.

To be authorised, a consumers’ association must fulfil specific criteria, including:

a  having been in existence for a period of at least one year;

b  demonstrating that the organisation carries out effective public activity in defence of the interests of consumers;

c  if purported to be a national organisation, having a membership of at least 10,000 members; and

d  being independent from any form of professional activities.

Approval is granted for a period of five years and may be renewed subject to the same conditions.

Authorised associations may only represent consumers, defined by the consumer code as individuals acting for purposes that are primarily outside their trade, business, craft or profession.

The procedure of this new class action is twofold. First, the court must establish the liability of the professional, identify the group of consumers concerned and set the amount to be paid as compensation for each consumer. Once such a ruling has been issued, the consumers concerned then have two to six months, as specified in the decision, to join the group and be compensated. By joining the group, consumers are deemed to have given proxy to the association, which will collect the damages and redistribute them to each individual consumer. The French regime is therefore based on an opt-in mechanism.

A simplified procedure allows for direct and individual compensation when the number and identity of consumers harmed is known and when these consumers have suffered damage of the same amount.

Aside from this new type of class action for competition law infringements, there still exists the traditional representative action: the action of joint representation. This action is

4  Article L 623-1 et seq. of the Consumer Code.
only opened to registered consumers’ associations and may be brought before any French court, including criminal courts, to represent either an individual interest or a number of interests where the individuals involved have sustained damage as the result of the same infringement. To initiate an action of joint representation, a consumers’ association must first obtain a written proxy from at least two of the consumers affected by the infringement. The consumers’ association cannot publicly call for proxies. Because of these very strict requirements, the action of joint representation is rarely used. This procedure is of lesser interest in light of the new class action procedure introduced by the Hamon Law.

For the purpose of consumers’ class actions, the consumer code provides that infringements of competition law are irrefutably established on the basis of a final decision of national or European authorities or courts (including competition authorities and courts of all Member States of the European Union). However, the authorised consumers’ association or the claimant still needs to provide evidence of a loss and a link between the infringement and the damage.

Consumer class actions can be brought up to five years from the date of issuance of a final decision by a national or European authority or a court establishing an infringement of the competition rules. The limitation period for individual damages actions is suspended by the launch of a class action. The period resumes for at least six months from the date on which a final class action decision establishing liability for damages has been issued.

VIII CALCULATING DAMAGES

French law establishes a rebuttable presumption that cartel infringements cause harm. No such presumption applies to other competition infringements such as abuse of dominant position or vertical practices.

The claimant will in any case have to assess the extent of the loss it has suffered. French law provides for the principle of full compensation, meaning that a person who has suffered harm shall be placed in the position in which that person would have been had the infringement of competition law not been committed. Compensation shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

French law provides that the compensation may include:

a the loss resulting from the overcharge (subject to the absence of passing on to the downstream purchaser) or from a lower price paid by the infringer;
b the loss resulting from the loss of volume of products sold in the case of a partial or total passing on of the overcharge;
c the loss of chance; and
d moral damage.

Courts will continue to assess the extent of the harm, although it is up to the claimant to quantify his or her loss. Courts can request guidance from the French Competition Authority regarding the assessment of harm.

The losing party normally bears the costs of proceedings (translation fees, witnesses, experts, etc.). These costs do not, however, include attorneys’ fees, but courts may order the losing party to bear the attorneys’ fees. Courts have discretionary powers to set the amount of legal costs to be paid by the losing party, and these costs are generally much lower than the actual attorneys’ fees incurred by the party.
IX  PASS-ON DEFENCES

The passing-on defence is available under French law. Given that compensation of harm can be claimed by anyone who has suffered it, irrespective of whether it is a direct or indirect purchaser from the infringer, it must be ensured that a claimant does not obtain compensation of harm exceeding that caused by the infringement of competition law to such claimant.

The defendant in an action for damages can therefore invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on rests on the defendant. Indeed, the rule is that direct or indirect purchasers are deemed not to have passed on the overcharge to their direct co-contractors.

There are specific rules regarding damages claims made by indirect purchasers. It is normally up to such indirect purchasers to prove that they have been affected by the anticompetitive practices through passing on and to quantify the resulting loss they have suffered. However, to make it easier for such indirect victims to claim damages, the law provides that the indirect purchaser is deemed to have demonstrated the existence of a passing on if it is able to show that the defendant committed an infringement of competition law; the infringement resulted in an overcharge for the direct purchaser of the defendant; and the indirect purchaser bought the goods or services that are the object of the infringement, or derived from or containing them.

The defendant can nevertheless demonstrate that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

The above rules are also applicable to direct or indirect suppliers of the authors of competition law infringements claiming compensation for a loss resulting from a lower price paid by infringers.

X  FOLLOW-ON LITIGATION

French law provides that an infringement of competition law is deemed to be irrefutably established by an infringement decision of the French Competition Authority or of the court of appeal that cannot be appealed through an ordinary appeal process. The same applies in relation to final infringement decisions issued by the European Commission, as French courts cannot issue decisions going against Commission decisions.

Findings of infringements of competition law in a final decision rendered by other national competition authorities or a court of appeal are deemed to constitute prima facie evidence of an infringement. Thus, if a final prior decision of the French Competition Authority or the European Commission has already established that the defendant has infringed competition law, the claimant will only need to prove causation and loss.

Infringers that cooperate with the Competition Authority in the context of leniency or settlement proceedings are not protected against private actions. In this respect, the anticipated increase of follow-on actions may have deterred certain infringers from applying for leniency, as is reflected in the decreasing number of leniency applications received by the French Competition Authority.

It must be noted that parties settling a case under French law do not have to expressly acknowledge their guilt (i.e., their involvement in the anticompetitive practices); they merely have to abstain from contesting the objections. However, it is often considered that it may be more complicated for a company to successfully defend a follow-on damages action if it has settled with the Competition Authority.
XI PRIVILEGES

French courts recognise legal privilege, but only in relation to independent attorneys registered with a bar. In-house counsel do not benefit from legal privilege. French courts will give full effect to applicable legal professional privilege when ordering the disclosure of evidence. Attorney–client correspondence, attorneys’ work products, handwritten notes of a conversation with an attorney and all the documents that form part of an attorney’s file are legally privileged.

French law also contains specific rules regarding disclosure of certain documents held by or submitted to competition authorities. Thus, a court cannot request competition authorities or the French Ministry of Economy to disclose evidence that can reasonably be obtained from another party.

Investigation evidence is ordinarily confidential and therefore not disclosable in judicial proceedings. Any information or document prepared by a natural or legal person specifically for the proceedings of a competition authority, any information drawn up and sent to the parties by the competition authority, and any settlement submissions that have been withdrawn are therefore not disclosable so long as the competition authority has not closed its proceedings by adopting a decision or otherwise.

In addition, courts cannot at any time order a party or a third party to disclose corporate statements (written or transcription of oral statements) made in the context of leniency or settlement proceedings.

A party may request the court to access the evidence for the sole purpose of ensuring that it is protected. The competition authority may, acting on its own initiative, submit observations to the court before which a disclosure order is sought. The court may also request the competition authority’s opinion. If only parts of the evidence requested are covered by the above protection, the remaining parts thereof shall be released.

Evidence that is obtained by a natural or legal person solely through access to the file of a competition authority is deemed to be inadmissible if it is submitted prior to the closure of the proceedings by the authority or if it concerns leniency statements or settlement submissions.

XII SETTLEMENT PROCEDURES

As in any other damages claims, parties to a damages claim in relation to a competition law infringement can settle the case. In fact, most follow-on actions tend to be settled, as defendants want to avoid the issuance of a publicly available decision awarding damages that may encourage other potential victims to seek compensation. French law provides for certain rules dealing with the amount of compensation that can be claimed to settling and non-settling parties in this context.

The injured party having settled with one of the co-infringers can only claim from the other co-infringers an amount of damages reduced by the settling co-infringer’s share of the harm that the infringement of competition law inflicted upon the injured party.

Any remaining claim of the victim can be exercised only against non-settling co-infringers. By way of derogation, except as otherwise provided in the settlement agreement, where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim, the victim may exercise the remaining claim against the infringer with which it has previously settled.
Non-settling co-infringers are not permitted to recover contribution for the remaining claim from the settling co-infringer.

When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by an infringement of the competition law, courts must take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

Settlements may also have an impact on the level of fines imposed by the French Competition Authority on the settling infringers. Indeed, the Competition Authority may decide to reduce the amount of the fine imposed on an infringer that has paid compensation to the victim as result of a consensual settlement.

**XIII ARBITRATION**

Parties who do not wish to bring their case before a court may resort to arbitration or mediation to resolve disputes involving competition law issues. The Paris Court of Appeal confirmed that, although arbitrators do not have the power to impose fines for infringements of competition law, they can decide upon the consequences of such infringements and, in particular, award damages.5

Authorised associations may also engage in mediation in the context of a class action at all stages of the proceedings. If the mediation leads to an agreement between the parties, the negotiated agreement must be confirmed by a judge, who must ascertain that the agreement has been reached in the interests of consumers and will be enforceable.

**XIV INDEMNIFICATION AND CONTRIBUTION**

Under French law, damages are exclusively compensatory. Their purpose is to restore the victim to the position that it would have been in had the breach never been committed.

Punitive damages as they exist, for instance, in the US do not exist under French law. This is because, as stated above, the purpose of damages under French law is to compensate the victim for the harm sustained rather than to deter the defendant and others from engaging in infringing conduct.

As a general rule, damages will be awarded only if the harm sustained is direct, personal, certain and foreseeable. The claimant must show that there is a causal link between the infringement and the harm suffered. Consequential damages are available if certain and foreseeable. French courts will therefore award damages for loss of chance and loss of earnings, if appropriate.

Liability will ordinarily be joint and several for infringements of competition law involving several defendants. This means that a claimant may potentially bring an action for damages against any one party for the entire loss caused by all infringers. In cases where only one cartelist is sued, it can seek to join others to the action or initiate a claim against them at a later stage for a contribution to any damages paid out, or both.

If an award of damages is made against a group of defendants on the basis that their liability is joint and several, it is for the court to assess how liability should be apportioned.

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as between those defendants. French courts will apportion damages between co-defendants by reference to the seriousness of their respective conduct and the causal role in the resulting harm.

By way of derogation, where an infringer is a small or medium-sized enterprise (SME), it is liable only to its own direct and indirect purchasers where its market share in the relevant market was below 5 per cent at any time during the infringement of the competition law, and the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

Such derogation does not apply where an SME has led the infringement of competition law, has coerced other undertakings to participate therein, or has previously been found to have infringed competition law by a decision of a competition authority or an appeal court.

Similarly, defendants having been granted immunity from fines in the context of leniency proceedings may only be held jointly and severally liable to claimants other than their direct or indirect co-contractors where such other claimants cannot obtain full compensation from the other undertakings that were involved in the same anticompetitive practices.

In addition, the amount of contribution of an infringer that has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Until now, antitrust private enforcement actions have remained relatively rare in France. Commentators have suggested that a possible reason for the low number of private enforcement actions brought in France was the relatively low level of awareness of the possibility for aggrieved companies to obtain damages, the absence of discovery and the lack of expertise from courts, in particular in relation to the assessment of damages.

The recent implementation of the EU Directive on damages in France has largely remedied this situation. Courts have also been issued with guidelines and received training on the assessment of damages following competition law infringements.

This more favourable legal environment for claimants has not led, however, to a dramatic increase of private enforcement in France to date. In the case of EU-wide cartels, French companies still tend to bring actions before foreign courts, such as UK or Dutch courts, which are still viewed as more claimant-friendly, in part due to discovery rules.
Chapter 11

GUATEMALA

Juan Carlos Castillo Chacón and Natalia Callejas Aquino

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Since Guatemala has no antitrust or competition laws (see Section II), there is no antitrust litigation activity to report.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Guatemala is in the process of approving competition legislation, but there is currently no specific competition law or antitrust bill in our legal system.

Although there is no specific bill that regulates competition law, there are scattered provisions that regulate antitrust practices.

The Constitution of Guatemala establishes a general prohibition on monopolies and state privileges. It empowers the state to limit companies that may absorb, to the detriment of our national economy, production in one or more industrial, commercial or agricultural activities.2

The Commerce Code also has a general provision that prohibits monopolies by imposing the obligation on all companies to supply to anyone who requests from them their products or services, observing equal treatment among the various consumer categories.3

The Criminal Code regulates monopolistic behaviour, which is attributable to whoever performs acts, for illicit purposes, that are evidently to the detriment of our national economy, absorbing (or taking advantage of, with some sort of privilege) the production exclusively of one or more industrial branches, or of the same commercial activity or an activity related to the agricultural industry. In addition, the following acts are considered monopolistic:

- the hoarding or removal of articles of basic needs to provoke a rise in prices in the local market;
- all acts that hinder or seek to impede free competition in production or trade;
- all acts executed without government authorisation that seek to limit the production of a certain good with the purpose of establishing or sustaining privileges and profit from said privilege;
- selling any product at a price below its cost with the purpose of limiting free competition in the local market; and

1 Juan Carlos Castillo Chacón is a managing partner and Natalia Callejas Aquino is a partner at Aguilar Castillo Love, SRL.
2 Constitution of the Republic of Guatemala, Article 130.
3 Decree No. 2-70, Commerce Code, Article 361.
causing scarcity of a basic-need product through its export without a permit issued by a competent authority when required.\(^4\)

Some other specific laws regulate, through very concise provisions, matters related to free competition: the Telecommunications Law, the General Electricity Law and the Distribution of Hydrocarbons Law.

In May 2010, Guatemala adopted a commitment as part of the association agreement with the European Union to adopt antitrust legislation by the end of November 2016.

Guatemala is still in the process of approving its first Competition Law, and Congress has not finalised the approval proceedings necessary to send the bill to its final phase of approval before the executive branch of the government.

On 17 May 2016, the Bill for Antitrust Law (Bill No. 5074) was submitted before Congress for its approval.

A general outline of the Bill is as follows:

- purpose and general provisions;
- free competition defence;
- competition advocacy;
- the Superintendency of Competition;
- administrative procedure;
- infringements, sanctions, measures and prescription;
- reforms; and
- final provisions and transitory norms.

On 4 November 2016, the Congressional Commission on Economy and Foreign Trade issued a judgment on Bill No. 5074 in which it rendered a favourable resolution on the Bill being discussed in Congress. The procedure of incorporating the Bill as law is still pending the approval of Congress of the whole Bill and the final sanctioning of the Bill by the Executive Branch.

On 30 November 2016, Congress approved the Competition Law for final discussion. Although this does not provide for final approval of the law, it does obligate Congress to review the final draft of the law and sanction its approval.

On 9 March 2018, the Congressional Commission on Economy and Foreign rendered a favourable opinion on Bill No. 5074.

On 10 April 2018, Bill No. 5074 was heard for the first debate by Congress.

All references made hereafter related to Bill No. 5074 may be subject to change in light of future amendments that could be approved by Congress during final discussions of the Bill.

**III EXTRATERRITORIALITY**

As a general principle, Guatemalan law applies only within the territory of Guatemala.\(^5\) However, Bill No. 5074 includes a provision that states that the Competition Law will apply to all acts originated outside the territory of Guatemala that have effects in the territory of Guatemala.

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\(^4\) Decree No. 17-73, Criminal Code, Articles 340–341.

\(^5\) Decree No. 2-89, Judiciary Branch Law, Article 5.
IV STANDING

The Commerce Code states that any person harmed by unfair competition, any trade association or the Attorney General’s office may bring an unfair competition action in ordinary tribunals that oversee civil and commercial matters.

In addition, Bill No. 5074 grants standing to:

a the Superintendency of Competition, which is an autonomous state entity that will oversee the defence and promotion of free competition, and the prevention, investigation and sanctioning of anticompetitive practices. Any person with knowledge of an anticompetitive activity may inform the Superintendency of these acts;

b public officials and government employees; and

c accountants and auditors.

V THE PROCESS OF DISCOVERY

As a general principle, Guatemalan law does not provide for discovery. However, Bill No. 5074 allows for an investigation to be initiated by the Superintendency of Competition prior to requesting the starting of an administrative procedure. Investigation by the Superintendency may involve, but is not limited to, verification visits, interviews with economic agents and requests for information and documents.

This investigation process may be initiated by the Superintendency once a competent judge has granted authorisation to the Superintendency to do so.

VI USE OF EXPERTS

Guatemala has not approved legislation that regulates the use of experts in matters specifically related to competition or antitrust. However, as a general rule, the Civil and Commercial Procedure Code allows the use of experts as proof to be rendered within a trial. Experts are designated by each party during a trial, and the judge appoints a third expert in the event of discord. Experts must personally accept to act as such, and must deliver a written opinion to the presiding judge.

VII CLASS ACTIONS

Class action suits are not regulated in Guatemala.

VIII CALCULATING DAMAGES

Compensatory damages are cognisable under Guatemalan law; however, they must be proven by the harmed party. These damages are calculated according to the losses suffered by the damaged party and the profits that were lost by the rights holder as a direct result of the action.

Punitive damages are not awarded in either civil or criminal proceedings. Attorneys’ fees and costs may be included in a final judgment rendered by a judge to be paid by the losing party.
IX  PASS-ON DEFENCES

There are currently no limitations imposed beyond an initial sale.

X  FOLLOW-ON LITIGATION

There is currently no legislation that provides any limitations on private actions or awards against parties who have been subject to a public enforcement action or immunity.

XI  PRIVILEGES

Under the Code of Professional Ethics, there is an obligation to keep professional secrecy and recognise attorney–client privilege. There is no objective parameter to determine the extent to which courts in Guatemala recognise this right that attorneys must maintain professional secrecy; however, judges tend to respect this right.

Our Criminal Code foresees the breach of professional secrecy as a crime that is sanctionable with six months’ to two years’ imprisonment or a fine.6

Information or documents produced to governmental authorities, unless categorised as reserved information or classified information, are deemed public and should therefore be accessible to the public upon formal written request.

Confidential information is defined in law as all information that either by constitutional mandate or by express provision in law has restricted access, or information that has been delivered by an individual person or a legal entity with the guarantee of confidentiality.

Reserved information is defined in law as all information whose access is temporarily restricted due to a provision in law.

XII  SETTLEMENT PROCEDURES

Guatemalan law does not provide specific settlement procedures for competition and antitrust matters. Guatemalan law only regulates the applicability of settlement agreements either through a separate agreement or through a petition presented before a judge.

For a settlement agreement to be valid, the following requirements must be met:

a parties must have legal capacity to dispose of that which is the object of the settlement;

b the issues on which the settlement is taking place are either dubious or contentious;

c parties must promise to assign or give something reciprocally; and

d if the settlement is being carried out through a proxy, this person must have special powers not only to settle but to perform all acts and agreements derived from the settlement, if necessary.

XIII  ARBITRATION

Guatemala has not approved competition or antitrust legislation regulating specific procedures such as arbitration and alternative disputes. However, arbitration and conciliation procedures are available for all matters in which a dispute mechanism can be freely chosen.

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6 Decree No. 17-73, Criminal Code, Article 223.
The current provisions drafted in Bill No. 5074 do not provide information as to whether alternative dispute mechanisms or arbitration will be allowed.

XIV INDEMNIFICATION AND CONTRIBUTION

There are currently no limitations set forth on seeking indemnification or contributions from third parties, co-defendants and cross-defendants. At this time, we do not know if the future law to be approved by Congress will introduce any limitation to those effects.

XV FUTURE DEVELOPMENTS AND OUTLOOK

As previously mentioned, Congress is in the process of approving Guatemala’s first competition law, Bill No. 5074. There is no date specified for the approval of the Competition Law.
Chapter 12

INDIA

Vandana Shroff and Avaantika Kakkar

I  OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Competition Commission of India (CCI),2 established under the Competition Act, 2002 (Competition Act), has only been discharging its enforcement functions for the past nine years,3 yet it has had a significant impact on India’s competition regulatory framework, considering that conduct of enterprises (publicly or privately owned, multinationals or small and medium-sized enterprises) across various sectors has been indiscriminately scrutinised and, where needed, penalised.

The Competition Act has had a ground-breaking impact on a wide gamut of enterprises (companies, associations, partnership firms, individuals) operating through different mediums (online, brick and mortar) in different levels of markets (manufacturers, wholesalers, distributors, retailers). Last year saw important developments both on the legislative as well as the judicial front.

On the legislative front, the Ministry of Corporate Affairs (MCA) has constituted a Competition Law Review Committee (Committee) to review the Competition Act, Competition Rules and Competition Regulations in view of the changing business environment and recommend necessary changes, if required. The Committee will also consider international best practices in the competition fields, especially antitrust laws, merger guidelines and the handling of cross-border competition issues, and recommend appropriate changes after seeking views from stakeholders.

As per an official press release from the Press Information Bureau (PIB),4 in April 2018 the Union Cabinet also gave its approval for ‘rightsizing’ the CCI from one chairperson and six members (a total of seven) to one chairperson and three members (a total of four) by not filling two member vacancies, and one more additional vacancy that became vacant in September 2018 when one of the incumbents completed his term. However, no legislative amendment to the Competition Act has been brought forth in this regard.

Additionally, the CCI has also recently undertaken an amendment to the Competition Commission of India (General) Regulations, 2009 (CCI General Regulations) so as to expressly provide for parties to be represented by advocates when giving statements

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1 Vandana Shroff and Avaantika Kakkar are partners at Cyril Amarchand Mangaldas.
2 The CCI acts as the market regulator for prevention and regulation of conduct having an adverse effect on competition in India.
3 Notification dated 15 May 2009 issued by the Ministry of Corporate Affairs.
on oath before the Director General (DG).\textsuperscript{5} Given its recent vintage, the manner of the implementation of the amendment remains to be seen, not to mention any legal challenges that may be brought against it.\textsuperscript{6}

The CCI has also released a Policy Note\textsuperscript{7} focused on the healthcare sector entitled ‘Making Markets Work for Affordable Healthcare’. The Policy Note recognises that practices prevailing in the sector due to lack of information symmetry may not always violate the Competition Act, but they tend to create conditions that do not permit the process of competition to unfold effectively in the markets. Accordingly, the CCI has brought out a set of recommendations and decided to share the same with the MCA, the Ministry of Health and Family Welfare, the Department of Pharmaceuticals and NITI Aayog.

Besides the above legislative developments, last year witnessed various important decisions passed by the Supreme Court of India (Supreme Court), high courts and the CCI. The Supreme Court decided certain important cases on substantive issues under the Competition Act which provide important guidance for the CCI in its functioning.

In \textit{Rajasthan Cylinders and Containers Ltd v. Union of India & Anr},\textsuperscript{8} the Supreme Court set aside concurrent findings by the CCI and the Competition Appellate Tribunal (COMPAT)\textsuperscript{9} regarding an alleged cartelisation by a set of liquefied petroleum gas (LPG) cylinder manufacturers based on the market conditions. The Supreme Court based its decision on \textit{Excel Crop Care Ltd v. Competition Commission of India & Ors},\textsuperscript{10} relying on the market conditions and observing that ‘those very factors on the basis of which the CCI has come to the conclusion that there was cartelisation, in fact, become valid explanations to the indicators pointed out by the CCI’.

The Supreme Court\textsuperscript{11} also set aside COMPAT’s decision and upheld the CCI’s ruling regarding alleged abuse of dominance by multi-system operators (MSOs).\textsuperscript{12} In that case, COMPAT\textsuperscript{13} had set aside the CCI’s order on the premise that denial of market access (under Section 4(2)(c) of the Competition Act) can be occasioned only by one competitor to another. COMPAT\textsuperscript{14} reasoned that since the broadcaster and the MSOs were not competitors, there could be no denial of market access and, thus, set aside the CCI’s order and the penalty imposed thereby. In the appeal, Supreme Court noted that the term denial of market access in any manner is of wide import and must be given its natural meaning. Accordingly, the Supreme Court noted that once the existence of a dominant position is proved, the question

\textsuperscript{5} Regulation 46A, CCI General Regulations (brought into effect from 6 December 2018).
\textsuperscript{7} Policy Note on Making Markets Work for Affordable Healthcare (1 November 2018) available at https://www.cci.gov.in/node/4184 (last accessed on 17 December 2018).
\textsuperscript{8} Rajasthan Cylinders and Containers Ltd v. Union of India & Anr, Civil appeal 3546 of 2014, order dated 1 October 2018.
\textsuperscript{9} As per the legislative change undertaken last year, the functions of COMPAT have been merged with those of the National Company Law Appellate Tribunal.
\textsuperscript{10} Excel Crop Care Ltd v. Competition Commission of India & Ors (2017) 8 SCC 47.
\textsuperscript{12} Footnote 8.
\textsuperscript{13} Footnote 8.
\textsuperscript{14} Footnote 8.
of whether the denial of market access is being done by a competitor or not is irrelevant. Thus, it upheld the CCI’s order on the merits (although removing the penalty) and set aside the COMPAT order.  

In a significant decision, the Supreme Court provided important clarity regarding the overlap of jurisdiction between the CCI and sector regulators. In *Competition Commission of India v. Bharti Airtel Limited & Ors*, the CCI had approached the Supreme Court regarding a decision of the High Court of Bombay that had set aside a CCI order initiating an investigation against a set of telecom operators for alleged cartelisation on the ground that Telecom Regulatory Authority of India (TRAI) and not the CCI had the requisite jurisdiction. The Supreme Court upheld the order of the High Court of Bombay, but also provided certain clarifications regarding the exercise of jurisdiction by the CCI in cases where sectoral regulators exist. The Supreme Court has held that the CCI’s jurisdiction in the telecom sector cannot be completely eliminated, but that the exercise of jurisdiction in the first instance should be carried out by TRAI, and that at a later stage the CCI can exercise its jurisdiction after TRAI forms its *prima facie* view.

In discharging its functions, the National Company Law Appellate Tribunal (NCLAT), has also rendered some important decisions. Significantly, NCLAT upheld the 67 billion rupees fine imposed by CCI on 11 cement manufacturers for alleged cartelisation. The cement manufacturers, and also their association, have referred appeals before the Supreme Court. The Supreme Court has accepted the appeals and directed that the interim orders as passed by NCLAT (whereby the parties were required to deposit 10 per cent of the penalty amount for a stay on the CCI order, but that if the appeals were to be ultimately dismissed, the parties would have to pay the balance amount with 12 per cent interest from the date of the CCI’s order) shall continue in the meantime.

Currently, NCLAT is also hearing an appeal against an order passed by the CCI where Google was found to have abused its dominant position and a penalty of 1.35 billion rupees was imposed on it (by the CCI). During the pendency of the appeal, NCLAT has passed an interim order staying the operation of the CCI order in certain respects subject to Google depositing 10 per cent of the penalty imposed by the CCI.

Additionally, while conducting an inquiry (after examining the material on record and the investigation report submitted by the DG) relating to the imposition of unfair prices by private super speciality hospitals for alleged violation of provisions of Section 3 and 4 of the Competition Act, the CCI recently noted that huge profit margins are being earned through the sale of products to locked-in in-patients to the detriment of such patients. Considering the mandate given to the CCI under the Competition Act, the CCI decided to widen the scope of the investigation to cover the practices of super specialty hospitals across Delhi in respect of healthcare products and services provided to their in-patients.

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15 Footnote 8.
18 *Google LLC & Ors v. Competition Commission of India & Ors*, Competition appeal (AT) 18/2018.
19 Id., order dated 27 April 2018.
Further, the CCI itself revealed its evolution by continuing to pass various orders imposing penalties on enterprises for indulging in anticompetitive activities in violation of Section 3 (anticompetitive agreements having an appreciable adverse effect on competition in India) and Section 4 (abuse of dominant position) of the Competition Act.

So far this year, the CCI has passed 17 orders imposing penalties against anticompetitive conduct.\textsuperscript{21} In addition to the above, various inquiries have been initiated by the CCI against enterprises in the following sectors:

\begin{itemize}
  \item[a] broadcasting;\textsuperscript{22}
  \item[b] energy;\textsuperscript{23}
  \item[c] electronics;\textsuperscript{24}
  \item[d] sports;\textsuperscript{25}
\end{itemize}


\textsuperscript{22} Noida Software Technology Park Ltd v. Star India Pvt Ltd & Others, case No. 30/2017, order dated 27 July 2018.

\textsuperscript{23} Indian National Shipowners' Association (INSA) v. Oil and Natural Gas Corporation Limited (ONGC), case No. 1/2018, order dated 12 June 2018.

\textsuperscript{24} Velankani Electronics Private Limited v. Intel Corporation, case No. 16/2018, order dated 9 November 2018.

\textsuperscript{25} Pan India Infraprojects Private Limited v. Board of Control for Cricket in India (BCCI), case No. 91/2013, order dated 1 June 2018.
Significantly, the CCI also passed various orders under the Competition Commission of India (Lesser Penalty) Regulations, 2009 (Lesser Penalty Regulations).

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private antitrust actions are governed by the Competition Act and the regulations framed therein. The provisions of the Competition Act do not bar the application of any other law. However, the Competition Act expressly bars the civil courts from accepting any suits or proceedings in respect of any matter that the CCI or NCLAT is empowered to determine, which, in the case of NCLAT, includes compensation applications by aggrieved parties.

Section 19(1) read with Section 26(1) of the Competition Act empowers the CCI to initiate inquiries (through investigation by the DG) into anticompetitive agreements or abuse of dominant position of an enterprise either on its own motion or upon receipt of information from any person, consumer or their associations or trade association or on reference from central or state government or a statutory authority.

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29 In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India v. Panasonic Corporation, Japan & Others, suo motu case No. 02/2017, order dated 30 August 2018 (appeal preferred by some of the opposite parties before NCLAT); In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters v. Essel Shyam Communication Limited & others, suo motu case No. 02/2013, order dated 11 July 2018 (appeal preferred by some of the opposite parties before NCLAT); In re: Cartelisation in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing v. Lahs Green India Private Limited & Others, suo motu case No. 04/2016, order dated 31 May 2018 (appeal preferred by opposite parties before NCLAT); In re: Cartelisation in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing v. Saara Traders Private Limited & Others, suo motu case No. 03/2016, order dated 31 May 2018 (appeal preferred by opposite parties before NCLAT); Nagraj Chetna Manch v. Fortified Security Solutions & Others, case No. 50/2015, order dated 1 May 2018 (appeal preferred by opposite parties before NCLAT); Cartelisation in respect of zinc carbon dry cell batteries market in India v. Eveready Industries India Ltd & Ors, suo motu case No. 02/2016, order dated 19 April 2018 (appeal preferred by some of the opposite parties before NCLAT).
30 Section 53N, Competition Act, 2002.
31 Section 64, Competition Act, 2002.
32 Section 62, Competition Act, 2002.
33 Section 61, Competition Act, 2002.
34 Section 19(1), Competition Act, 2002.
Although there is no legislative no provision in this regard, the High Court of Delhi by way of a decision\(^{35}\) has held that the CCI has an inherent power to recall or review (based on certain specified grounds) an order passed by the CCI under Section 26(1) of the Competition Act initiating an investigation.

The Competition Act empowers the DG to investigate contraventions when directed by the CCI upon formation of a *prima facie* view. In this regard, the Competition Act grants the DG with certain powers\(^{36}\) such as summoning and enforcing attendance if any person and examining him on oath, requiring discovery or production of documents, receiving evidence on affidavit, issuing commissions for the examination of witnesses or documents, carrying out search and seizure operations (or dawn raids). However, DG’s powers, though wide are supposed to be exercised with caution. In 2016, COMPAT\(^{37}\) set aside the order of the CCI observing that the DG as well as CCI should not be blinded by the statement made by parties during investigation and veracity of such statements must be independently tested by DG and CCI.\(^{38}\)

At the conclusion of an inquiry, the CCI can pass an order under Section 27 of the Competition Act, *inter alia*, imposing a penalty on the contravening enterprise. In the interim, Section 33 of the Competition Act empowers the CCI to pass interim orders restraining alleged anticompetitive conduct until the inquiry is concluded or further orders are issued.\(^{39}\) As per a leading decision of the Supreme Court\(^{40}\) interpreting Section 33, this power has to be exercised by the CCI ‘sparingly and under compelling and exceptional circumstances’. Additionally, the CCI, while recording a reasoned order in this regard, *inter alia*:

- **a** should record its satisfaction (which has to be of a much higher degree than the formation of a *prima facie* view under Section 26(1) of the Competition Act) in clear terms that an act in contravention of the stated provisions has been committed, and continues to be committed or is about to be committed;
- **b** should, as a necessity, issue an order of restraint; and
- **c** from the record before the CCI, show that it is apparent that there is every likelihood of the party to the *lis* suffering irreparable and irretrievable damage, or there is a definite apprehension that it would have adverse effect on competition in the market.

The CCI also has the power to impose a lesser penalty, in enforcement proceedings, where ‘full, true and vital disclosures’ are made by a person cooperating with a cartel investigation.\(^{41}\)

An application for compensation (arising from findings of CCI or findings of NCLAT) can be made before NCLAT under Section 53N of the Competition Act. Furthermore,

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\(^{35}\) *Google Inc v. Competition Commission of India & Ors*, 2015 (150) DRJ 192. (The CCI has preferred SLP (C) 13716-17/2017 against this order before the Supreme Court, which is currently pending. The Supreme Court has issued a notice on the appeal as well as an application for condonation of delay, but no other interim order has been passed).

\(^{36}\) Section 41, Competition Act, 2002.

\(^{37}\) Footnote 8.

\(^{38}\) *Lupin Ltd & Ors v. CCI & Anr*, appeal No. 40/2016, I.A. No. 152/2016, order dated 7 December 2016 (appeal preferred by CCI pending before the Supreme Court).

\(^{39}\) Section 33, Competition Act, 2002.

\(^{40}\) *Competition Commission of India v. Steel Authority of India Ltd and Ors*, (2010) 10 SCC 744.

\(^{41}\) Section 46, Competition Act, 2002 (r/w CCI Lesser Penalty Regulations).
an application can be made to NCLAT under Sections 42A and 53Q(2) for recovery of compensation from any enterprise for any loss or damage shown to have been suffered as a result of the contravention of the orders of the CCI or NCLAT.

At present, NCLAT has five compensation applications\(^ {42} \) pending before it that have been filed by parties under Section 53N of the Competition Act. However, NCLAT is yet to render a final view on those applications.

The limitation period for an appeal before NCLAT is prescribed by the Competition Act. Section 53B provides that any person aggrieved by a CCI order\(^ {43} \) can file an appeal before NCLAT within 60 days of the communication of the order’s issuance. Further, an appeal can be made to the Supreme Court of India against the orders passed by NCLAT within 60 days of the communication of the order passed by NCLAT.\(^ {44} \) Since the Competition Act is silent on the limitation period applicable to filing of an application for compensation, the doctrine of laches would prohibit the parties from bringing an action after an unjustifiable and unreasonable delay.\(^ {45} \) However, if the information filed by the informant is in the nature of a continuing violation, the limitation period would not bar the filing of such information.\(^ {46} \)

### III EXTRATERRITORIALITY

Article 245(2) of the Constitution of India provides that no law made by the Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation. Further, Section 32 of the Competition Act provides the CCI with the power to inquire into activities having an adverse effect on competition in India, even though the enterprise or party is outside India or the practice arising out of an anticompetitive agreement or abuse of dominant position has taken place outside India. Section 18 of the Competition Act, implicitly, also empowers the CCI to enter into any memorandum of understanding (MoU) or arrangement with any agency of any foreign country, with the prior approval of the Central Government. Additionally, the Competition Act exempts agreements that relate exclusively to the production, supply, distribution or control of goods or the provision of services for export.\(^ {47} \) The issue of the extraterritorial jurisdiction of the CCI was a subject of dispute in the inquiries initiated against Google Inc\(^ {48} \) by the CCI. Although not giving any specific


\(^{43}\) Section 53A specifies the orders passed by the CCI against which an appeal before NCLAT would be maintainable.

\(^{44}\) Section 53T, Competition Act, 2002.

\(^{45}\) See Prabhakar v. Joint Director Sericulture Department and Ors, 2015(10)SCALE114, paragraph 36.

\(^{46}\) Kingfisher Airlines Limited, a company incorporated and registered under the provisions of the Companies Act, 1956 and Dr Vijay Mallya v. Competition Commission of India through its Secretary (Ministry of Company Affairs, Government of India), The Director General, Competition Commission of India, MP Mehrotra, Indian Inhabitant and Union of India (UOI) through Secretary, Ministry of Company Affairs [2011]100CLA190 (Bom).

\(^{47}\) Section 3(5)(ii), Competition Act, 2002.

\(^{48}\) Cases Nos. 07 & 30/2012, case No. 06/2014 and case No. 46/2014, order dated 31 January 2018.
finding on this aspect, the CCI seems to have imposed a penalty based on the sales of Google Inc (along with that of its Indian subsidiary) from their India operations. Additionally, the CCI in a number of cases has made parent companies parties to proceedings before the CCI, and in certain cases has called foreign officials for the recording of their statements. Interestingly, in a recent case, the CCI held that an alleged anticompetitive agreement did not have an appreciable adverse effect on competition in India because almost the entire quantities of the goods in question were being exported.

IV STANDING

The Competition Act allows any person to give information to the CCI regarding an alleged contravention, the proceedings are not considered to be a private dispute and the informant’s role is generally considered to be a medium of information for the CCI. When information is filed under Section 19(1)(a) of the Competition Act and the CCI is of the opinion that a prima facie case of contravention of the Competition Act is made out, an investigation could be directed irrespective of whether an informant withdraws at a later stage. The identity of the informant can also be kept anonymous during the investigation, and the CCI has done so in various cases.

However, more clarity is required regarding the position on the locus or the standing of an informant under the Competition Act. In a case pertaining to trade associations, COMPAT recognised that internal rivalry between different sections of a trade association can lead to the filing of motivated information that the CCI should be wary about. Likewise, in another case, COMPAT also acknowledged that business rivalry can influence competitors to make untrue allegations before the CCI, requiring the CCI to take a careful approach.

Any aggrieved party having suffered loss or damage in India (either because of anticompetitive activities or non-compliance with the CCI or NCLAT order) may file an

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49 Biocon Limited & others v. F. Hoffmann-La Roche AG & Ors, case 68/2016, order dated 21 April 2017 (opposite parties have challenged the initiation of inquiry before the High Court of Delhi); Kaveri Seed Company Limited, Ajeet Seeds Private Limited & Ankur Seeds Private Limited v. Mahyco Monsanto Biotech (India) Limited & Ors, case No. 37, 38, 39 of 2016, order dated 9 June 2016 (opposite parties have challenged the initiation of inquiry before the High Court of Delhi).

50 Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson, case No. 76/2013, order dated 16 January 2014; (appeal challenging the initiation of inquiry pending before the High Court of Delhi).

51 Nirmal Kumar Manshani v. Ruchi Soya Industries Ltd & Ors, case No. 76/2012, order dated 28 June 2016 (order is currently under challenge in W.P(C) 3922/2017 before the High Court of Delhi).

52 The Board of Control for Cricket in India v. The Competition Commission of India and Ors, appeal No. 17 of 2013 and I.A. No. 26 of 2013, order dated 23 February 2015.


55 Footnote 8.

56 Schott Glass India Pvt Ltd v. Competition Commission of India through its Secretary and M/s Kapoor Glass Private Limited, appeal No. 91, 92/2012, order dated 2 April 2014.

57 Footnote 8.
application before NCLAT or the Supreme Court for compensation. Further, an enterprise (including a person, government or an association) may file an application (in the prescribed manner) before NCLAT for an award of compensation by establishing the loss or damage suffered by it.

V THE PROCESS OF DISCOVERY

The Competition Act does not provide for any pretrial discovery procedures. Any evidence collected by the DG of the CCI and used while preparing the investigation report is placed before the CCI and then made available to all the concerned parties, subject to the legitimate claim of confidentiality.

Although the CCI has the power to regulate its own procedures, it must be guided by the principles of natural justice. Section 36(2) of the Competition Act empowers the CCI as well as the DG to exercise the same powers as are vested in the Civil Court under the Civil Procedure Code in respect of discovery and production of documents, requiring evidence on affidavit, issuing commissions for the examination of witnesses or documents and requisitioning of any public record or document or copy of such record or document from any office subject to the provisions of Section 123 and 124 of the Indian Evidence Act, 1872 (the Evidence Act). During the investigation, DG can seek information or documents and summon and conduct examination of parties including witnesses or third parties (i.e., parties that are not party to the case) on oath. The Evidence Act governs the admissibility of evidence including pre-existing evidence under Section 19(1), evidence from experts under Section 36(3), 36(4) and 36(5) and evidence from search and seizure procedure under Section 41(3). Categories of evidence admissible can be documentary, oral, economic and financial analysis.

The CCI (General) Regulations, 2009 also contain provisions on confidentiality, inspection of documents, taking of evidence, issue of summons and commissions for the examination of witnesses or documents. Further, there are several cases that are pending adjudication before the high courts on the issue of powers of the DG in relation to the rights of the parties during the process of investigation.

58 Section 53N, Competition Act, 2002.
59 Regulation 35, CCI (General) Regulations, 2009.
60 Section 36(1), Competition Act, 2002.
61 Section 41(2), Competition Act, 2002.
63 Regulation 37 and 50, CCI (General) Regulations, 2009.
64 Regulation 41, CCI (General) Regulations, 2009.
65 Regulation 44, CCI (General) Regulations, 2009.
66 Regulation 45, CCI (General) Regulations, 2009.
67 See NTN Corporation v. Competition Commission of India and Anr., W.P.(C) 3051/2016, High Court of Delhi; Sumitomo Electric Industries Ltd v. CCI, W.P. (C) 9894/2017, High Court of Delhi; Toyo Element Industry Co, Ltd v. CCI, W.P. (C) 9884 of 2017, High Court of Delhi; Miyamoto Electric Horn Co Ltd v. CCI & Anr., W.P. (C) 6492/2017, High Court of Delhi; NOK Corporation v. CCI & Anr., W.P.(C) 11628/2016, High Court of Delhi; Toyota Industries Corporation v. CCI, W.P.(C) 3177/2017, High Court of Delhi.
VI USE OF EXPERTS

The CCI may call upon experts from the fields of economics, commerce, accountancy, international trade or from any other discipline as it may deem fit for the purpose of conducting an inquiry. 68 It may also engage an expert to assist it in the discharge of its functions. 69 The CCI has also framed regulations to govern the procedure for its engagement. 70 In this regard, the CCI has empanelled institutions and agencies with the CCI for conducting surveys or undertaking economic analysis of markets, or both. Additionally, the CCI has also empanelled institutions for the assessment of select upcoming or existing economic legislation and policies made by the Parliament, state legislature, ministries, departments of the central and state governments, and statutory authorities, from a competition perspective. 71 Based on the assessment, the CCI may suggest, if necessary, appropriate modifications in the economic legislation or the policy.

VII CLASS ACTIONS

Section 19(1)(a) of the Competition Act empowers the CCI to inquire into alleged contraventions of provisions specified in Sections 3(1) or 4(1) either on its own motion or on receipt of information from any person, consumer, or their association or trade associations. 72 In terms of compensation applications to be filed under Section 53N, Subsection (4) thereof clearly allows one or more persons to file an application for the benefit of other interested persons. Therefore class actions can be taken by consumer associations, trade associations, a body of individuals, a cooperative society, a Hindu undivided family, non-governmental association or any trust. Class actions can also be taken under Section 53N(4) of the Competition Act whereby one or more persons on behalf of numerous persons with the same interest in filing a class action can file an application with the permission of NCLAT, on behalf or for the benefit of all the interested persons.

VIII CALCULATING DAMAGES

Section 27 of the Competition Act empowers the CCI to pass orders that include penalties after conducting an inquiry into agreements that are in violation of Section 3 or conduct that is in violation of Section 4 of the Competition Act. The CCI also has the power to impose a lesser penalty if full and vital disclosure is made by a lesser penalty applicant in case of a cartel. 73

68 Section 36(3), Competition Act, 2002.
69 Section 17(3), Competition Act, 2002 and Regulation 52, CCI (General) Regulations, 2009.
72 There have been several cases where the CCI has initiated an investigation on receipt of information filed by associations, e.g., Builders Association of India v. Cement Manufacturers’ Association & Ors, case No. 29/2010, order dated 31 August 2016 (appeal filed by opposite parties pending before NCLAT); Belaire Owners’ Association v. DLF Limited, HUDA & Ors, case No. 19/2010, order dated 12 August 2011 (appeal preferred by opposite party pending before Supreme Court).
73 Section 46, Competition Act, 2002 (r/w CCI Lesser Penalty Regulations).
Penalties can also be imposed if the orders or directions issued by DG and the CCI are not complied with. Any person or enterprise may file an application before NCLAT for recovery of damages. An application for claiming damages can be filed before NCLAT under Sections 53N (in an appeal arising from findings of the CCI or NCLAT), 42A (for recovery of damages suffered by the plaintiff) and 53Q (2) (damages suffered due to inability of the judgment debtor to comply with the CCI orders) of the Competition Act. Though a party needs to demonstrate the damage suffered because of the contravention, it need not re-prove the contravention to obtain compensation.

IX PASS-ON DEFENCES

There is currently no pass-on defence in India. However, Explanation (b) to Section 53N of the Competition Act clarifies that when deciding compensation applications, NCLAT must be concerned with ‘determining the eligibility and quantum of compensation due to a person applying for the same’. Therefore, the pass-on defence may be taken by a respondent to contend that since the applicant has passed on the loss or damage, if any, caused to it, it is not eligible for any compensation.

X FOLLOW-ON LITIGATION

The Competition Act does not provide any explicit limitation prohibiting the initiation of a private action if there has been an enforcement action with respect to the same. However, under Section 61 of the Competition Act, the civil courts’ jurisdiction over any matter which the CCI or NCLAT is empowered to determine (which, in the case of NCLAT, includes compensation applications by aggrieved parties) is barred.

XI PRIVILEGES

Although the concept of privileged communications is not covered by the Competition Act, the Evidence Act provides for protection of privileged professional communications between attorney and client. While this protection certainly extends to external counsel, it has also been held that a paid or salaried employee who advises his or her employer on all questions of law and relating to litigation (in certain situations) must enjoy the same protection of law as an external counsel. Section 126 of the Evidence Act provides the scope of attorney–client privilege and restricts attorneys from disclosing any communication exchanged with the client or stating the contents or condition of documents in his or her possession. However, this privilege would not apply in situations where a crime or a fraud has been committed during the period of attorney’s engagement by the client.

The privilege applicable under Section 126 of the Evidence Act is extended to the interpreters, clerks and employees of the legal adviser by Section 127 of the Evidence Act. Under Section 128 of the Evidence Act, the legal adviser is bound by Section 126 of the Evidence Act unless the client calls the legal adviser as a witness and questions him or her on the information. Moreover, Section 129 of the Evidence Act provides that no one shall

74 Section 42, Competition Act, 2002.
75 Section 43, Competition Act, 2002.
76 Section 42A, Competition Act, 2002.
be compelled to disclose to the court any confidential communication that has taken place with his or her legal professional adviser, unless the latter offers him or herself as a witness. Moreover, the application of these provisions to leniency applications is yet to be tested since no case has been decided.

XII SETTLEMENT PROCEDURES

Although there is no express provision under the Competition Act that prescribes the settlement procedure, a recent decision77 passed by the High Court of Delhi upheld the possibility of settlements between an informant and opposite party regarding an antitrust dispute and held that the basis of information furnished by the informant cannot survive after the informant itself has withdrawn the said information and settled the case with the opposite party. However, the decision also held that if, notwithstanding the settlement, the CCI feels that any action is required against the opposite party for anticompetitive conduct, the CCI cannot be barred from doing so. The decision is currently under appeal before a larger bench.78

XIII ARBITRATION

The Competition Act in India does not empower the CCI or NCLAT to direct the parties to resort to arbitration or any other alternate dispute resolution mechanism. Significantly, the High Court of Delhi in Union of India v. CCI & Ors79 has held that existence of an arbitration agreement is not relevant for the purposes of competition law proceedings under the Competition Act. The general rule prevalent in India regarding arbitration is that though issues in personam may be arbitrable, rights in rem should not be arbitrable. Given the specific provision for adjudication of private antitrust claims by Section 53N of the Competition Act, these disputes may not be termed as arbitrable. However, as yet, there has not been a substantive decision on arbitrability of competition law disputes and more clarity may emerge in the future if such a decision were to be passed.

XIV INDEMNIFICATION AND CONTRIBUTION

Although the Competition Act does not provide for indemnification or contribution from third parties, co-defendants and cross-defendants, such situations could arise in the future, especially where suo moto cognisance or investigation by authorities could implead third parties in the same sector.80

77 Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India & Arr, High Court of Delhi, W.P(C) 5604/2015, order dated 14 December 2015.
78 CCI v. Telefonaktiebolaget LM Ericsson & Arr, High Court of Delhi, LPA 550 of 2016.
79 Union of India v. CCI & Ors, 2012 CompLR 187 (Delhi).
XV  FUTURE DEVELOPMENTS AND OUTLOOK

After the current competition law legislation came into operation, the government constituted an expert committee in 2011 to suggest changes to the existing regime. However, the Competition (Amendment) Bill, 2012 lapsed before it could be passed by the lower house of Parliament. It will be interesting to see if the Committee considering amendments to the Competition Act decides to revisit the amendments sought to be put in place through the proposed amendment in 2012, which was approved by the Parliamentary Standing Committee on Finance in 2014.

The competition law regime in India is undergoing tremendous change and the CCI is actively working with the government as well as governments abroad to achieve its goal of furthering economic development by preventing anticompetitive practices and promoting fair competition. In this regard, in line with its proactive methods, the CCI has also expanded the scope of its investigation into alleged anticompetitive conduct by a leading hospital chain and a leading medical devices company by directing the DG to cover in its investigation the practices of super specialty hospitals across Delhi in respect of healthcare products and services provided to inpatients.

Antitrust jurisprudence in India continues to develop, but there are regulatory issues that need to be addressed. Some of the major issues that require further clarity are as follows:

a competition and intellectual property: although a single judge of the High Court of Delhi decided in favour of the CCI’s jurisdiction to initiate inquiries where alleged anticompetitive conduct may arise due to the exercise of intellectual property rights, this continues to be a subject of debate due to the appeal preferred by the opposite party;
b competition and sectoral regulators: while the decision by the Supreme Court in Competition Commission of India v. Bharti Airtel Limited & Ors presents an important step forward, its implementation and acceptance by other sectoral regulators, apart from TRAI, remains to be seen; and
c the extent of the powers of the DG: several issues in this regard are pending adjudication.

The decision of the Supreme Court in Excel Crop Care Limited v. Competition Commission of India & Anr seems to have laid down the foundation for a more transparent, proportionate yet strong competition enforcement in India. A concurring opinion by Ramana J in the above decision clearly highlighted the need to consider various aggravating and mitigating factors before determining the penalty to be imposed for a contravention:

the nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such
contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc.

The Supreme Court highlighting the absence of guidelines for the imposition of penalties in India as compared to other jurisdictions may lead the CCI to consider the issuance of guidelines for the imposition of penalties (though none have been issued thus far).

While certain grey areas still remain, the future of competition law regulation in India seems positive, with the CCI adopting a proactive, indiscriminate stance towards promoting competition and NCLAT, high courts and the Supreme Court of India working to ensure that the CCI and the DG pursue their ends in accordance with their powers and duties under the Competition Act.
Chapter 13

ISRAEL

Eytan Epstein, Mazor Matzkevich and Shani Galant-Frankfurt

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The past few years have been characterised by an increasing number of motions to certify class actions based on alleged global cartels being filed with the Israeli district courts. The initiation of these proceedings is usually made by private practitioners, and the plaintiffs are private consumer organisations or Israeli individuals, while the respondents are foreign companies that have allegedly been parties to global cartels that, according to plaintiffs’ claims, affected the Israeli market and harmed consumers.

The trigger for these motions is largely based on proceedings by enforcement agencies in various jurisdictions with respect to the alleged global cartels. According to these motions, the financial damage suffered by Israeli consumers was caused by the broad impact of the alleged global cartels on the relevant products’ markets in Israel.

1 Eytan Epstein is a senior partner, Mazor Matzkevich is a partner and Shani Galant-Frankfurt is an associate at M Firon & Co. The authors also wish to thank advocate Tamar Dolev Green, who co-authored previous editions of this chapter.

2 Thus, in November 2013, a motion to certify a class action with respect to an alleged global cartel in the market of liquid crystal display (LCD) panels for flat screens was filed against five foreign companies (the LCD cartel class action. See Central District Court, class action 53990-11-13 Hatzlacha consumer movement for the promotion of equitable economic society (RA) v. AU Optronics Corporation and others, 27 November 2013, published in Nevo). The motion is based on proceedings in various jurisdictions worldwide, inter alia, in the United States and Europe. In November 2014, a motion to certify a class action was submitted in Israel against six foreign companies – allegedly members of a global cartel in the cathode ray tubes (CRT) and CRT-based products industry (the CRT cartel class action. See Central District Court, class action 10812-11-14 David Merom v. LG ELECTRONIC INC et al, 5 November 2014, published in Nevo). The motion is largely based on criminal and civil proceedings against the companies that took place in the United States, as well as on the European Commission’s decision of December 2012, and the fines that were imposed by it. In May 2015, a motion to certify a class action with respect to an alleged global cartel in the market of lithium batteries was filed against six foreign companies who allegedly were members of the cartel (the lithium battery (LiB) cartel class action. See Central District Court, class action 54288-05-15 Shlomi Talmon v. Samsung SDI Co Ltd et al, 28 May 2015, published in Nevo). The factual basis of this motion is the criminal and civil proceedings that are pending in the United States in connection with the alleged cartel. In May 2016, a motion to certify a class action with respect to an alleged global cartel in the market for optical disc drives (ODD) was submitted against eight foreign companies that allegedly participated in price fixing, bid rigging and market allocation (the ODD cartel class action. See Central District Court, class action 23139-05-16 Itai Lantuel v. Sony Corporation et al, 10 May 2016, published in Nevo). This motion is based on proceedings taking place in the United States, Europe and other jurisdictions. In September 2016, a motion to certify a class action with respect to an alleged global cartel in the market of truck manufacturing was filed against six foreign
Nonetheless, private civil proceedings against foreign entities are subject to the rules of service, including the rules relating to service outside the state as provided in the Civil Procedure Regulations\(^3\) (CP Regulations). Particularly, in the case of a foreign defendant that does not have any presence in Israel, a plaintiff needs the court’s approval to serve its claim outside the jurisdiction.

In August 2017, the Supreme Court held, in the framework of a request to appeal the District Court’s decision in the LCD cartel case,\(^4\) that damage, in itself, would not suffice to grant permission for a service outside Israel if the act or omission of the alleged cartel were not performed in Israel. Thus, the Supreme Court’s decision in this case limits the possibility of filing actions, including class actions, against foreign entities that have no presence in Israel when the alleged global cartel was not performed in Israel. However, this decision only set an obstacle on parties to class actions against global cartels when service could not be effectuated in Israel.

The past few years have also witnessed several motions to certify class actions alleging excessive pricing by monopolists. This trend was developed following an April 2014 public statement by the Israel Competition Authority (IAA) regarding the prohibition on a monopolist charging excessive prices.\(^5\) The public statement elaborated on the legal and economic tests for estimating whether prices charged by a monopolist are excessive under Section 29A(1) of the Economic Competition Law, which prohibits a monopolist from abusing its dominant position by charging unfair prices. Furthermore, the statement detailed the considerations that would be taken into account by the IAA when deciding to act against a monopolist that charges excessive prices. The statement provided a safe harbour for prices that exceeded the production costs by up to 20 per cent. However, it provided no guidance as to the circumstances in which the price would have been considered excessive. Interestingly, according to the statement, a monopolist that charged more than 20 per cent over its production costs might have been considered to be in breach of the law.

As a result, several class actions were filed against monopolistic companies claiming unfair excessive pricing. For example, in September 2014, an individual farmer who purchased potassium for fertilisation purposes from Dead Sea Works Ltd, one of the world’s largest manufacturers of potassium, submitted a motion to certify a class action against the company at the Central District Court on behalf of all consumers of potassium in Israel. According to the motion, Dead Sea Works abused its dominant position in the potassium market by charging excessive and unfair prices. In April 2016, the Central District Court approved a

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\(^3\) Civil Procedure Regulations, 5744-1984.
\(^4\) Supreme Court, permission for civil appeal 925/17 Hatzlacha consumer movement for the promotion of equitable economic society (RA) v. AU Optronics Corporation and others, 31 July 2017, published in Nevo.
\(^5\) Draft Opinion on the General Director’s Considerations on the Enforcement of the Prohibition on Charging Excessive Prices by a monopolist, 2016, publication 501055, available in Hebrew on the IAA’s website; Public Statement 1/14 The Prohibition on Charging Excessive Prices by a monopolist, 2014, publication 5006035, available in Hebrew on the IAA’s website.
settlement agreement between the parties. This decision is discussed in detail in Section XII. Moreover, in April 2016, the Central District Court certified a class action against Tnuva, Israel's largest dairy manufacturer, alleging that Tnuva charged excessive prices for cottage cheese. This decision is precedential to a great extent as it explicitly recognised, for the first time, excessive pricing as a violation of the Economic Competition Law in Israel. This decision is discussed in detail in Section VII. In addition, in September 2017, the Supreme Court denied the appeal of the gas monopoly (composed of the six largest gas companies in Israel), held that the class action brought against it for excessive pricing should not be dismissed and returned the case to the District Court to decide the motions to certify this class action.

In spite of all of the above, it should be highlighted that, shortly after her nomination in 2016, the current Director General of the IAA, Michal Halperin, expressed her disagreement with the above-mentioned public statement of April 2014, and announced a public hearing and formal reevaluation of the IAA's policy concerning the prohibition on excessive pricing by monopolies, which was designed to examine the merits, enforceability and effectiveness of that policy. The need for reevaluation arose due to a vigorous public debate that took place following the publication of the public statement. Indeed in September 2016, the IAA published a new statement regarding the enforcement of the prohibition on excessive pricing by monopolists, replacing the previous public statement. The new policy introduces the main principles of enforcement challenges of unfair prices, and suggests that the IAA will act against firms charging excessive unfair prices only where there is no other competitive remedy available for addressing the underlying problem in the specific market. In principle, the IAA would prefer a structural solution to the specific treatment of prices; however, it will act when prices are significantly higher than the price charged under competitive conditions, and when there are indications that the high price is unfair. Furthermore, according to this policy statement, the IAA will not enforce the prohibition in a market where there is a designated industry regulator supervising the prices set in the market. The policy statement abandoned the safe harbour established in the previous public statement, making it difficult for private plaintiffs to argue a lighter burden of proof of excessive pricing by monopolists.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private antitrust enforcement is founded in Section 50 of the Economic Competition Law, under which any act (or omission) that contravenes the provisions of the Economic Competition Law, including instructions or conditions imposed by the Director General, automatically constitutes a tort actionable in terms of the Torts Ordinance. For example, Section 4 of the Economic Competition Law makes it a contravention for any person to be a party to a restrictive arrangement, which may include both horizontal and vertical agreements, including per se illegal price-fixing or market-allocation agreements. Section 29

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6 Central District Court, class action 41838-09-14 Weinstein v. Dead Sea Works, 5 April 2016, published in Nevo.
7 Supreme Court, civil appeal 9771/16 Nobel Energy and others v. Moshe Nezri and others, 28 September 2017, published in Nevo.
and 29A of the Antitrust Law make it illegal for a monopolist to abuse its monopolistic position in the market through, for example, unreasonable refusal to supply or purchase goods or services, price discrimination or charging an unfair price for goods or services. Such contraventions of the Economic Competition Law are thus deemed to constitute a tort for purposes of the Torts Ordinance. Section 71 of the Torts Ordinance empowers a civil court to grant compensatory damages or to make other orders, such as injunctions, in favour of a person who has suffered damage or injury as a result of a tort committed against him or her.

In 2006, the Class Action Law was signed into law. This legislation extracted the provisions regulating class actions from, inter alia, the Economic Competition Law, and set out an independent regime regulating class actions. The Class Action Law regulates, inter alia, the legal requirements for the commencement of a class action such as issues of legal standing, the legal requirements to bring a class action and the relief that may be claimed, including the calculation of damages. The Class Action Law also sets out the court’s powers and authority in its hearing and enforcement of class actions, including its authority to recognise a claim as a class action, to grant a settlement order, and to issue other orders such as in respect of professional fees and remuneration of the class action representative. The Class Action Law also regulates various other issues, such as prescription and the establishment of a fund to finance class actions that are of social or political significance.

Sometimes, claims alleging anticompetitive conduct are brought both under the Economic Competition Law and the Unjust Enrichment Law. In a decision issued by the Central District Court, which involved a claim of abuse of dominant position, the Court awarded the plaintiff a remedy based on the Unjust Enrichment Law. The Court held that misleading the Patents Registrar in order to prolong a pharmaceutical company’s monopoly and delay the entry of a generic competitor in the market entitled the competitor not only to receive compensation under the antitrust laws, but also entitled it to claim all or part of the monopoly profits under the Unjust Enrichment Law.9

During 2013 and 2014, two laws were enacted aiming to increase competition in the markets generally and in the food sector in particular.

In March 2014, the Law for Enhancement of Competition in the Food Sector10 (Food Law) was enacted with the objective of increasing competition in the food sector and consequently bringing price reductions to consumers. Inter alia, the Food Law prohibits a supplier from dictating, recommending or interfering in any way in decisions made by a food and consumption products retailer regarding the price it charges consumers for a product of another supplier or the conditions under which it sells a product supplied by another supplier. Specific prohibitions apply to big retailers and big suppliers based on, inter alia, their sales volumes in the preceding year. In general, a big supplier is prohibited:

a. from interfering in shelves stewardship of a big retailer;
b. from setting prices below cost to the big retailer;
c. from recommending the resale prices of its products; and
d. in the absence of special permission, from subjecting the sale of a product to the acquisition of other products supplied by it.

In addition, the law authorises the Director General to publish on the IAA’s website a list of very big suppliers (i.e., suppliers the annual sales of which exceed 1 billion shekels) of which

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9 Central District Court, civil case 33666-07-11 Unipharm v. Sanofi, 8 October 2015, published in Nevo.
10 Law for Enhancement of Competition in the Food Sector, 5774-2014.

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products’ placement must not exceed 50 per cent of the total shelf space available in any one of the big retailer’s biggest stores. The Food Law further regulates geographic competition by retailers. In this respect, the Director General must define, for every big store of a big retailer, its competitive geographic area, in which area the law prohibits the expansion of the big retailer without prior approval of the Director General.

Interestingly, the Food Law also requires big retailers to publish full and updated prices of any product sold in any of their stores on the internet.

Breach of the Food Law is considered an offence under the Consumer Protection Act, and the Director General is in charge of the enforcement thereof. For example, in July 2018, the IAA reached a consent decree with Shufersal Company, the largest supermarket chain in Israel, according to which Shufersal agreed to pay an administrative fine of 9 million shekels for violations of the Food Law.\(^\text{11}\) In addition, in June 2018, the Director General decided to impose a monetary sanction on three supermarket chains for breaching their reporting obligations under to the Food Law.\(^\text{12}\)

In the absence of a specific reference to private enforcement of this law, private actions may be filed pursuant to the Torts Ordinance [General Version] 1982 (breach of statutory duty).

In addition, in December 2013, the Law for the Promotion of Competition and Reduction of Concentration was enacted, aiming to strengthen competition and break up certain powerful business groups in the Israeli economy. \textit{Inter alia}, the Law bans groups from owning both financial and non-financial enterprises (any group that owns both types of companies must divest one or the other) and dismantles business pyramids by stating that no group may have more than two tiers of publicly listed companies. The Law also deals with competition considerations relating to allocation of rights in state assets and the requirement to consult with the Director General in certain cases.

\begin{itemize}
  \item \textbf{Prescription}
  
  Where a civil claim for damages is brought under the Economic Competition Law, the Prescription Act\(^\text{13}\) applies. Sections 5(1) and 6 of the Act direct that a claim (not in respect of immovable property) will prescribe seven years from the date on which the cause of action arose. Under Section 8, however, if the plaintiff was unaware of the facts that constituted the cause of action for reasons that were independent of it, and that even using reasonable caution it could not have known, the period of limitation will commence on the day that the facts became known to the plaintiff. Section 89 of the Torts Ordinance directs that the date on which the cause of action arose will be the date on which the relevant act or omission occurred; and that where the act or omission is a continuing act or omission, then the date on which such act or omission ceased will be the date on which the cause of action arose.\(^\text{14}\)
  
  Specifically, however, where the claim is a claim for damages, including pecuniary damages, caused by a tortious act or omission, then the date on which the claim arose will be the date on which the damage was incurred. However, should such damage only be discovered at a later date, the cause of action arises on this date, subject to a maximum period of 10
\end{itemize}

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\begin{enumerate}
  \item \footnotesize 2018, publication 501552, available in Hebrew on the IAA’s website.
  \item \footnotesize 2018, publications 501532, 501531, 501530, available in Hebrew on the IAA’s website.
  \item \footnotesize Prescription Act, 5718-1958.
  \item \footnotesize Section 89(1) of the Torts Ordinance.
\end{enumerate}
years. Since damage is one of the elements of a cause of action brought under the Economic Competition Law, the latter rule of Section 89(2) should apply to such cases, provided that the plaintiff shows a causal link between the argued action (or omission) and the damage.

In *Straus Group et al v. Carmit Candy Industries Ltd*, the Supreme Court considered the question of which day the plaintiff became aware of the facts constituting the cause of action. The case involved an action for damages brought by Carmit, the Israeli distributor of Cadbury, against Strauss Group for alleged abuse of dominant position by exclusionary practices aimed at forcing Cadbury chocolates out of the market. The Court ruled that the day on which the plaintiff became aware of the facts constituting the cause of action was not the date on which Carmit became aware of the defendant’s salespeople’s behaviour and threats to the retailers, but later – when Carmit revealed for the first time that this was part of a strategic decision of the defendant’s management to exclude Cadbury from the market. This information was revealed to Carmit only when the investigation of the IAA against the defendant became public.

The inclusion of a person as a claimant in a class action group has the same effect in terms of tolling the statute of limitations as if that person had issued the summons in the matter. In addition, should the court deny an application for approval, the prescription period of the claim of a person included in the group deriving from that cause of action does not end prior to one year after the date on which the decision on the application for approval becomes final, provided that person’s claim had not been tolled prior to the date on which the application for approval was filed.

### III EXTRATERRITORIALITY

The Economic Competition Law is silent on its extraterritorial reach. In 1999, in accordance with the statutory authority granted under Section 43(a)(1) of the Economic Competition Law to declare that an arrangement is restrictive, the Director General of the IAA determined that such an arrangement existed in the market for selective fragrances. The Director General’s report addressed the issue of the extraterritorial application of the Israeli antitrust legislation. The subject of the investigation of the IAA was an Australian registered company, James Richardson, which held a licence from the Airports Authority to operate a duty-free shop at an Israeli airport. James Richardson held over 30 per cent of the Israeli market in selective fragrances and entered into restrictive arrangements with foreign selective perfume manufacturers to distort competition for selective fragrances in Israel. James Richardson sought, through its restrictive arrangements with the foreign suppliers, to maintain its 30 per cent markdown on imported selective fragrances.

In addressing the extraterritorial application of the Israeli antitrust legislation, the Director General referred to foreign jurisprudence on the issue, in particular the approach of the US and EU authorities, and referred with approval to the use of the effects doctrine in those jurisdictions. The Director General held that the purpose of the Israeli antitrust

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15 Section 89(2) of the Torts Ordinance.
18 Section 26(a) of the Class Action Law.
19 Section 26(b) of the Class Action Law.
legislation was to protect competition in Israel, and that such purpose might require the extension of the Israeli legal arm to activities that occur beyond Israel’s borders but have a detrimental effect on competition on the Israeli market. As such, the Director General continued, a restrictive arrangement between foreign parties entered into outside the borders of Israel but the purpose or result of which, in whole or in part, is significant damage to competition on the Israeli market, will fall within the purview of the Israeli Economic Competition Law. The Director General found support for this position in the wording of the Economic Competition Law itself, which in Section 2(a) defines a restrictive arrangement as ‘an arrangement entered into by persons conducting business according to which one of the parties restricts itself in a manner liable to eliminate or reduce the business competition between it and the other parties to the arrangement’.

The Director General held that when any of the elements constituting a restrictive arrangement occurs in Israel, this provides the necessary jurisdiction for the application of the Economic Competition Law. Thus, where an arrangement is concluded abroad but may eliminate or reduce business competition in Israel, this is sufficient to establish Israeli Economic Competition Law jurisdiction. The Antitrust Tribunal addressed this issue for the first time in 2011, when it adopted the Director General’s position.20

The Director General rendered another interesting decision in September 2013,21 which declared illegal under Section 43(a)(1) of the Economic Competition Law an international cartel entered into between foreign companies to coordinate bids submitted in tenders for gas insulated switchgears (GIS) in many countries, including in Israel. In his decision, the Director General emphasised that extraterritorial application of antitrust laws can only take place in respect of conduct taking place outside the state borders when there is a clear connection between that conduct and the local market. The Director General indicated that the very fact that bids being submitted in Israel were based on the agreements between the cartel members is an expression of the striking influence of the cartel on the Israeli market, thus justifying the enforcement of Israeli law.22 The Director General concluded: ‘The restrictive arrangement which is the subject of this declaration was conducted abroad by non-Israeli companies. Nonetheless, its influence over competition in the local market obliges the conclusion according to which the performance of such arrangement breaches the Israeli Antitrust Law.’

21 The Director General’s declaration under Section 43(a)(1) regarding a restrictive arrangement between GIS manufacturers, 2013, publication 500473, available in Hebrew on the IAA’s website.
22 The Director General decided not to include in the determination the worldwide cartel members who had never submitted bids in GIS tenders in Israel. The Director General determined that considering the agreement applied to many countries (not just Israel), and there is a satisfactory explanation and competitive reason for these specific companies to refrain from activities in Israel during the period of the cartel (the geopolitical situation during the relevant period), it is difficult to attribute the participation of these companies in the global cartel to an impact on the Israeli market. Therefore, and in light of the terms of the effects doctrine, it cannot be determined that they were a party to a cartel in Israel. Ibid., paragraph 140.
Private civil proceedings against foreign entities are subject to the rules of service outside the state as provided in the CP Regulations. Particularly in the case of a foreign defendant who is not personally present in Israel, a plaintiff needs the court’s approval to serve its claim outside the jurisdiction as a precondition for the court’s jurisdiction over that defendant.23

The court may grant a motion for service outside of the jurisdiction if a claim falls under one of the categories listed in Regulation 500 of the CP Regulations. Regulation 500 stipulates a list of 10 situations in which service outside the jurisdiction will be permitted.24 The common denominator of the factors detailed in the Regulation is the existence of a link between the dispute and Israel. For instance, matters in which relief is sought against a party domiciled in Israel or that concern real estate located in Israel, and matters that concern a breach of a contract entered into in Israel or breach of a contract that occurred in Israel, irrespective of where the contract has been made, are recognised.

The issue of extraterritoriality in antitrust cases has not yet been firmly decided by the courts in the context of a claim for damages or in a criminal proceeding.

The most pertinent ground for service outside of the jurisdiction in antitrust civil claims is set forth in Regulation 500(7) of the CP Regulations, which requires that the claim be founded on an act or omission within the state.

According to long-standing Israeli case law, Regulation 500(7) requires certain nexus to Israel in addition to the damage: the mere occurrence of damage in Israel does not amount to ‘an act, or omission, within the state of Israel’, and accordingly does not confer on the Israeli court jurisdiction over the foreign defendant.25 However, several rulings of the Israeli district courts given (ex parte) in the past few years in respect of service outside of the jurisdiction to foreign corporations that allegedly engaged in illegal global cartels seemed to apply a different reasoning. For example, in September 2014, the Registrar of the Central District Court approved, ex parte, a motion for service outside of Israel in the LCD cartel class action, stating that the mere sale to Israeli purchasers of flat screen panels, flat screens or products that contain flat screens – of which prices were allegedly fixed by the respondents outside of Israel – falls within the meaning of an act within the state as stated in Regulation 500(7).26

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23 Additional methods for serving a foreign defendant under the Civil Procedure Rules are through personal service when a representative of the corporation is present in Israel, or via an agent of the foreign defendant that is located in Israel. An individual or a corporation is deemed to be an agent if it is proved to have strong ties with the foreign defendant.

24 Fulfilment of one of the grounds for the service out of the jurisdiction under Regulation 500 will allow the court to properly exercise jurisdiction over foreign entities, subject to compliance with the forum non conveniens doctrine.


26 Central District Court, class action 53990-11-13 Hatzlacha consumer movement for the promotion of equitable economic society (RA) v. AU Optonics Corporation and others, 5 September 2014, published in Nevo. Also see the CRT cartel class action: in January 2015, the Registrar of the Central District Court approved, ex parte, a motion for service outside of Israel against the alleged foreign respondents. The Court determined that the grounds for approval of service outside of the jurisdiction were satisfied, after accepting the petitioners’ argument that the mere sale of products in Israel that contained CRT – of which prices were allegedly fixed by the respondents – falls within the meaning of an ‘act within the State’ as stated in Regulation 500(7) [Central District Court, RA 15317-12-14 Meron and others v. LG ELECTRONIC INC and others, 5 January 2015, published in Nevo]; the Registrars of the Central District Court in the LiB cartel class action and in the ODD cartel class action granted the plaintiffs, ex parte, approvals of service outside of the jurisdiction, based on the same reasoning. It will be interesting to follow these cases and see how they develop in light of the ruling in the LCD cartel class action.
However, the ruling of the Registrar was reversed on appeal. In December 2016, the Central District Court accepted the appeal of the foreign defendants, rejecting the argument that the damages assessment in antitrust cases should be deemed part of the act within the state for Regulation 500(7) purposes. The District Court emphasised that under customary case law, the act is a separate element that must be distinguished from the damage component in antitrust cases, exactly as is the case in other causes of actions, such as in negligence. The Court stated that if the state wishes to force its laws on foreign parties to facilitate the commencement of lawsuits against foreign parties in Israel, then an amendment of the law or regulations is required.27

As mentioned above, in August 2017, the Supreme Court upheld this decision in the LCD cartel case, ruling that damage, by itself, would not suffice to establish a basis for service outside Israel if the act or omission of the alleged cartel were not performed in Israel.28 Thus, the significance of the decision is that Israeli plaintiffs are not able to bring an action against foreign companies that participated in a global cartel that affected the Israeli market and consumers unless the alleged illegal activity (in full or in part) occurred, de facto, in Israel, or the defendant has some recognised presence in Israel.

IV STANDING

Section 3 of the Torts Ordinance provides that any person who is injured or has suffered damage due to a tort committed in Israel is entitled to a remedy from the infringer, as provided for in the Torts Ordinance. In Tivol Ltd v. Chef of the Sea Ltd,29 a majority of the Supreme Court held that a party to a restrictive arrangement is not prevented from bringing a claim for the cancellation of the agreement under the rubric of the antitrust laws, and many of the first private enforcement claims of the Economic Competition Law were brought by parties to restrictive agreements to escape their contractual obligations. Following the Tivol decision, parties to an anticompetitive restrictive agreement should also arguably be entitled to claim damages under the Torts Ordinance.30

Section 4 of the Class Action Law sets out the requirements for standing to bring a class action suit. As regards natural persons, the claimant must have standing to bring a personal claim in the matter to have standing to bring a claim on behalf of a class. A public authority or organisation may also bring a class action acting in furtherance of an issue related to the field in which it engages and in which there are significant factual or legal questions common to the group of persons represented in the class action (note that as a condition for approving a class action brought by an organisation, the court must usually be convinced that the claim cannot be brought by a natural person31). Where one of the bases for the class action is damage, then it is sufficient for individuals to show that prima facie they suffered damage.

27 Central District Court, class action 53990-11-13 Hatzlacha consumer movement for the promotion of equitable economic society (RA) v. AU Optronics Corporation and others, 29 December 2016, published in Nevo.
28 925/17 Hatzlacha, footnote 4.
31 The District Court in Tel Aviv ruled on what is the correct interpretation of the class action laws requirement to prove that under the circumstances of the case, it would be difficult to bring the petition in the name of a natural person. Class action 2484-09-12 Hatzlacha The Consumers' Movement for the
Similarly, a claim that damage was suffered by a member of the group represented by a public authority or an organisation will suffice where the class action is brought by such public authority or organisation on behalf of that group.

In *Auto Line*, the Central District Court stated, *obiter dictum*, that a person who is not party to a consent decree entered into with the IAA has no standing to sue based on that consent decree.32

**V THE PROCESS OF DISCOVERY**

The CP Regulations govern discovery and inspection of documentation in civil proceedings. ‘Laying your cards on the table’, and not surprising the opposing litigant with evidence of which such litigant may not have been aware, is viewed as both efficient and in the interests of determining the truth in respect of the issue in dispute. The emphasis in the discovery process is on the relevance of the documents to be discovered (i.e., relevance being determined by whether such documents may shed light on the dispute).33 The range of documents permitted to be requested in a discovery application is wide, and the courts have allowed not only actual documents of the parties to be discovered, but information contained in other forms (e.g., recordings and transcripts of recordings, video recordings, and information including lists and records contained in magnetic or electronic form).34 Note, however, that the courts have emphasised that a distinction must be made between appropriate discovery applications and fishing expeditions. Fishing expeditions will not be granted by the courts.35

32 Central District Court, civil case 13427-02-10 *Auto Line Ltd v. Universal Motors Isreal Ltd (UMI)*, 19 June 2012, published in Nevo.

In June 2012, the District Court denied a 20 million shekel lawsuit submitted by Auto Line Ltd, an importer and marketer of automotive spare parts for vehicles manufactured by General Motors and Isuzu, against UMI, a General Motors importer and Auto Line’s main competitor in Israel, alleging restrictive arrangements and violation of a consent decree UMI signed with the IAA in 2003.

As part of its business, UMI engaged in several types of maintenance agreements with automobile fleets under which UMI is responsible for any repair needed. The repair services are done by garages that are UMI’s subcontractors, which are required under their contracts with UMI to use only UMI’s original spare parts.

Inter alia, Auto Line argued that the 2003 consent decree with the IAA prohibits importers of vehicles from restricting garages in any way, and that the obligations UMI imposed on the garages violated the consent decree. The District Court rejected Auto Line’s argument. First, the Court indicated that Auto Line itself had admitted that the consent decree violation was not an independent cause. In addition, in *obiter dictum* the Court stated that since Auto Line was not a party to the decree, it could not sue on its basis and, in any case, the IAA references to the maintenance agreements in the consent decree were not conclusive. An appeal against this ruling was denied in December 2013 by the Supreme Court. See civil appeal 7490/12 *Auto Line Ltd v. Universal Motors Isreal Ltd*, 26 December 2013, published in Nevo.

33 Rishon LeZion Magistrate Court, civil case 18673-05-14 *Hizkiyahu company Ltd (CIC) et al v. Netzer Israel Torah, grace and education institutions et al*, 15 November 2015, published in Nevo.


Usually, litigants (any litigant, not necessarily an opposing one) must disclose by way of affidavit the documents that pertain to the matter at hand or that were under their control or possession. The affidavit must describe the documents that are relevant to the matter at hand and that are or were in the possession or under the control of the litigant disclosing them. The concept of relevance is interpreted broadly and includes both documents that are damaging to the litigant discovering them as well as documents that may prove useful to the opposing party. The existence of a privileged document must still be declared, although its contents may be claimed (in the affidavit) as privileged. Note that fulfilment of this requirement does not require the litigant to detail the content of the documents.

A litigant may also be required to produce documents for inspection and copying. This may apply to documents that have been mentioned in the pleadings or in the affidavit of that litigant, or to documents that have not been mentioned. The applicant, however, must show that the documents requested are relevant to the instant matter, and the court may not grant the applicant’s request unless satisfied that the requested documents or category of documents are necessary for the conduct of a fair trial or to lessen expenses. The onus of proof is on the party requesting the inspection.

A litigant may also obtain information through a questionnaire submitted to another litigant. The questionnaire may cover information that is not limited to documents. It may pose a broad range of questions to the other litigant, often aimed at extracting admissions, which questions are limited only by their relevance to the issue at hand. Again, the central concern is that of relevance. Although the questionnaire itself and the answers thereto do not form part of the court file and automatically become admissible as evidence, any party to the proceedings may use the information provided in the answers of the other party, in whole or in part, as part of its evidence. The court may also order the inclusion of further information provided by a litigant in its answers to the questionnaire should the court find that such further information is closely connected to the information already submitted as evidence.

Failure by a litigant to reply to a questionnaire, to produce documents or to allow inspection of documents contrary to an order granted by the court may justify the dismissal of that litigant’s statement of action or defence and could result in judgment being entered against that litigant. Failure to discover a specific document that should have been discovered results in the litigant being unable to use that document as evidence during the course of the trial without the court’s permission.

Third-party testimony is regulated by the CP Regulations and the Courts Law. CP Regulation 178(a) stipulates that litigants may summon third parties to provide testimony

36 CP Regulation 112.
38 CP Regulation 114.
39 CP Regulation 117.
40 CP Regulation 120(b).
41 Tel Aviv District Court, civil case 3006/00 Danooch Dani v. Chrysler Corporation, 24 October 2004, published in Nevo.
42 CP Regulations 109 to 111.
43 CP Regulation 122.
44 CP Regulation 114.
before a court on their behalf. Such third parties may also be summoned to present
documents to court. The court may not prevent such third-party testimony on the basis
that, in its opinion, such testimony will not assist the litigant who summoned the third party
in the furtherance of his or her matter. As with expert evidence (discussed below), the court
may also call on witnesses to testify as to matters before the court, or to produce documents
that are either in their possession or under their control. Testimony may be provided in
the form of an affidavit (although it may be required of the witness to later appear in court
to provide oral testimony, particularly where the opposing party wishes to question the
witness). It is also possible, depending on the particular circumstances of the matter, for
testimony from third parties to be given via electronic means, such as videoconferencing,
for example, where witnesses are abroad. Should a person summoned to testify or produce
documents by the court fail to appear or produce such documents, Section 73 and 73A
of the Courts Law empowers the court to take measures to compel such witness to appear
before it or to produce such documents, including fining, imprisonment or the confiscation
of passports.

VI USE OF EXPERTS

Regulation 20 of the Evidence Ordinance entitles the court to receive into evidence the
opinion of an expert relating to issues of science, research, art or professional knowledge.
Economic assessments to establish antitrust violations and prove competition damages would
certainly fall within the scope of expert evidence permitted to be received by a court hearing
a civil antitrust claim for damages.

Litigants may choose to present expert evidence to the court to substantiate or prove
their arguments. In addition, the court also may, on its own initiation and at any stage
of proceedings, appoint an expert to give evidence on an issue on which the litigants
disagree.

In practice, as the popularity of the civil enforcement of the Economic Competition
Law increases in Israel, the use of experts to determine damages will also increase.

In recent years, the courts have required class action applicants to support their motions
for class action approval with an expert opinion to satisfy the requirement of providing prima
facie evidence by anticompetitive conduct or impact. Moreover, courts may even require
applicants to base their claim on an expert opinion prepared especially for the purpose of
the specific class action. In Johanan v. Partner Tikshoret Ltd, the applicants claimed that
the cellular companies (the respondents) charged their customers an unfair price for texting
services (SMS). The applicants did not support their claims with an independent expert

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47 CP Regulation 167.
48 Supreme Court, civil appeal 3005/02 SmithKline Beecham PLC v. Unipharm Ltd, 30 June 2002, published
in Nevo.
50 CP Regulation 129.
51 CP Regulation 130.
52 Supreme Court, permission for civil appeal 2616/03 Isracard Ltd v. Haward Rice, 14 March 2005,
published in Nevo; Central District Court, civil case 1817-08-07 Johanan and others v. Partner Tikshoret
53 Civil case 1817-08-07, ibid.
opinion, but relied on reports and experts’ opinions that had originally been prepared by and for the Israel Ministry of Communication (MOC). The court criticised the applicants and rejected their claims, *inter alia*, since the MOC’s reports had no legal probative weight, being no more than hearsay testimony, and their purpose was to assist the MOC in its decision-making process. Consequently, the court ruled that the applicants had not provided sufficient evidence to support their claim. The Supreme Court took a similar approach in the *Tnuva v. Naor* class action case.\(^5\)

In *Tnuva-Strauss*,\(^5\) the Court determined that since the applicant did not attach an expert opinion to prove its claims, and since it is not possible to rely only on identical prices for a defined period of time to prove price fixing over time, the application should be denied. Furthermore, the Court emphasised that an applicant should turn to court only when it possesses sufficient evidence to support its claim, at least *prima facie*, and cannot use the legal proceedings to obtain the initial support for its claim.

## VII CLASS ACTIONS

Standing to bring a class action is discussed in Section IV.

Section 8(a) of the Class Action Law provides that a court may authorise a class action under the following, cumulative, conditions:

a. the claim raises significant questions of fact or law that are common to the group purported to be represented in the claim, and there is a reasonable possibility that such questions will be answered in favour of the group;

b. the class action is the most efficient and fairest method to make a determination in the dispute in the circumstances of the case; and

c. it is reasonable to presume that the interests of the members of the group purported to be represented will be represented and managed in an appropriate manner and in good faith.

Of course, one of the advantages of a class action claim is its efficiency, both in terms of litigation costs saved and in terms of forcing a defendant at fault to compensate those who suffered damage. The flipside, however, is that respondents, some of whom are not necessarily at fault, may be coerced, because of the sheer size and impact of an impending class action suit, to compromise. The class action brought against the banks in *Sharnoa Computerised Machines*\(^5\) exemplifies the massive claims that may be levied against respondents in a class action – the maximum amount of 7 billion shekels could be devastating to the banks and might force them into a settlement with the applicants (for further discussion, see Section XII). In this context, the decision by the Supreme Court in *Phoenix Insurance Company v. Amusi*\(^\) is relevant: the Court discussed the term ‘reasonable possibility that such questions will be answered in favour of the group’ (from Section 8(a) of the Class Action Law), and

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\(^{5}\) Central District Court, class action 3947-09-11 *Amir Josef Brot v. Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd*, 11 March 2012, published in Nevo.

\(^{5}\) Tel Aviv District Court, civil case 19230/06 *Sharnoa Computerised Machines Tel Aviv Ltd v. Bank Hapoalim Ltd, Bank Leumi Israel Ltd and Bank Discount Ltd*, 21 January 2008, published in Nevo.

criticised the lower courts’ tendency to set too strict standards for claimants in class action proceedings at the preliminary approval stage. The Supreme Court clarified that at this stage, the Class Action Law requires no more than a reasonable possibility that the common questions will be ruled in favour of the group and that, for that purpose, the courts should refrain from bringing the main hearing of the case into the preliminary approval stage.

In 2012, the Supreme Court ruled on the standard under which applications to approve actions as class actions should be examined. Specifically, in Phoenix Insurance Company v. Amusi\(^{58}\) (which is not an antitrust case), the Supreme Court considered the criterion of showing a reasonable possibility that the common questions will be answered in favour of the group.\(^{59}\) The Supreme Court criticised the lower courts’ tendency of setting too strict a standard for claimants in class action proceedings at the preliminary approval stage, clarifying that at the preliminary stage, the Class Action Law requires no more than a reasonable possibility that the common questions will be ruled in favour of the group, and the courts should refrain from setting stricter proof standards, which are more appropriate during the hearing of the main case.

At the same time, however, the Supreme Court continued to set strict requirements concerning the evidentiary standard at the preliminary stage of a class action. In the Tnuva v. Naor class action,\(^ {60}\) for example, the Supreme Court upheld the requirement of including with the application for a class action in an antitrust case an expert’s opinion, prepared specifically for the purpose of the claim, and refused to allow the submission of the expert’s opinion later unless the applicant can show that the submission thereof together with the claim was impossible.

The use and the evidentiary significance of an expert’s opinion in class action cases are discussed in Section VI.

As discussed below, the amount of damages awarded need not be determined on an individual basis, and may instead be a global award. While a global award may be significant in terms of the payer, the class action members may only receive a token amount as compensation, thus not truly being compensated. Class actions, from this perspective, may be viewed as an efficient deterrent but an inefficient compensatory mechanism.

In May 2014, the Tel Aviv District Court partly approved an application for a class action against Bezeq The Israel Telecommunication Corp Ltd (Bezeq) for collecting payments after ceasing to provide services to its subscribers.\(^ {61}\) The applicants argued, inter alia, that by doing so, Bezeq had abused its dominant position.

The Court denied the applicants’ argument, stating that since Bezeq acted according to the law (the telecommunications laws) it could not be said to have abused its dominant position. The Court added that activities that are allowed by law cannot be considered, by themselves, as abuse of dominant position.

In January 2014, the District Court in Tel Aviv denied a class action application against Israel Railways, the national operator of train transportation.\(^ {62}\) The applicant alleged that

\(^{58}\) Ibid.

\(^{59}\) Section 8(a)(1) of the Class Action Law 5366-2006 (Class Action Law).

\(^{60}\) PCA 4778/12 Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd v. Advocate Ophir Naor, 19 July 2010, published in Nevo.

\(^{61}\) Tel Aviv District Court, 2519-06 Eyal Goldenberg v. Bezeq The Israel Telecommunication Corp Ltd, 15 May 2014, published in Nevo.

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Israel Railways had abused its monopolistic position by ceasing to provide its services to the public due to an employees’ strike. During the strike, so alleged the applicant, Israel Railways reduced the scope of its services not within the context of fair competitive activity. The applicant pointed to the Court’s decision in Bezeq in which it upheld the IAA’s determination that Bezeq had abused its monopolistic position by striking and failing to provide services to its competitors. The Court distinguished between the cases and determined that in contrast to Bezeq, Israel Railways’ management had operated quickly and efficiently to bring to an end the employees’ strike and did not harm its competitors. On the contrary, the Court stressed, Israel Railways’ competitors (the bus companies) gained from the strike.

In April 2016, the Central District Court issued a precedential preliminary decision explicitly recognising excessive pricing as a ground for a claim under the Economic Competition Law. The Central District Court certified a class action against Tnuva, Israel’s largest dairy manufacturer. According to the plaintiff, Tnuva charged excessive and unfair prices for cottage cheese during between 2008 and 2011. In support of its decision, the Court stated that the language of Section 29A of the Economic Competition Law, which prohibits monopolies imposing unfair pricing, applies not only to predatory pricing, but also to excessive pricing.

Further, the Court based its decision on the IAA’s previous public statement regarding the prohibition on charging excessive prices by a monopolist, stating that although the IAA’s guidelines are not binding in court, they should be given significant interpretative weight. Finally, the Court supported its ruling on the fact that Article 102 of the Treaty on the Functioning of the European Union (TFEU), upon which Section 29A of the Economic Competition Law is based, was interpreted in the European Union ruling as, inter alia, prohibiting charging excessive monopolistic prices. An appeal against this preliminary decision was submitted by Tnuva and is still pending in the Supreme Court.

In recent years, there has been an increasing number of motions to certify class actions based on alleged global cartels filed against foreign companies (see Section I).

VIII CALCULATING DAMAGES

A private litigant injured monetarily by contraventions of the Economic Competition Law may bring a claim for tortious damages in terms of the Torts Ordinance. The purpose of damages under Israeli law, which derives from the English law, is to place injured parties in the position they were in prior to the commission of the tort. Punitive damages are not usually awarded by the Israeli courts. Note, however, that in February 2013 a legislative memorandum that was published by the IAA proposed, inter alia, the adoption of the American triple damages model in private enforcement of antitrust (except for cases where a defendant was granted immunity from criminal prosecution under the IAA’s leniency programme).

In class actions, the court may determine various compensatory damage awards. Section 20 of the Class Action Law directs that the court may order compensation to be paid to each member of the group who has proven his or her entitlement thereto, or may order that each member of the group prove the actual damage he or she has suffered. The court may

63 Antitrust case 801/08 Bezeq the Israeli company for communication v. the general director of the IAA.
64 Class action (Center) 46010-07-11 Ophir Naor v. Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel (5 April 2016, published in Nevo).
also order global compensation to be paid and divided among the members of the group, so long as where global compensation is granted, the amount of damages is capable of precise calculation in accordance with the evidence presented to the court. In *Dan Reichart v. the Heirs of Moshe Shemesh*, the Supreme Court discussed the different methods of calculating or proving damages. Where individual damages are awarded to each member of the class, each member must show the amount of damage personally suffered, for example, by way of production of documentary proof such as receipts. On the other hand, various methods exist to determine global damages, such as having regard to the accounts and documents of the respondent, the use of statistics or the use of mathematical models.

In *Dan Reichart*, the Supreme Court also approved a third method for determining damages – estimation of the amount of damages based on the information that has been brought before it. In the Court’s opinion, however, this latter method should be reserved for exceptional circumstances.

Professional attorneys’ fees are, in the main, determined between litigants and their attorneys, and may be based on a global amount, an hourly charge or a fee based on the percentage of the amount awarded to the litigant. It is possible to request that the court determine the professional fee, and in so doing, the court must take account of all the circumstances of the matter before it, including the time devoted by the attorney to the matter at hand, the significance of the matter, the extent and complexity of the matter, and the reputation of the attorney. Section 23 of the Class Action Law specifies that the court will determine the maximum professional fees of the attorney representing the claimant. The court makes this determination based on several factors, including the benefit of the class action for the members of the class, the complexity of the matter, the risk undertaken by the attorney and the expenses incurred by him or her, the public significance of the class action, the manner in which the attorney conducted the matter, and the difference between the requested remedies and those that were granted by the court. The court can also determine partial attorneys’ fees (out of the global attorneys’ fees) to be paid to attorneys during the course of the proceedings. Attorneys may appeal the court’s ruling regarding the attorneys’ fees. Nevertheless, this is not common practice.

It should be mentioned that in May 2018, to reduce the increasing volume of motions for approval of class actions that are filed to court each year on various legal grounds, and in an effort to reduce defendants’ exposure to groundless claims, a new regulation that requires court fees to be paid on the commencement and development of class action proceedings  


66 Supreme Court, civil appeal, 345/03 *Dan Reichart v. The Heirs of Moshe Shemesh*, 7 June 2007, published in Nevo.


68 In practice, such an appeal was submitted to the Supreme Court in February 2011 by the plaintiff’s attorneys in the *Crocs* class action (Supreme Court, civil appeal 959/11 *Adv Nachum Oren v. Kohoat Hadash Ltd and subsequent procedure*). The appellants argued that the attorneys’ fees awarded by the District Court in the class action (493,000 shekels) were remarkably low, and reflected an average hourly rate of 150 shekels instead of the appropriate rate of approximately 930 shekels per hour. In September 2011, the appeal was annulled by the Supreme Court with the respondents’ consent to pay up to 45,000 shekels to the appellants to cover their expenses in the class action proceedings.
entered into force. According to the new regulation, plaintiffs are required to pay a total fee of 16,000 shekels for filing a class action motion to the District Court, and 8,000 shekels when filing it to the Magistrates Court.\(^6^9\)

**IX PASS-ON DEFENCES**

While attempts have been made to use the pass-on defence in various cases, the courts have not yet explicitly ruled on the issue. While the indirect purchaser doctrine was expressly asserted in several matters before the courts, ultimately the cases were settled without the courts ruling on the issue. In *Howard Rice*,\(^7^0\) the Supreme Court noted that even under the assumption that the plaintiff was able to prove that the fee was excessive or unfair, it will be difficult to approve a class action since the damage was partly passed on to the plaintiffs’ customers and was not suffered by the plaintiff alone.

In November 2013, the Central District Court rejected a motion for dismissal of a class action application, having determined\(^7^1\) that the existence of a conflict of interest between the members of two distinct sub-groups of the class action group (direct and indirect injured members) does not deny the possibility of providing compensation to any of the group’s members. This may be the path for rejecting the pass-on defence doctrine in antitrust private actions. Note, however, that this issue was not the core of the debate there, and was not the subject of the decision. Also notable is the position paper submitted by the State Attorney General to the Central District Court in the context of the *Aviation* cartel case,\(^7^2\) in which he argued that indirect consumers should be allowed to claim their damages from the cartel members. Although this opinion has not yet been examined by the Court, it reflects the authorities’ policy and might lead to the rejection of the ‘pass-on’ defence in antitrust private actions.

**X FOLLOW-ON LITIGATION**

Private enforcement of the Economic Competition Law may be carried out alongside public enforcement, which includes criminal and administrative enforcement. Notably, special evidentiary significance is attributed to the following: the findings and conclusions of a final verdict of the court, convicting the defendant in the criminal proceeding, serve as *prima facie* evidence in a civil proceeding to which the defendant is a party;\(^7^3\) and a determination of the Director General of the IAA made in terms of the Economic Competition Law shall constitute *prima facie* evidence in any legal proceedings.\(^7^4\)

*Inter alia*, the Director General may determine that an arrangement or agreement constitutes a restrictive arrangement in contravention of Section 4 of the Economic Competition Law or that a monopolist has abused its market position in contravention of

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\(^{69}\) Section 7A(A) of the Court Regulations (Fees), 5767–2007.

\(^{70}\) Supreme Court, permission for civil appeal 2616/03 *Issacard Ltd v. Howard Rice*, 14 March 2005, published in Nevo.


\(^{72}\) *Tower Air*, footnote 9.

\(^{73}\) Section 42A of the Evidence Act.

\(^{74}\) Section 43(e) of the Economic Competition Law.
the provisions of Section 29A of the Economic Competition Law. Indeed, as discussed above, it is possible for criminal investigatory activity by the IAA and civil proceedings to proceed in parallel, as is the case, for example, with the Sharnoa Computerised Machines case and the Bakeries cartel. In fact, it is common to see the filing of class actions immediately upon the discovery of a criminal investigation (for example, in the Bakeries cartel).

In 2004, the IAA adopted a leniency programme in respect of cartels. Leniency is awarded to the first party to come forward with full information regarding the illegal activity in which such party was involved, unless the party led the illegal activity or has previously been convicted of a cartel offence. Leniency is available to both an individual and a corporation, and where a corporation qualifies for leniency, such leniency extends to all its directors, officers and employees. An agreement of leniency is entered into between the Director General, the District Attorney and the applicant and, after execution, is binding on the state. Note that, as such, civil litigants are not bound by the terms of a leniency agreement, and they may bring a civil action even against those that enjoy the application of the leniency programme’s defence.

The actions against the GIS cartel members exemplify actions for damages. Following the GIS cartel declaration of September 2013 (see Section III), a class action on behalf of electricity consumers, and a private action for damages by the Israel Electricity Company, have been submitted against the cartel members. That declaration, which is an administrative measure, was based on information gathered in the framework of a criminal investigation commenced as a result of an application made by one of the cartel members to apply the leniency programme. That cartel member is one of the defendants in the claims for damages.

While immunity from criminal prosecution under the leniency programme does not preclude private enforcement, such immunity may assist the immunised wrongdoer in gaining exemption from administrative monetary sanctions in those cases where the Director General elects to take this measure.

Note also that Section 77 of the Courts Law allows incidental civil actions in criminal proceedings. Thus, if a defendant has been convicted in court, and a civil lawsuit was filed against the defendant (and only against him or her) on the basis of the same facts constituting the offence in which the defendant was convicted, the judge or the bench that convicted the defendant is allowed to rule in the civil lawsuit as well on the basis of the evidence already admitted to the court in the criminal case (as long as the criminal judgment has become peremptory).

75 See footnote 44; also see Jerusalem District Court, class action 41272-05-10 Nazar Tanus v. Angel Bakery Ltd, 16 June 2011, published in Nevo (the motion was dismissed in June 2011 following the plaintiff’s application to withdraw the class action); Tel Aviv District Court, class action 41418-05-10 Mia Edry v. Shlomo Angel Ltd (this motion was dismissed as well on 8 June 2011, following the applicants’ application to withdraw the class action due to lack of grounds. Notably, the District Court denied the parties’ withdrawal agreement according to which the respondents were supposed to pay the applicants and their representatives 10,000 shekels each. The Court emphasised that such payment in the circumstances of withdrawing due to lack of grounds is an incentive for the submission of ungrounded class actions, and therefore should not be allowed. Interestingly, the Court stated that in the future it may consider sanctioning applicants who file an ungrounded class action and later ask for its withdrawal).

76 Director General’s Guidelines 2/12: The Director General’s considerations in setting the level of financial sanctions.

XI PRIVILEGES

Section 48 of the Evidence Ordinance provides for legal privilege for documents and information exchanged between attorneys and their clients. The privilege extends solely to documents exchanged in the context of the professional services provided by the attorney to the client. Importantly, the right and duty of non-disclosure attaches to the attorney. The information itself is not privileged, and the client is not exempted from disclosing it in the framework of an investigation or court proceedings. Section 48 provides that unless the client has waived his or her right to claim legal privilege, an attorney is not obliged to produce for evidence documents or information that were exchanged with his or her client and related to the professional services provided by the attorney to the client. This obligation is reinforced by the confidentiality obligations of attorneys, as set out in the Bar Association Law.78 Note that the courts have held that legal privilege may be invoked in respect of documents prepared for purposes of obtaining legal advice in connection with legal proceedings, which proceedings are either then currently under way or are expected. This privilege applies even where such documents have not yet been exchanged between the attorney and the client, or where such documents were prepared by a third party in accordance with the request of either the client or the attorney.79 The Supreme Court explicitly ruled that privilege for documents exchanged between an attorney and client related to the professional services provided by the attorney may apply regardless of the geographical location of those documents. Therefore, privilege may apply also to documents such as emails and text messages that are held by the client or saved in the client’s computer.80

Section 23 of the Law of Commercial Wrongs81 directs that a court, an authority, a person or a body with judicial or quasi-judicial authority may grant an order, at its own initiative or on the request of a person, ensuring the confidentiality of a commercial secret disclosed in proceedings before it. Thus, a party may claim confidentiality in a document or information submitted to a government authority on the basis of its containing commercial secrets. The submission of a document or information containing commercial secrets to a government authority does not alter the status of such document as a commercial secret. Similarly, the Privacy Law82 protects private information of parties. Thus, any such information or documentation (with a few exceptions) submitted to a government authority remains protected under this law.

A request for access to information submitted to government authorities may be made under the Freedom of Information Law.83 Section 9 of the Freedom of Information Law, however, sets out the circumstances in which a government authority may not disclose the information provided to it, including where:

a the information constitutes commercial or professional secrets, or has an economic value that would be seriously damaged by such disclosure;

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78 Bar Association Law, 5721-1961.
80 Supreme Court, permission for criminal appeal 8873/07 Heinz Israel Ltd v. The State of Israel, 2 January 2011, published in Nevo.
82 Privacy Law, 5741-1981.
the information is commercial or business information relating to the business of a person the disclosure of which information would significantly damage the business, commercial or economic interests of such person;

c the information was provided to the authority on condition of confidentiality;

d disclosure of the information would jeopardise future receipt of information; or

e disclosure of the information would result in the disclosure of the existence or identity of a privileged source.

Note, however, that Section 11 of the Freedom of Information Law provides that, where the concerns addressed in Section 9 may be alleviated by omitting or altering the details contained in the information or providing the information subject to conditions, then, unless it proves too burdensome on the authority concerned, these steps should be taken, and the remaining information, subject to the necessary amendments, must be provided to the person requesting access.84

XII SETTLEMENT PROCEDURES

Section 79A of the Courts Law provides that parties to a civil proceeding may reach a settlement agreement, either of their own accord or proposed to them by the court, and the court may, with the consent of the parties, enforce such settlement agreement. A court-enforced settlement agreement has the effect of a judgment.

Sections 18 and 19 of the Class Action Law specifically address the possibility of settlement agreements in detail. The parties to a class action may request that the court approve a settlement that was agreed to by the parties. A member of the group represented in the class action, however, may elect to be excluded from the settlement. The court may not approve a settlement agreement in a class action unless it determines that the terms of the agreement are fair and reasonable as concerns the interests of all the members of the class and that the termination of proceedings by means of settlement is the most efficient manner of settling the dispute between the parties.85 In November 2018, the Attorney General submitted his objection to the settlement agreement that was reached between the plaintiff and Zepra restaurant, which was alleged to have sold pork to its customers without their knowledge.86 The Attorney General stated that the settlement agreement does not adequately serve the interests of the members of the class, and does not constitute any compensation. As a result, the Attorney General claimed that this agreement does not comply with the purposes of the Class Action Law, which includes deterrence of law infringement and granting a fit remedy to those injured by a breach of the law, and therefore should not be approved by Court. The Court's decision regarding this matter is still pending.

Further protection to the members of a class is provided by the requirement that the court, prior to granting a settlement agreement, hear the opinion of a court-appointed expert

in the relevant field. The court may dispense with this requirement, however, if it determines that such evidence is unnecessary. The court must substantiate its decision regarding approval of a settlement agreement by addressing the following issues:

a. the delineation of the group subject to the settlement agreement;
b. the legal claims, the significant questions of fact or law common to the class and the remedies requested;
c. the main aspects of the settlement agreement;
d. the difference between the remedies requested in the claim and those agreed to in the settlement agreement;
e. any opposition entered into the settlement agreement;
f. the stage of the proceedings;
g. the recommendations contained in the expert opinion; and
h. the risks and likelihood of success in the class action in comparison to the settlement agreement.

As part of the settlement agreement in a class action, the court will determine the professional attorneys’ fees and any remuneration due to the claimant, and in so doing, may take into account any recommendation of the parties proposed in terms of the settlement agreement. Finally, the Class Action Law provides that should the settlement agreement not be approved by the court, or should the court’s approval thereof be subsequently annulled by the court, any determinations made in terms of the settlement agreement and any statements made in the framework of the settlement proceedings will not be admissible as evidence in civil proceedings.

Several antitrust class actions were settled with coupons arrangements. For example, in October 2012, the District Court of Beer-Sheva approved a settlement agreement between the Central Bottling Company (Coca-Cola Israel) and 300 individuals and soft drink companies, upholding Coca-Cola Israel’s expert’s opinion and rejecting the opinion of the objective examiner appointed by the court.

In the settlement agreement, Coca-Cola Israel undertook to give the vending machine operators a 2 per cent discount for the next three years on soft drinks cans purchased from it. Coca-Cola Israel also committed not to give higher discounts to Mashkar. In addition, any operators that exited the market before 2007 as a result of Coca-Cola Israel’s alleged abusive behaviour would be able to re-enter the market and receive a 10 per cent discount for up to 5,200 cans of soft drinks per year.

In June 2014, the Competition Tribunal approved a consent decree between the IAA and the five largest banks in Israel, which was reached during an appeal submitted by the banks against a determination of the Director General stating that the banks engaged in a restrictive arrangement by repeated exchange of information regarding their fees. Within the framework of the consent decree, the banks undertook to pay to the State Treasury a sum of 70 million shekels. It was also agreed that if eventually the class actions brought against the

87 Section 19(b)(1) of the Class Action Law.
88 The terms of the settlement agreement may not contain agreement as to professional attorneys’ fees and remuneration for the claimant, but may contain a recommendation as to these amounts.
89 Section 19(g) of the Class Action Law.
banks regarding the alleged coordination of fees come to an end by way of a settlement, this amount of money will be directly passed on to the consumers. This unusual solution creates, for the first time, a link between administrative and private enforcement measures. In April 2015, a revised motion to certify a class action was submitted against the banks regarding the alleged coordination of fees. In May 2015, the Tel Aviv District Court approved a settlement agreement between the parties that implemented the provision of the consent decree after finding that it was a proper, fair and reasonable arrangement.91

In April 2016, the Central District Court approved a settlement agreement between Dead Sea Works Ltd, a governmental company which constitutes one of the world’s largest manufacturers of potassium, and an individual farmer who purchased potassium from the company for fertilisation purposes, on behalf of all consumers of potassium in Israel.92 According to the application to approve the action as a class action, Dead Sea Works allegedly abused its dominant position in the potassium market by charging excessive, unfair prices. According to the settlement agreement, Dead Sea Works will compensate the class action’s group members in an amount of 20 million shekels. Moreover, it was agreed that over the next seven years the company will sell potassium in Israel at prices not exceeding the average of the three cheapest prices under which it will sell potassium to any of its customers worldwide, or at a price not exceeding US$400, whichever is the lowest. The settlement agreement was approved in January 2017 after being revised and amended according to the Court’s suggestions and comments.93 The Court recognised excessive pricing as a ground for claim under the Economic Competition Law in Israel, based on the wording of Section 29A(a)(1) thereof and on the TFEU from which it originated, and under the purpose of the Economic Competition Law. The Court even went further and considered excessive pricing as a specific case of exploitation from the field of contract laws and consumer protection laws. The Court viewed the settlement agreement as a suitable deterrent since, on the one hand, the prohibition on charging excessive prices was not enforced before, and on the other, it will demonstrate the possibility of private enforcement.

In July 2017, the District Court of Tel Aviv-Jaffa approved a settlement agreement between a shoe company (Naot Shoes) and Shanit Oren, a customer of that company.94 The claim in this class action was that the shoe company had adopted anticompetitive practices, dictated and enforced minimum resale prices for the final consumer, and restricted independent stores from selling its products by providing discounts to the final consumer. As part of the settlement agreement, the shoe company undertook not to bind retailers to the recommended retail price set by it. In addition, the shoe company agreed to grant consumer benefits worth 6.75 million shekels to members of the class action group.

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91 Tel Aviv District Court, class action 1714/08 Einav Kaplan Basharis v. Bank Leumi, 31 May 2015, published in Nevo.
92 Central District Court, class action 41838-09-14 Weinstein v. Dead Sea Works, 5 April 2016, published in Nevo.
93 Central District Court, class action 41838-09-14 Weinstein v. Dead Sea Works, 29 January 2017, published in Nevo.
XIII ARBITRATION

In general, in accordance with Section 79B of the Courts Law, a court, with the consent of the parties, may order that a civil matter before it be referred, in whole or in part, to arbitration. In addition, the parties themselves may have agreed or may agree to proceed to arbitration, and may agree on the appointment of an arbitrator. Failing an agreement between the parties in respect of the arbitrator’s identity, the court may appoint the arbitrator. Section 13(a) of the Arbitration Law directs that an arbitrator will have the same powers as a court in respect of the summoning of witnesses to appear or to produce documentation. The decision of an arbitrator has the effect of a court judgment for the litigants.

Arbitration in antitrust cases is not a common practice in Israel; nevertheless, this seems to be changing. The arbitration mechanism was used in an antitrust matter for the first time by several food suppliers following a consent decree they entered into relating to anticompetitive conduct in the supply of various foodstuffs. The consent decree included stewarding arrangements between suppliers and food chains. Apart from the compensation agreed to and the possibility of criminal charges in the event of breach of the consent decree, the concerned suppliers undertook to engage in a special agreement in which the dominant suppliers must compensate each other and non-dominant suppliers should they breach the provisions in the consent decree that relate to stewarding. The consent provided that any disagreement between the parties concerning the terms of the consent decree would be referred to arbitration. Note, however, that the arbitration mechanism was not used to determine the substantive antitrust issues in that case.

Section 3 of the Arbitration Law directs that an arbitration agreement will have no validity in matters that cannot be a proper subject for arbitration between parties. Some academics suggest that antitrust matters may not be a proper subject for arbitration because an anticompetitive injury may affect a broad range of persons who may not be the direct parties to the specific court or arbitration proceeding. We see no reason, however, why antitrust-related disputes may not be resolved in an arbitration proceeding, particularly given that the public or the public interest can still be safeguarded by the IAA. Nor does arbitration prevent claimants from suing for damages.

The Tel Aviv District Court considered the legitimacy of a ruling given by an arbitrator involving a non-competition provision. In 2009, the Court ruled on an application to annul an arbitrator’s ruling concerning a restrictive arrangement in Novosty Neidly et al v. Ma’ariv Modi’in Publishing Ltd. The applicant, a private firm engaged in the publication of a Russian language newspaper, Novosty, and the owner thereof, entered into a contract with the respondent, the second-largest publisher of newspapers in Israel at that time, whereby the applicant purchased from the respondent the right to publish another newspaper in Russian. In return, the applicant undertook to pay the respondent monthly royalties. After six years the applicant ceased to pay royalties, and the parties turned to arbitration. The arbitrator ruled that the applicant had to pay the balance to the respondent. The applicant subsequently applied to the Tel Aviv District Court, requesting an annulment of the arbitrator's ruling. The applicant argued that the contract, in which the respondent undertook not to compete with

95 Section 8(a) of the Arbitration Law, 5728-1968.
96 Section 21 of the Arbitration Law.
97 Yagur, footnote 32.
the applicant in the publishing of newspapers in Russian, was a restrictive arrangement and as such was illegal and unenforceable. Thus, the applicant argued, the arbitrator’s ruling to enforce the contract was against public policy and should be annulled in accordance with the Arbitration Law.

Emphasising that this argument had not been raised in the arbitration proceeding, the Court adopted the opinion expressed by one of the Supreme Court judges in an earlier case, according to which such an argument, when brought following many years of performance of a contract by the parties, is unfair. Further, the District Court ruled that the applicant could not, on the one hand, claim damages based on the non-compete provision and, on the other, seek to rely on the alleged illegality of such provision, as an illegal restrictive arrangement, to annul the arbitration ruling. The Court also noted that the causes for annulling an arbitration ruling, set out in the Arbitration Law, have been interpreted narrowly, and that according to the Arbitration Law, a court may in any event reject an application for annulment of an arbitrator’s ruling if no distortion of justice is caused as a consequence.

In light of the above, the Court ruled that after many years of adherence to the contract, the parties were stopped from raising a claim of illegality in respect of the non-compete provision.

In December 2011, the Tel Aviv District Court annulled an arbitration award, stating that the arbitration award in effect enforced a memorandum of understanding (MOU) that was illegal according to the Economic Competition Law. The Court determined that the MOU was an agreement between two competitors in the cement industry, and that its purpose was to prevent the respondent from competing with the applicant and to allocate the market, thus amounting to an unenforceable restrictive arrangement.

In February 2015, the District Court rejected a motion to partially void an arbitration award after ruling on substantial antitrust-related matters. The arbitrator rejected a petition for declaratory relief finding that a non-competition clause in a partnership agreement between lawyers was unreasonable and constituted an illegal restrictive arrangement.

Specifically, the arbitrator ruled that not all non-competition clauses that limit the freedom of occupation are unreasonable and contrary to public policy, and that in this specific case the non-competition clause was reasonable in light of its limited scope. Further, the arbitrator stated that the non-competition clause was set in accordance with reasonable and acceptable practices, and therefore was not considered a restrictive arrangement according to Section 3(8) of the Economic Competition Law, which states that an obligation by the seller of a business sold in its entirety towards the purchaser of the business not to engage in the same type of business, provided such obligation is not contrary to reasonable and accepted practices, shall not be deemed a restrictive arrangement. Moreover, even if the non-competition clause constituted a restrictive arrangement, it falls within the application of the Block Exemption for Agreements of Minor Importance (de minimis).

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99 Permission for civil appeal 6233/02 Extel Ltd v. Kalma Vi Industries, 4 February 2004, Official Rulings of the Supreme Court 58(2) 635. One of the questions discussed in that case was whether an arbitrator is authorised to sit in judgment when the dispute involves an illegal restrictive arrangement. Since each one of the three judges held a different opinion, no decisive ruling was given by the Supreme Court in respect of this question.

100 Tel Aviv District Court, originating summons of arbitration 1039-08 Ardan – Cement Industries Ltd v. Dan Tmir, published in Nevo.

101 Central District Court, originating motion arbitration 34150-09-14 Rubin v. Hazel, 12 February 2015, published in Nevo.

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The District Court upheld the arbitrator’s ruling without analysing in detail the application of Section 3(8) of the Law and the said block exemption. The Court added that even if the arbitrator erred in the application of the substantive law, such error does not establish grounds for the revocation of the arbitration award. This ruling further strengthens the tendency to recognise the authority of arbitrators to rule on antitrust-related questions of substance.

XIV INDEMNIFICATION AND CONTRIBUTION

Parties may be found liable jointly as joint wrongdoers in a civil action for damages. In these circumstances, the court may rule on the amount of damages for which each co-respondent is liable (i.e., liability for damages may be apportioned among the co-respondents).102 Where a party has not been cited as a co-respondent, he or she may be joined by the respondent as a co-respondent by submission of a third-party notice, such that that party contributes to or indemnifies the respondent against the damages claimed.103 To date, there does not appear to be a civil antitrust damages ruling in which this procedure has been used.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In recent years, there has been increasing criticism about the concentrated structure of the markets in Israel and the skyrocketing cost of living. Consequently, several laws were enacted and some were amended with the aim of improving the competitiveness of markets, and expanding substantially the (already wide) powers of the IAA’s Director General. Further legislation of this type has yet to come. Some of the laws and guidelines are expected to lead to many private claims, for example claims for abuse of dominant position by charging excessive prices and claims based on the Food Law (see Section II).

Since 2013, several applications to approve actions as class actions have been submitted against alleged members of international cartels (with or without the participation of a company based in Israel): the LCD cartel, the GIS cartel, the CRT cartel, the LiB cartel, the Trucks cartel and the ODD cartel. To date, no decision has been made as to whether to certify any of these applications.

However, as stated above, the ruling of the Supreme Court in the LCD cartel case limits the ability to file class actions against foreign entities that have no presence in Israel.

On 10 January 2019, a significant amendment to the Israeli Antitrust Law, which changed the statute’s name to the Economic Competition Law, entered into effect. The amendment has revamped the Competition Authority’s enforcement powers, and has also amended the monopolistic requirements and limitations applicable to corporations that have market shares that are lower than 50 per cent but that have significant market power. These amendments are expected to promote and encourage private enforcement.

102 Section 84 of the Torts Ordinance.
103 CP Regulation 216.
Chapter 14

NETHERLANDS

Rick Cornelissen, Naomi Dempsey, Albert Knigge, Paul Sluijter and Weyer VerLoren van Themaat

I \hspace{1em} OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Netherlands is a preferred forum for private competition law enforcement cases and connected damages claims. Since 2010, follow-on damages claims have been brought before the Dutch courts with regard to Gas-Insulated Switchgear, Bitumen, Airfreight, Sodium Chlorate, Candle Waxes, Elevators and Escalators, Paraffin Wax, Pre-stressing Steel, CRT, Trucks and Interest Rate Derivatives. In 2018, several judgments were published in the Airfreight, Trucks, CRT, Gas-Insulated Switchgear and Bitumen cases. The Amsterdam District Court also issued an interim judgment in follow-on proceedings to a decision of the Greek competition authority on an infringement of Article 102 of the Treaty on the Functioning of the European Union (TFEU) in the Beer case. Apart from the above-mentioned pending cases, several interest groups have announced their intention to initiate cartel damages proceedings in the Netherlands.

1 Rick Cornelissen, Naomi Dempsey and Paul Sluijter are counsel and Albert Knigge and Weyer VerLoren van Themaat are partners at Houthoff.
3 Commission decision, 13 September 2006, case COMP/38456.
4 Commission decision, 9 November 2010, case COMP/39258.
5 Commission decision, 11 June 2008, case COMP/38695.
6 Commission decision, 1 October 2008, case COMP/39181.
7 Commission decision, 21 February 2007, case COMP/38823.
8 Commission decision, 1 October 2008, case COMP/39181.
9 Commission decision, 30 June 2010, case COMP/38.344.
10 Commission decision, 5 December 2014, case COMP/39437.
12 Commission decision, 4 December 2013, case COMP/39914 (Euro), Commission decision, 21 October 2014, case COMP 39924 (Swiss Franc), Commission decision, 4 February 2015, case COMP/39861 (Yen).
II THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTI TRUST ENFORCEMENT

i Legal basis
The legal framework for antitrust damages claims is the Dutch Civil Code (CC),19 and the specific competition legislation prescribed in the Competition Act (CA), the TFEU and the Dutch Code of Civil Procedure (CCP). Most cartel damages claims are based on an alleged unlawful act conducted by the alleged cartelist. To succeed, a claimant must establish that the defendant has committed an unlawful act that is attributable to it and that caused the claimant to suffer damage. Whether a breach of national or European competition law in itself will amount to an unlawful act against the claimant depends on whether the breached rules are aimed at preventing the damage suffered by the claimant.20

A relatively limited number of national substantive and procedural rules have been amended and added to the CC and CCP respectively by the Implementing Act Directive Private Enforcement of Competition Law (Implementing Act) to implement the Directive on antitrust damages actions adopted by the Council of the European Union on 26 November 2014 (EU Damages Directive). The Implementing Act entered into force on 10 February 2017. The new statutory provisions are applicable to damages claims relating to infringements of EU competition law only, and not yet to damages claims relating to infringements solely of national competition law. A draft bill, which will broaden the scope of the Implementing Act, was published in 2017 to allow interested parties to react to the proposed legislative text. 21 The draft bill has not yet been submitted to the Parliament. Moreover, pursuant to Article III of the Implementing Act, the added statutory provisions regarding the stay of proceedings and regarding the disclosure of evidence are not applicable to actions for damages of which the Dutch court was seised prior to 26 December 2014.

ii Limitation
The Implementing Act provides for a specific prescription period for competition law-related claims for damages (Article 6:193s CC). This provision stipulates:

a a five-year limitation period, which will start to run the day following the day on which the infringement has ceased and the claimant has become aware, or can reasonably be expected to have become aware, of the infringement, the fact that the infringement caused harm to it and the identity of the infringer; and

b a 20-year limitation period, which will start to run the day following the day on which the infringement has ceased.

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19 Article 6:162 of the CC embodies the obligation to repair damage in the case of an unlawful act, which generally forms the legal basis for cartel damages claims. In addition to this, it should be noted that in the case of an infringement of the competition law, victims can annul legal acts (based on Article 3:44 CC) or agreements (based on Article 6:228 CC) because of vitiated consent. This would provide a basis to claim damages because of unjust enrichment (Article 6:212 CC) or to claim that repayment shall take the place of the amount that has been paid unduly (Article 6:203). Finally, according to Article 6:74 CC – in sum – every imperfection in compliance with an obligation is a non-performance of the debtor and makes him or her liable for the damages.

20 Article 6:163 of the CC. More on this can be found in Section IV.

21 www.internetconsultatie.nl/wijzigingmarktenoverheid.
To illustrate: regular claims for damages become time-barred five years after the claimant has become aware of the damages and the person liable for the damages, provided that no claims can be brought 20 years after the damage-causing event (Article 3:310 CC). The Explanatory Memorandum to the Implementing Act (Explanatory Memorandum) seems to indicate that there is no reason to deviate from the standard relative and absolute limitation periods (five or 20 years, respectively) in Article 6:193s CC, as Article 10 Paragraph 3 of the EU Damages Directive holds that Member States will ensure that the limitation periods for bringing actions for damages are at least five years. However, other noteworthy differences between Article 3:310 CC and the new Article 6:193s CC are that the latter requires that the infringement has ceased before a limitation period starts running and the fact that the claimant can reasonably be expected to have become aware of the infringement is sufficient to trigger a limitation period as well (instead of ‘has become aware’).

Hereinafter, the relevant case law preceding the Implementing Act will be discussed. This case law is still relevant for the interpretation of the concept of ‘has become aware’, which has remained applicable to actions for damages of which the Dutch court was seised prior to 26 December 2014. Pursuant to Article 3:310 CC, for the short limitation period to start running the claimant must be aware of the damage and the liable person (‘ought to have been aware’ is insufficient). Depending on the circumstances of the case, it is therefore possible that the limitation period will have started (and run out) before the Netherlands Authority for Consumers and Markets (ACM) or the European Commission decides there has been a breach of Article 6 of the CA or Article 101 TFEU.

For example, in 2007 the Rotterdam District Court found that a claim for damages by CEF, a wholesale distributor of electro-technical fittings, against the individual directors of FEG, a Dutch association in the electro-technical fittings sector, was time-barred. The Court ruled as irrelevant the fact that the European Commission had only given its decision that FEG had breached Article 101 TFEU in 1999. CEF was held to have already been aware of the damage and the liable person in 1991 when it submitted a complaint to the European Commission regarding FEG’s conduct. Because CEF first sent a letter claiming damages from the individual directors in 2000, and the limitation period had not been interrupted in time, the claim was dismissed.

In contrast, in a judgment relating to the Gas-Insulated Switchgear cartel, the Oost-Nederland District Court rejected the defendants’ defence that the limitation period had started in May/June 2004 when the European Commission and the defendant – being the leniency applicant – issued a press release indicating that an investigation had been started into a possible Gas-Insulated Switchgear cartel in which the defendant had participated. The Court ruled that the publication only stated that an investigation had started that, in the circumstances, was insufficient to make the claimant aware of the fact it may have suffered damage. The Court did not accept that the claimant should have started an investigation of its own in response to the May/June 2004 publication, citing that, according to the European Commission, the cartel members had done their utmost to keep the cartel’s activities secret.

Although Spanish, Finnish, Swedish, Czech, Slovak and Austrian law is applicable to the claims, in one of the Sodium Chlorate cases, the Amsterdam District Court ruled that

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23 Commission decision, 26 October 1999, case IV/33.884.
it is up to claimants to explain what essential information was included in the summary of the non-confidential version of the European Commission’s decision, but not in the press release, and why such information means that the required awareness did not exist when the press release was issued. Furthermore, the ability to formulate a claim during a period of one year may suffice for the determination that such claim is time-barred without violation of the relevant EU law principle of effectiveness.

In the 

Bitumen case,26 the Rotterdam District Court rejected Shell’s argument that the claim was time-barred under Dutch law. It found that the limitation period had not started before the European Commission decision of 13 September 2006. According to Shell, the claimant was already aware of the damage and the liable person at the time that the European Commission published its first press release about an investigation into the bitumen sector in October 2002, or at least since October 2004, because the possible Bitumen cartel was frequently covered in the media. In this case, the claimant’s actual supplier of bitumen was Kuwait Petroleum, not Shell. The Court ruled that the claimant could not have deduced from the presented newspaper articles that Kuwait was one of the cartelists, or that the cartel had raised the prices of non-cartelists. Therefore, the claimant could not have known of any possibility to hold Shell, as one of the members of the cartel, accountable for its damage.

The Arnhem-Leeuwarden Court of Appeal found that a 2014 European Commission press release announcing investigations into a possible GIS cartel was not sufficient to start the limitation period. The press release did not include the names of the companies being investigated or the nature of the alleged anticompetitive behaviour. The press release also expressly stated that the investigations did not implicate the companies in any wrongful act. Therefore, the press release did not lead to the required awareness.27

In one of the CRT cases,28 the Oost-Brabant District Court decided on limitation periods under Turkish law and issued a ruling along the same lines as those of the above-mentioned courts.

Finally, the newly enacted Article 6:193t CC provides for two grounds for extension of the limitation period for future cartel damages claims. The first ground regards an extension between the parties involved during a consensual dispute resolution process (Paragraph 1 of Article 6:193t CC). In the case of mediation, such process ends when one of the parties or the mediator has notified in writing to the other party that mediation has ended or because pending the mediation no actions have been performed during a period of six months. The second ground for an extension relates to a competition authority performing an act within the context of an investigation or proceedings with regard to the infringement of competition law (Paragraph 2 of Article 6:193t CC). The extension commences on the day following the day that the limitation period has lapsed. The duration of the extension is equal to the period required for establishing the final infringement decision or alternatively terminating the investigation or proceedings with regard to the infringement of competition law, extended by one year.

III EXTRATERRITORIALITY

i Applicable law

The CA applies to all competition-restricting decisions, agreements or conduct that aims to appreciably restrict or limit competition in (part of) the Dutch market or that has such an effect. Foreign parties are not exempted and do not enjoy any immunity in that regard.

With regard to antitrust damages claims arising from acts committed before 11 January 2009, when Council Regulation (EC) 864/2007 (Rome II) entered into force, in determining which national law or laws apply to a claim, Dutch courts apply the Unlawful Acts Act (UAA). According to Article 4(1) of the UAA, claims arising from wrongful acts as a result of illegal competition are governed by the laws of the country in whose territory the competitive act impacted the competition. In cases of cross-border competition distortion, the Dutch legislature has acknowledged that this rule of reference may lead to an unavoidable fragmentation as to the laws that will apply to parts of the claim. This implies that claims will have to be judged separately for each country where competition has been distorted. Unlike Article 6(3) Rome II, which applies to cartel damages in relation to acts committed after 11 January 2009, the UAA does not contain a provision enabling the claimant to choose the applicability of only the law of the court seised when the distortion of competition has also considerably affected competition in that country.

In 2014, the District Court of The Hague laid down an interim judgment in Paraffin Wax, finding that the place where the damage was suffered according to the UAA (in line with the above) was the production location of the different undertakings involved, hence leading to the applicability of Italian, Swedish, Finnish, German and Norwegian law. The Court proposed that the parties would agree on a choice of law, but it follows from a subsequent interim judgment that the parties did not do so. In one of the Airfreight cases, the Amsterdam District Court ruled that the place where the airfreight service took place cannot be determined by the criterion ‘the territory where the competitive act affected the competitive relationships’ or by any ‘production location’ as in the Paraffin Wax case. The Court referred prejudicial questions to the Supreme Court in January 2018 regarding the interpretation of Article 4(1) UAA for determining the applicable law in cross-border infringements of competition law. At the time of the Supreme Court’s judgment, it had not yet been irrevocably determined if the defendants violated European competition law as a result of which the shippers had suffered damage. It had also not been irrevocably determined on which territory the competitive act would have affected competitive relationships. Therefore, the Supreme Court ruled, it was not certain that an answer to the prejudicial questions would be needed to give a judgment in this case. Furthermore, an answer to the prejudicial questions about Article 4(1) UAA was not relevant for a large amount of claims.

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29 Article 6 of the CA.
30 As confirmed by the Amsterdam District Court, 12 April 2017, ECLI:NL:RBAMS:2017:2841 (Airfreight).
32 Which is possible pursuant to Article 6 UAA. If the Rome II Regulation applies, such a choice of law is prohibited by Article 6(4) Rome II.
based on similar facts, nor to resolve a large amount of disputes that are subject to the same type of questions. Therefore, the Supreme Court refrained from answering the prejudicial questions.35

The law that pursuant to Article 4(1) UAA governs claims not only determines the grounds for and extent of the liability, but it also determines the rules on (suspension and tolling of) limitation periods. For example, the District Court of Limburg decided in Pre-stressing Steel that under the German law that was applicable to the claims, most claims had expired.36 A similar decision followed in Sodium Chlorate in 2017: under a few of the eight law systems applicable, the claims had expired.37

ii Jurisdiction

Main rule: defendant’s domicile

As a main rule, Dutch courts have jurisdiction to hear antitrust damages claims that are submitted against (legal) persons domiciled in the Netherlands.38 A company is domiciled in the Netherlands if it has its statutory seat, central administration or principal place of business in the Netherlands.39

Alternative jurisdiction ground: anchor defendant rule

Since claimants in cartel damages proceedings often prefer to sue several (alleged) cartel participants domiciled in several countries in the same proceedings, they frequently invoke the alternative jurisdiction grounds under Article 8(1) Brussels I recast (anchor defendant rule). Under this rule – which is similar to Article 6(1) Brussels I (old) and almost the same as its Dutch equivalent, Article 7(1) of the CCP40 – a claim for cartel damages brought against a company that is not domiciled in the Netherlands may still be brought before the Dutch courts, but only if this claim is sufficiently closely connected with a claim against a cartelist that is domiciled in the Netherlands and if it is expedient to hear and determine both claims together.

On 21 May 2015, the European Court of Justice (CJEU) rendered a landmark decision41 in the Hydrogen Peroxide (or CDC) case on the interpretation of Article 6(1) Brussels I (old) in cartel damages proceedings where all defendants had been – as established by a decision of the European Commission – found to be participants in a single and continuous infringement. The CJEU decided that in such a case, even when the undertakings have participated from different places and at different times, the prior case law criterion of

37 Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166, also applying the laws of the countries of the production locations of the undertakings involved.
38 Article 4 of Council Regulation (EU) 1215/2012, which applies to proceedings instituted on or after 10 January 2015 (Brussels I bis), and Article 2 of Council Regulation (EC) 44/2001 (Brussels I (old)), which applies to proceedings instituted before 10 January 2015.
39 Article 63 Brussels I bis.
40 It was confirmed in the CRT case, Oost-Brabant District Court, 29 June 2016, ECLI:NL:RBOBR:2016:3484, that the case law of the CJEU with regard to Article 6(1) Brussels I (old) is also relevant for the application of Article 7(1) CCP, which applies when a defendant is not domiciled in an EU or EEA country.
41 CJEU 21 May 2015, C-352/13 (Hydrogen Peroxide or CDC).
the same situation of fact and law is fulfilled, and that Article 6(1) Brussels I (old) can apply if one defendant is domiciled in the Netherlands and other defendants are not. This decision actually confirmed prior Dutch case law decisions in which jurisdiction based on Article 6(1) Brussels I (old) was accepted in cartel damages cases, such as Paraffin Wax, Sodium Chlorate and Pre-stressing Steel.\textsuperscript{42}

On 17 July 2013, the Rotterdam District Court decided that it had jurisdiction to hear a claim brought against two Dutch subsidiary companies of two members of the Elevators and Escalators cartel.\textsuperscript{43} The Court ruled at the same time that it had no jurisdiction to hear a claim brought against defendants who did not have their domicile in the Netherlands. The claims against the various defendants were not closely connected, given the substantial differences in fact and law and the fact that the European Commission had distinguished four national cartels that should each be assessed in accordance with the various national laws.\textsuperscript{44} Contrary to the aforementioned case, the Midden-Nederland District Court found the damages claims against various other defendants based on the Elevators and Escalators cartel to be sufficiently connected. According to the Court, an equal factual basis in this case did exist, because the case pertained to the conduct of five escalator manufacturers and was based on Article 6:166 CC (group liability arising from a wrongful act).\textsuperscript{45}

On 7 January 2015, the District Court of Amsterdam\textsuperscript{46} in the Airfreight cartel damages proceedings accepted jurisdiction when the same anchor defendant was summoned for the second time for the same claim. The claimant aimed to create jurisdiction with regard to claims against additional foreign defendants, and therefore used the same Dutch anchor defendant twice. The Court rejected the defendants’ abuse of law arguments.

The Amsterdam District Court also ruled\textsuperscript{47} that the sole fact that KLM determined the competent court by requesting a negative declaratory decision that it was not liable to pay damages to Deutsche Bahn did not constitute a ground for abuse of procedural law. The Court seemed to take into consideration in this regard that KLM, at the time the writ of summons was sent, was confronted with claims of shippers (claiming that surcharges were passed on to them) and claims of freight forwarders (claiming they suffered damage (meaning that surcharges were not passed on by them)). Thus, KLM would run the risk of being obliged to pay the same damages twice.

The Oost-Brabant District Court accepted jurisdiction regarding all except one of the defendants in the CRT cases, and thereby even further extended the criteria of the above-mentioned CJEU Hydrogen Peroxide case, as not all defendants were addressed in a prior European Commission decision as participants in a single and continuous infringement.\textsuperscript{48}


\textsuperscript{43} Commission decision, 21 February 2007, case COMP/38823.

\textsuperscript{44} Rotterdam District Court, 17 July 2013, ECLI:NL:RBROT:2013:5504.

\textsuperscript{45} Midden-Nederland District Court, 27 November 2013, ECLI:NL:RBMNE:2013:5978.

\textsuperscript{46} Amsterdam District Court, 7 January 2015, ECLI:NL:RBAMS:2015:94.

\textsuperscript{47} Amsterdam District Court, 22 July 2015, ECLI:NL:RBAMS:2015:4408.

\textsuperscript{48} Oost-Brabant District Court, 29 June 2016, ECLI:NL:RBOBR:2016:3484. Almost similar decisions were rendered in other CRT cases before the same court with different claimants but many similar defendants (decisions of 29 November 2017, ECLI:NL:RBOBR:2017:6331/6332/6333).
According to the Court, even though the CJEU attributed decisive meaning to those circumstances, this does not mean that the required connection by definition cannot exist in other circumstances. The Court considered that the defendants that were not addressed in the operative part of the European Commission decision were nevertheless mentioned as ‘undertakings subject to proceedings’ elsewhere in the decision. They had not provided indications that they determined their behaviour on the market independently from their parent companies and the claimant had sufficiently explained the business it conducted with each subsidiary. The Court rejected jurisdiction with regard to one defendant that was not mentioned as an undertaking subject to proceedings in the European Commission decision.

Finally, in the Beer case, in which the claims were based on the infringement of Article 102 TFEU, the Amsterdam District Court accepted jurisdiction only with regard to the claims against Heineken, seated in the Netherlands. MTC was not allowed to use Heineken as an anchor defendant for claims against Greek brewery AB. The Greek competition authority had found no evidence of Heineken’s involvement in AB’s infringement of competition law and MTC had not substantiated their arguments in a way that made the court accept that Heineken had been involved in the competitive act. Therefore, the claims were not sufficiently closely connected.

Alternative jurisdiction ground: place where the harmful event occurred

Claimants sometimes also invoke another alternative jurisdiction ground: according to Article 7(2) Brussels I recast, a tort claim can be brought before the courts of the place where the harmful event occurred. In the Hydrogen Peroxide case discussed above, the CJEU decided that in cartel damages cases the harmful event occurred in relation to each alleged victim on an individual basis. Each victim can choose to bring an action before the courts of the place in which the cartel was definitively concluded; the place in which the particular agreement was concluded, which is identifiable as the sole causal event giving rise to the loss allegedly suffered; or before the courts of the place where its own registered office is located. Dutch courts applying Article 6(e) CCP to cases in which the defendant is not domiciled in the EU may be guided by this decision as well. In flyLAL, which concerned an infringement of Article 102 TFEU, the CJEU decided that the place where the harmful event occurred can also cover ‘the place where the loss of income consisting in a loss of sales occurred, that is to say, the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses’. The Court also decided that the notion of the place where the harmful event occurred may be understood to mean either the place of conclusion of an anticompetitive agreement contrary to Article 101 TFEU, or the place in which the predatory prices were offered and applied in cases where such practices constituted an infringement of Article 102 TFEU.

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50 See also Article 6(e) of the CCP and Article 5(3) of Brussels I (old).
51 CJEU, 21 May 2015, C-352/13 (Hydrogen Peroxide or CDC).
52 The non-cartel related Universal/Schilling decision (CJEU 16 June 2016, case C-12/15) is also relevant in this regard, in which it was decided that: ‘In the context of the determination of jurisdiction . . . the court seised must assess all the evidence available to it, including, where appropriate, the arguments put forward by the defendant.’
54 CJEU, 5 July 2018, C-27/17, ECLI:EU:C:2018:533 (flyLAL).
In one of the GIS cases, the Arnhem-Leeuwarden Court of Appeal accepted jurisdiction on the basis of Article 5(3) Brussels I (old), in line with the appealed Gelderland District Court judgment, since the suffered damage consists of the overcharge paid for a GIS installation destined for a Dutch switching station.55

**Jurisdiction and arbitration clauses**

The CJEU decided in *Hydrogen Peroxide* that in cartel damages cases, account should be taken of jurisdiction clauses56 contained in contracts for the supply of goods, even if the effect thereof is a derogation from the rules on international jurisdiction provided for in Article 5(3) or Article 6(1), or both, of Brussels I (old). However, such jurisdiction clauses only cover cartel damages claims if these refer to disputes concerning liability incurred as a result of an infringement of competition law. A clause that abstractly refers to all disputes arising from contractual relationships is therefore insufficiently specific to cover cartel damages claims. In the *Sodium Chlorate* decision, which was rendered shortly after the *Hydrogen Peroxide* decision on 21 July 2015,57 the Amsterdam Court of Appeal applied this same rule and rejected the jurisdiction defence based on jurisdiction clauses that it found too abstract. For the same reasons, it also rejected the jurisdiction defence based on arbitration clauses.58 However, in the context of an action for damages based on Article 102 TFEU, the jurisdiction clause does not have to refer expressly to disputes relating to liability incurred as a result of an infringement of competition law.59

**IV STANDING**

To bring a claim for cartel damages in the Netherlands the claimant must be a natural or legal person. Dutch associations or foundations that, according to their articles of association, promote and protect the interests of others affected by a cartel may, subject to certain requirements, bring a claim in the interests of these others (a collective claim) as well, but may not yet claim damages on their behalf.60 On 16 November 2016, a draft bill regarding collective damages claims was submitted to the Dutch parliament pursuant to which the latter limitation will be abolished.61 If this draft bill is enacted, the road for collective cartel damages actions by Dutch associations or foundations will be opened. In practice, several (follow-on) cartel damages claims in the Netherlands have already been initiated by (special purpose) claim vehicles (in the form of Dutch or foreign legal entities, such as limited

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56 Article 23 Brussels I (old) and Article 25 Brussels I bis.
58 Even though the Brussels I Regulation does not apply to arbitration clauses (Article 1(2)(d) Brussels I).
59 Pursuant to Articles 1074 (arbitration beyond the Netherlands) and 1022 (arbitration in the Netherlands), the Dutch court rejects jurisdiction if the dispute is covered by an arbitration clause. The national law applicable to the arbitration clause defines whether the dispute is covered by that clause.
60 More on this can be found in Section VII.
61 Wetsvoorstel Afwikkeling van massaschade in een collectieve actie (WAMCA), 34608, which can be found at https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen?cfg=wetsvoorstellen&dpp=25&qry=34608. The draft bill is still pending in the Dutch parliament.
companies or foundations). This is possible under current Dutch law if the actual claimants have assigned their claims to such claim vehicles in a legally valid way or have mandated such a claim vehicle.

On 2 August 2017 and 13 September 2017, the Amsterdam District Court rendered two important judgments in the Airfreight follow-on proceedings brought by SCC62 and Equilib, respectively.63 The Court confirmed that the burden of proof for a valid assignment is on the claimant. However, it also decided that this in principle sufficiently proves the validity of the assignment if the submitted documentation contains the assignment agreement (title) and the assignment deed, and it is clear that the documentation was signed or provided by the assignor unless the defendants submit specific indications to the contrary. The Court held that in these particular cases, (most) assignments were valid, and were neither in breach of the prohibition on fiduciary transfers nor in breach of the assignment formalities.64

In general, it is inferred from the Manfredi and Kone decisions of the CJEU and an underlying principle of Dutch law on damages that indirect purchasers have standing to claim cartel damages, which has been confirmed in the Explanatory Memorandum.

Again in 2017, the Oost-Brabant District Court ruled in one of the CRT cases65 that although it understands the claimants’ position that their claims are based on Brazilian tort law and not directly on Article 101 TFEU, it considers for the sake of completeness that the scope of the European Commission decision and EU law is limited. CJEU case law, in which it is stated that any individual is able to claim damages, was not meant to also include damage caused by transactions on non-EEA markets. The Court ruled that the Article 101(1) TFEU prohibition is limited to infringements insofar that these negatively influence trade between EEA Member States.

V THE PROCESS OF DISCOVERY

There is no pretrial discovery system in Dutch law. Parties can, however, request the disclosure of information judicially and extrajudicially. In addition, it is possible for a party to assess its case up front within the context of a preliminary examination of a witness or a preliminary expert opinion. As disclosure under Dutch law deals with the rights of parties when obtaining information, this topic is discussed hereafter.

The Dutch courts have general discretionary power to order disclosure from either or both of the parties,66 including the disclosure of books and records.67 This power covers both a demand for clarification of certain statements and the submission of specific documents. A party may refuse to cooperate with such a demand, but the court may draw adverse inferences from such a refusal unless the party can show he or she has sufficiently compelling reasons for his or her refusal. In principle, parties also have the possibility to request documents under Dutch administrative law (see below).

64 A comparable decision was rendered in a Sodium Chlorate case before the same court (Amsterdam District Court, 10 May 2017, ECLI:NL:RBAMS:2017:3166). In the Airfreight cases, the defendants have lodged appeals against the District Court’s judgments.
66 Article 22 of the CCP.
67 Article 162 of the CCP.
Parties’ options to obtain disclosure

While parties may request the court to apply its above-mentioned discretionary powers to order another (third) party to disclose certain information or documents, the court is not obliged to grant such a request. Instead, Article 843a CCP provides parties a special right to obtain disclosure. By way of a claim under Article 843a CCP – as a motion in ongoing proceedings or in separate proceedings – parties can demand specific written or digital documents and information from any person who has these documents or data in its custody.

For a claim under Article 843a CCP to be successful, the claimant must first establish that it has a legitimate interest in the disclosure. A legitimate interest may be found if the claimant is unable to obtain the documents or information in another way, and without them would be at an unreasonable disadvantage in the proceedings. Second, the claimant must show that the requested documents and information pertain to a legal relationship – contractual or non-contractual – to which the claimant is a party. As a third requirement, the disclosure needs to relate to specific documents and information to enable both the court and the other party to be able to identify the requested information and to prevent fishing expeditions. Finally, disclosure can only be sought for documents that are in the custody of the party against whom the order is requested.

Article 843a CCP constitutes the standard legal basis for disclosure of evidence in civil proceedings. The newly enacted Article 844 up to and including Article 850 CPP provide for the required deviations from and additions to Article 843a CCP as a subsection regarding the disclosure of information in the context of cartel damages claims in order to transpose Chapter II of the EU Damages Directive into Dutch civil law. These newly enacted articles of the CCP are applicable to actions for damages of which the Dutch court was seised after 26 December 2014.

According to the Explanatory Memorandum, Article 843a CCP provides for more extensive access to evidence in cartel damages proceedings than required by Article 5 of the EU Damages Directive, except for one point: a claim under Article 843a CCP should be denied if the information is subject to a legal privilege, or may be denied for compelling reasons (e.g., confidentiality or privacy) or if a fair and proper administration of justice is sufficiently secured without disclosure (e.g., if the information could reasonably be obtained another way, such as through witness testimony). Article 5 of the EU Damages Directive precludes the latter ground for refusal. Therefore, the newly enacted Article 845 CCP provides for a deviation of this ground for refusal and stipulates that disclosure of information can be refused in the event of compelling reasons. This means that with regard to cartel damages claims, disclosure cannot be refused on the basis that a fair and proper administration of justice can be sufficiently secured without disclosure.

In several proceedings regarding the Airfreight cartel, both claimants and defendants requested the disclosure of documents, such as the un-redacted Commission decision and documents relating to the functioning of the cartel, including air waybills, invoices and assignment documentation. The Amsterdam District Court rejected all these requests in March 2015 as there was insufficient legitimate interest to order such disclosure at that stage of the proceedings. The Court carefully weighed the different interests and, with regard to some types of documents, indicated that disclosure in the future might still be possible. In the

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68 For more on this aspect regarding privilege, see Section XI.

Paraffin Wax cartel, one of the defendants requested disclosure of the settlement agreement between the claimant and one of the (former) defendants in order to obtain information about the exact settlement amount. The Hague District Court rejected this request because the Court did not find this information essentially relevant at this stage of the proceedings. Moreover, the Court ruled that even if this information would ever become relevant, the Court could order the claimant to disclose the settlement amount without having to disclose the entire agreement.70

In the same case, the District Court of The Hague ruled on other (extensive) disclosure orders submitted by defendants in the light of a passing-on defence. Despite the fact that for a passing-on defence the burden of proof is on the defendant, the Court ruled that it should not be impossible or excessively difficult for defendants to set up a defence against the claims. According to the Court, from the equality of arms perspective the claimant had to disclose information required for the establishment and calculation of a possible passed-on overcharge (e.g., invoices, supply contracts, sales data) to defendants as such information was primarily in the custody of the claimant and as it was foreseeable for the claimant that the defendants would invoke a passing-on defence.71

In the field of public antitrust enforcement, there are furthermore two noteworthy developments relating to the access to documents.

First, it may be possible to obtain access to documents under Dutch administrative law as well. According to the Government Information (Public Access) Act (PAA), everyone can request an administrative body (also the ACM) to make certain documents publicly available. There are only certain grounds for refusal. The Trade and Industry Appeals Tribunal, however, has held in a judgment that the Act establishing the ACM (of 28 February 2013) has priority over the working of the PAA.72 This seems to imply that the ACM has additional grounds to refuse access to documents. However, the ACM does need to examine whether the information is obtained in the exercising of its functioning according to the Act establishing the ACM. If the information is obtained outside this authority, the PPA is applicable.

Secondly, the Trade and Industry Appeals Tribunal73 held that the right of access to documents for defending parties, as enshrined in Article 6 ECHR, may overrule the protection of leniency documents. The ACM requested that only the Tribunal (and not the parties accused of infringing the cartel prohibition) take notice of certain transcripts of the oral statement of leniency applicants. The Tribunal, however, weighed the interests, assessing the interest of a successful leniency programme and the interest that the parties should be able to defend themselves, and decided that the limitation of access (for defendants) to transcripts of the oral statement of leniency applicants was not justified. It remains to be seen to what extent such judgments could enhance the position of claimants (in damages proceedings) in acquiring information.

With the entry into force of the Implementing Act, a new section regarding disclosure in antitrust damages cases was added to the CCP (Articles 844 to 850 CCP) in accordance with

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72 Trade and Industry Appeals Tribunal, 17 June 2016, ECLI:NL:CBB:2016:169 in which the judgment in first instance (Rotterdam District Court, 13 May 2015, ECLI:NL:RBROT:2015:3381) was overturned because the ACM failed to examine whether the requested information was acquired under the authority of the Act establishing the ACM.
the EU Damages Directive. It mainly contains rules about the disclosure of the competition authorities’ documents. These articles are not applicable to actions for damages of which the Dutch court was seised prior to 26 December 2014.

ii Parties’ right to witness testimony

Dutch procedural law provides for parties’ right to provide evidence through witness statements. The only group of persons exempt from having to testify in civil proceedings are close blood relatives and professionals required to observe confidentiality obligations.74 (Opposing) parties can also be brought to the witness stand, but the strength of their testimony is limited when proving their own statements. Witnesses will be examined by a judge, and Dutch law does not contain a right to cross-examination. If a party or an opposing party called as a witness refuses to answer questions, the court may draw adverse inferences of such refusal.75

Finally, it is also possible to request a preliminary examination of a witness.76 This could facilitate a party obtaining clarification on certain facts upfront if this party is considering starting proceedings. In September 2014, such a request (in one of the Airfreight cases) by the claimant, SCC, for a preliminary examination of certain witnesses – among others, (former) KLM managers – was rejected by the Amsterdam District Court as SCC had not made it sufficiently clear why it had an interest in such an examination.77 This decision was upheld by the Amsterdam Court of Appeal by its decision of 22 September 2015.78

VI USE OF EXPERTS

Dutch procedural law states that, unless otherwise provided by law, parties may use any and all means to prove their propositions statements, and that the courts are free in their assessment of the evidence provided.79 Expert evidence is one of the means through which parties may prove their statements, for example by way of submitting a report by a renowned economist on the quantum of damages in a claim for cartel damages. Parties may also request the court to appoint one or more independent experts to give evidence and their advice on certain issues, or the court may of its own accord appoint an independent expert.80 Courts are not obliged to appoint experts: it is at the court’s discretion whether it deems such an appointment necessary for its decision on a case.81

It is also up to the court to decide the evidentiary value of a party, or a court-appointed expert’s testimony or report. The courts may deviate from the conclusions of court-appointed experts. In such a case, however, the court must provide sufficient grounds for such a decision.82

74 Article 165 of the CCP.
75 Article 164 of the CCP.
76 Articles 186–193 of the CCP.
78 Not published.
79 Article 152 of the CCP.
81 Supreme Court, 6 December 2002, NJ 2003, 63 (Goedel/Mr Arts qq).
82 Supreme Court, 5 December 2003, NJ 2004, 74 (Vredenburgh/NHL).
VII  CLASS ACTIONS

Since July 1994, a Dutch association or foundation that, according to its articles of association, has the goal of promoting and protecting the common and similar interests of various (legal or natural) persons has standing to bring a collective redress claim seeking injunctive or declaratory relief, a declaratory judgment or even specific performance. They do not, however, have standing to claim damages yet. On 16 November 2016, a draft bill was submitted to the Dutch parliament introducing collective claims for damages in the Netherlands. The draft bill is the subject of extensive debate and has been amended twice since its submission in 2016. At the end of 2018 the draft bill was still pending in the Dutch parliament. One of the questions being raised was how it will relate to the European Commission's proposed New Deal. If the draft bill is enacted, the road for collective cartel damages actions by Dutch associations or foundations will be opened.

Pursuant to Article 3:305a CC, the interests that an association or foundation aims to promote and protect must be sufficiently similar (commonality requirement) and thereby suitable to be represented and decided upon collectively. Usually, collective actions are aimed at obtaining a declaration under law that the defendant has, through certain actions, acted unlawfully. Although such a decision, strictly speaking, has no legal effect with regard to potential individual claimants, the Supreme Court has ruled that in individual follow-on proceedings, the courts will take such a decision on, for example, the unlawfulness of certain actions as their point of departure. In addition, such a decision in a collective action can also be a stepping stone for a collective settlement that can be declared binding for an entire group of claimants (see Section XII). Probably due to the inability under Dutch law to claim damages through class actions, the collective redress action claiming injunctive or declaratory relief, a declaratory judgment or specific performance has hardly been used in antitrust cases: however, it has been announced due to the legislative proposal allowing collective damages claims. Instead, the most popular model thus far in the Netherlands entails the assignment of individual claims to a legal entity acting as a claim vehicle. Dutch courts generally accept the standing of such ad hoc claim vehicles. Third-party funding generally is available and permitted in the Netherlands, but is not (explicitly) regulated.

Case law demonstrates that a claim vehicle that has been assigned individual claims still has a far-reaching obligation to substantiate each and every individual claim (e.g., by submitting the assignment agreements, the relevant deeds of assignment and additional relevant assignment documentation).

83 Article 3:305a of the CC.
85 Wetsvoorstel Afwikkeling van massaschade in een collectieve actie (WAMCA), 34608, which can be found at https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen?cfg=wetsvoorstellen&dpp=25&qty=34608.
VIII CALCULATING DAMAGES

i Cognisable damages

Generally, the newly enacted Article 6:193l holds that a cartel that forms an infringement of EU competition law is presumed to cause damage. Dutch civil law aims to compensate a claimant for the damages suffered due to another’s wrongful act or default to perform. As a result, both actual loss and lost profit may be claimed, as well as the claimant’s reasonable costs to prevent or reduce the damage suffered. Exemplary or punitive damages, however, are not available. Furthermore, any profits realised by the claimant as a consequence of the same wrongful act will be deducted from any damages award to the extent reasonable. In other words, the basic principle of the Dutch law of damages is full compensation, but no more (in conformity with the EU Damages Directive).

ii Method of calculating damages

Unless specifically provided for otherwise in legislation or by party agreement, it is up to the court to determine the most appropriate manner in which damages should be calculated in a given case. If the loss cannot be accurately determined, the judge may use his or her judgment to estimate its amount. As damages are as a rule calculated by a comparison of the claimant’s assets as a consequence of the wrongful act and the hypothetical situation in absence of the wrongful act, all possible relevant circumstances of the case are to be taken into account in this actual damages calculation. Alternatively, the court may calculate damages in an abstract way, thereby not taking certain actual circumstances of a case into account. Whether the court will choose to undertake an actual damage calculation or an abstract calculation depends on the nature of the damages claimed and the liability. As yet, there have been no definitive court decisions on whether an actual or an abstract damage calculation should be used in calculating antitrust claims. In 2015, the Amsterdam District Court shed more light on this topic by indicating specifically that (as regards Airfreight cartel-related claims) to determine the (amount of) damage suffered, an analysis will be necessary of the actual price that was charged in the relevant period to the shippers in comparison to the hypothetical price they would have paid if the carriers had not acted wrongfully in the way claimants asserted. In doing so, the Court referred to the Commission Staff Working Document Practical Guide of 11 June 2013 as a source for relevant insights. Pursuant to the newly enacted Article 44a Paragraph 3 CCP, the national court is entitled to request guidance from the ACM in determining the extent of the damage.

The court also has discretion to award damages based on the profit made by the defendant due to his or her wrongful act or failure to perform, provided the claimant requests the court to do so. To date, this power has been used only sparingly, mainly in intellectual property disputes. Interestingly, however, the Gelderland District Court decided in 2015 that the objection that a substantial price increase between an offer during a cartel and the agreement after the termination of the cartel could be attributed to a decrease of the cost

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88 Article 6:96 of the CC.
89 Article 6:97 of the CC.
91 Article 6:104 of the CC.
price was sufficiently rebutted by the claimant (TenneT in the case against Alstom). On 29 March 2017, the Gelderland District Court granted a damages award in another of the Gas-Insulated Switchgear cases. Based on an expert report estimating the prices that would have been paid if there had not been a competition law infringement, the claimant (TenneT) substantiated that the average overcharge amounted to €23.1 million. The defendant (ABB) contested this amount with reference to its profit margins. The Court ruled, however, that ABB’s line of reasoning, focusing on its profits, was irrelevant for the assessment of the overcharge and, due to the absence of evidence in rebuttal, the Court granted TenneT the claimed €23.1 million in damages. In the following appeal proceedings, which are still pending, ABB argued that the District Court had wrongly ignored its expert report. Since the parties had meanwhile submitted several reports, the Arnhem-Leeuwarden Court of Appeal appointed three experts to report on the question of possible overcharge.

### iii Statutory interest
A claimant is entitled to compound statutory interest annually over the amount of damages claimed (in cases of wrongful acts, to be calculated from the day the loss is suffered until the damages have been paid). It is not relevant whether the claimant actually suffered any loss due to not immediately receiving monetary compensation for his or her loss, but a claimant cannot claim more than the statutory interest rate for a delay in receiving monetary compensation. The statutory interest rate is determined by the government. Currently, the statutory interest rate for commercial transactions is 8 per cent and for non-commercial transactions 2 per cent.

### iv Legal costs
Unlike in, for example, the United Kingdom, the amount awarded for legal costs in the Netherlands is limited. As a rule, the losing party will be ordered to pay the legal costs of the winning party, but the court may decide to apportion costs if both parties have been found to be wrong on certain aspects of the case. Awards for legal costs will cover the full amount of court fees, court-appointed experts and witnesses. However, for attorneys’ fees only a limited and fixed amount is awarded, which generally does not begin to cover a party’s actual attorneys’ fees. Attorneys’ fee awards are determined on the basis of points awarded for procedural actions (e.g., two points for an oral hearing) and set tariffs depending on the amount claimed. Only in intellectual property law cases and exceptional circumstances (e.g., abuse of proceedings) do courts award actual compensation for attorneys’ fees.

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95 Article 6:119 of the CC.
97 Article 237 of the CCP.
98 Currently, the highest court fee at first instance is €3,894.
99 Currently, the maximum fee is €3,211 per point with no maximum number of points for claims exceeding €1 million.
IX  PASS-ON DEFENCES

The Implementing Act provides for an explicit confirmation of a party’s right to invoke a pass-on defence in Article 6:193p. Before the Implementing Act, only limited experience with the pass-on defence had been gained in the Netherlands. In response to the European Commission’s 2005 Green Paper on Damages Actions for breach of the European Commission antitrust rules, the government indicated that the pass-on defence was already available in the Netherlands. Nevertheless, there was considerable debate in legal literature about whether the pass-on defence was, or should have been, available in the Netherlands. Given the general principle of compensation for actual loss suffered underlying the Dutch law of damages, defendants to an antitrust action were in principle able to raise this defence in any case. Most interesting is that the Supreme Court in its judgment of 8 July 2016 held that although the EU Damages Directive did not cover the case at hand in a temporal sense and the assessment framework was therefore formed by Dutch law, with due observance of the general principle of equality and the principle of effectiveness, it was desirable to interpret that law such that the outcomes are compatible with the Directive and the Dutch legislative (implementing) proposal. In addition, the Supreme Court held that generally speaking, a pass-on defence comes down to the assumption that the scope of an injured party’s right to compensation resulting from an infringement of competition law is reduced in proportion to the amount of that loss the injured party has passed on to third parties.

Finally, the Supreme Court decided that what is ultimately relevant is that in comparing the actual situation with the situation that presumably would have existed had the standards not been violated, an assessment must be made of which losses and which benefits are related to the event for which the debtor is liable in such a way that they can reasonably be attributed to the debtor as a result of this event. As the EU Damages Directive provides for the prevention of overcompensation, such reasonableness test will presumably have a limited scope in future cartel damages cases. The Supreme Court upheld the judgment of the Court of Appeal to refer the claim for follow-up proceedings to determine the amount of damages before the Gelderland District Court.

On 29 March 2017, the Gelderland District Court ultimately rejected the defendant’s pass-on defence. Although the Court found that the claimant had likely passed on the overcharge to its direct customers, who, in turn, passed on the overcharge to the general public (i.e., the end customers), it awarded the entire overcharge (€23.1 million) to the claimant taking into consideration that:

a  it was very unlikely that the general public would initiate legal proceedings against the defendant;

b  the damages awarded to the claimant were likely to benefit the general public, since the claimant is fully owned by the state and therefore damages paid to the claimant were assumed to ultimately benefit the general public as well; and

c  surprisingly, the avoided fine resulting from the defendant’s leniency application was much higher than the payable amount of damages.

101 Supreme Court, 8 July 2016, ECLI:NL:HR:2016:1483.
In the following appeal proceedings, which are still pending, the Arnhem-Leeuwarden Court of Appeal appointed three experts to report on questions regarding the pass-on defence, for which, the Court of Appeal pointed out, the liable party (ABB) has to assert and prove the relevant facts.\(^\text{103}\)

**X FOLLOW-ON LITIGATION**

**i Evidence of a cartel infringement**

So far, most cartel damages claims in the Netherlands have been brought following a decision and a fine by the European Commission or the ACM. Pursuant to Article 16 of Council Regulation (EC) 1/2003, European Commission decisions on agreements, decisions or concerted practices under Article 101 TFEU that are no longer open for appeal bind the national courts, effectively meaning that in a claim for cartel damages following such a decision by the European Commission, the Dutch courts will have to accept and apply the breach of Article 101 TFEU found by the European Commission as a given. For example, in *Gas-Insulated Switchgear*, the Oost-Nederland District Court held that it was bound by the European Commission’s decision that the defendant, ABB Ltd, had participated in the cartel from 15 March 1988 until 2 March 2004, even though ABB Ltd had shown that it did not exist before 5 March 1999.\(^\text{104}\) ABB Ltd stated that it must assume that the European Commission had identified it with one of the other ABB companies that did exist (and did participate in the cartel) during the period from 15 March 1988 to 5 March 1999. The Court further held that it was up to the defendants to convincingly show that the project for which damages were claimed (and which had not been a subject of the European Commission’s investigation) had not been influenced by the cartel, as all the prospective participants in the project had been found to have participated in the cartel, which covered the entire EU market. This conclusion was upheld by the Arnhem-Leeuwarden Court of Appeal.\(^\text{105}\)

A European Commission decision and fine for participation in a cartel is no guarantee, however, of a successful damages claim, as demonstrated by the Midden-Nederland District Court’s decision in the *Elevators and Escalators* cartel damages claim case. The Court rejected the claim on the basis that the claimants (an owner–occupiers’ association and local council) had failed to prove that the cartel arrangements found by the European Commission had also influenced the specific maintenance contract for which damages were now claimed.\(^\text{106}\)

As regards the status of ACM decisions in follow-on civil litigation, the Implementing Act has provided for a new Article 161a CCP. This provision establishes that an infringement of competition law established by an irrevocable decision of the ACM shall provide irrefutable evidence of the established infringement in proceedings in which damages are claimed because of an infringement of competition law in the sense of Article 6:193k(a) CC.


\(^{104}\) Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403. In an interlocutory judgment of the Arnhem-Leeuwarden Court of Appeal, this subject was not discussed further: Arnhem-Leeuwarden Court of Appeal, 10 September 2013, ECLI:NL:GHARL:2013:6653.

\(^{105}\) Arnhem-Leeuwarden Court of Appeal, 2 September 2014, ECLI:NL:GHARL:2014:6766. The court of cassation is currently handling the appeal.

\(^{106}\) Midden-Nederland District Court, 13 March 2013, ECLI:NL:RBMNE:2013:CA1922.
ii  **European versus national law – parental liability**

It follows from CJEU case law as well as from the EU Damages Directive that in the absence of Community rules governing compensation for damage caused by cartel infringements, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of causal relationship, provided that the principles of equivalence and effectiveness are observed.107 A cartel infringement established by a competition authority must therefore be transposed into national law on damages. This is particularly relevant with regard to (alleged) parental liability. This starting point has been recognised by the Dutch legislator as well as by the Dutch court.

In a judgment related to the *Elevators and Escalators* cartel, the Midden-Nederland District Court held that the parental liability concept or single economic unit doctrine under competition law cannot equally be applied under Dutch civil law (a case initiated by claim vehicle East West Debt).108 With reference to *Manfredi*, the Court ruled – in short – that the CJEU’s concept of a single economic unit cannot be applied to determine the joint and several liability of a parent company in a civil claim for cartel damages: Dutch law should be applied to assess the topic of possible parental liability. For the liability of an entity under the Dutch law on damages, it is required that such entity actually committed a wrongful act (for example, by being actually involved in the cartel infringement).

It remains to be seen how this topic will further develop in European and national case law now that Article 6:193k CC has been enacted. This article – following Article 2 paragraph 2 of the EU Damages Directive – defines the infringer within the meaning of the CC subsection on cartel damages claims as an undertaking or association of undertakings that has committed an infringement of competition law. The Explanatory Memorandum indicates that the authentic interpretation of the concepts of undertaking and association of undertakings is preserved for the CJEU. However, the key question is whether the interpretation of these concepts from a tort law perspective is still reserved by the national court.

iii  **Stay of proceedings until a cartel infringement decision is irrevocable**

In 2013, the Amsterdam Court of Appeal decided an appeal of a decision to stay the proceedings in one of the *Airfreight* cartel damages cases pending the outcome of the European appeals of the airlines against the European Commission decision.109 According to the Amsterdam Court of Appeal, the stay of a civil law claim proceeding is only prescribed if the national civil law proceeding contains questions regarding facts or law whose answers depend on the validity of the contested European Commission decision. Answers to these questions only depend on the validity of the decision of the Commission, if the validity of

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107  CJEU 13 July 2006, C-295/04 (Manfredi), ECLI:EU:C:2006:461, CJEU 21 May 2015, C-352/13 (Hydrogen Peroxide or CDC) and Recital 11 of the EU Damages Directive.


the European Commission’s decision can reasonably be doubted: in other words, for the stay of a civil law claim proceeding, reasonable doubt regarding the validity of the European Commission’s decision is required. If one party in support of its claims invokes a European Commission decision, it is up to the other party who requested a stay for the proceeding to (1) show that it has timely brought an action for annulment; (2) clarify that it reasonably opposes the European Commission decision; and (3) state the defence it would argue in the proceeding, so that the national court can decide whether and to what extent the assessment of these defences depend on the validity of the European Commission decision. This now seems to be the general assessment framework. In the case in question, the respondents in appeal did not meet requirements (2) and (3), as a result of which the judgment of the Amsterdam District Court (which decided to stay the proceeding) could not be upheld.\(^{110}\)

In line with this judgment, in 2015 the Amsterdam District Court decided to reject a request for a stay while the EU appeals were still ongoing (in another Airfreight cartel-related claim initiated by SCC). According to the Court, at that stage in the proceedings it should be determined first which issues or which part of the issues could be debated and decided while the EU appeals were still ongoing. To that end, the defendants should submit a statement of defence.\(^{111}\) As the defendants had already submitted a statement of defence in the proceedings against claimant Equilib, the Court ordered that Equilib had to provide specific information about the alleged flights to establish the applicable law (and, if possible, regarding limitation and assignments).

XI PRIVILEGES

Lawyers must refuse to testify as witnesses regarding what they know through their professional relationship with their clients. Furthermore, a disclosure claim under Article 843a of the CCP against an attorney to obtain documents or information produced or obtained through such representation will be rejected.\(^{112}\) Attorney–client communications, attorney work product and joint work product that are in the possession of persons other than the attorney (and clients), however, are not necessarily excluded from production. This also includes in-house counsel if they are, \textit{inter alia}, registered in the Netherlands as an attorney, except with regard to (possible) infringements of EU competition law investigated by the European Commission. The latter exception follows from the \textit{Akzo} judgment of the CJEU.\(^{113}\) A 2013 judgment of the Dutch Supreme Court confirmed that the lack of legal privilege in \textit{Akzo} does not mean that legal privilege of in-house counsel does not exist generally under Dutch law.\(^{114}\)

Article 12g of the Act establishing the ACM acknowledges attorney–client legal privilege: the ACM may not examine or copy documents that have been exchanged between a company and its attorney. This legal privilege also covers in-house counsel if, \textit{inter alia}, they are registered in the Netherlands as attorneys, except with regard to (possible) infringements of EU competition law investigated by the European Commission.

\(^{110}\) Amsterdam Court of Appeal, 24 September 2013, ECLI:NL:GHAMS:2013:3013.


\(^{112}\) See Section V.ii.

\(^{113}\) CJEU, 14 September 2010, case C-550/07 P.

\(^{114}\) Supreme Court, 15 March 2013, ECLI:NL:HR:2013:BY6101.
In principle, general rules of contract law apply for adopting or imposing settlements. Settlement negotiations between lawyers enjoy legal privilege, meaning that to disclose the contents of such negotiations in proceedings may result in a disciplinary complaint. In addition, the newly enacted Article 6:193o CC contains specific legislation for competition law-related cases, which is discussed below. Finally, a specific collective settlement mechanism is also described below.

Article 6:193o CC provides both the alleged infringer as well as the claimant with more guidance with regard to the influence of a settlement on civil proceedings than the general rules of Dutch contract law. Article 6:193o Sub 1 CC stipulates that the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party. This means that the injured party cannot take recourse against the infringers that were not involved in the settlement for the part of the share of the settling infringer that has not been paid out under the settlement (e.g., if the infringer's share was X, and he or she settles for X minus 20, the injured party cannot take recourse on the other infringers for the remaining 20). This is a deviation from the general provisions on settlements in the CC, in which it is stated that even though as a general rule a payment from a settlement influences a claim in favour of the debtors, the remaining damages can still be recovered from the debtors who were not involved in the settlement unless the claimant performs an additional legal act, being that the claimant commits him or herself towards the co-debtors to reduce his or her claim on these co-debtors with the amount he or she could have claimed. The judgment of the District Court of The Hague, in one of the Paraffin Wax cases, is an example of how the mechanism for proportionate share reduction after a settlement was applied before the new Article 6:193o CC came into force.

Accordingly, and also in deviation from the general provisions on settlements in the CC, under Article 6:193o Sub 2 CC, the co-debtors who are not involved in the settlement cannot have recourse against the settling infringer, in order to secure the settling infringer, that as a result of the settlement he or she can no longer be successfully sued by either the injured party or the co-debtors. This generally means there can be a larger incentive for infringers to settle. For the settling party one risk remains, being that he or she can be held liable for the damage caused by the co-debtors in cases where these co-debtors are not able to pay the remaining damages (for example, in cases of bankruptcy). To eliminate this final risk, Article 6:193o Sub 4 CC provides for a possibility for the settling infringer to exclude this possibility in its settlement with the injured party.

Only rarely are settlement agreements embodied in a court order. In certain circumstances, however, parties to a settlement agreement may choose to request the Amsterdam Court of Appeal to declare its terms universally binding under the Collective Settlement of Mass Claims Act (WCAM). Under the WCAM, parties to a collective settlement can jointly request the court to declare a settlement binding on all members of a group on an opt-out basis. Such a binding settlement aims to reach finality for all parties in dispute. Basically, one or more associations or foundations that, according to their articles of association, protect and promote the interests of persons who have suffered damage due

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115 Article 6:14 of the CC.
117 Article 6:14 of the CC.
to the acts of another party, and that have reached a settlement agreement with one or more parties to compensate that damage, can request, with the other parties to the settlement agreement, that the Amsterdam Court of Appeal declare the settlement agreement generally binding. The Court must consider a number of aspects, such as whether the compensation is reasonable, and whether the associations or foundations that agreed to the settlement can be deemed sufficiently representative for the interests of those on whose behalf the settlement was reached. For this test, it is relevant whether the position of the non-active claimants (claimants who did not take part in the collective redress actions leading to the settlement) is sufficiently safeguarded.\textsuperscript{118} Part of the settlement may be that any claims for damages under the agreement will be forfeited if they are not submitted within one year of a claimant becoming aware of his or her claim under the settlement.\textsuperscript{119}

If the Court grants the request for the settlement to be declared binding, then all individuals who fall within the scope of the class as determined in the settlement agreement are bound unless they timely opt out within a specified period (of not less than three months). Opt outs must be filed on an individual basis, and there is no procedure for filing an opt out on behalf of a group of persons or entities. An individual who opts out remains free to start his or her own proceedings against the tortfeasor, and to claim more or another kind of compensation than he or she would have received under the generally binding settlement.\textsuperscript{120} Such an opted-out individual can, even if he or she has chosen not to be involved with the settlement, profit from interruption of the limitation periods reached by actions connected to the collective settlement, including the Court of Appeal proceeding.\textsuperscript{121} Those individuals, however, who do not opt out in time are bound by the terms of the settlement. The court decision must be sent to all known potential claimants under the settlement, and published in one or more court-determined newspapers.\textsuperscript{122}

According to two separate decisions of the Amsterdam Court of Appeal, the Court’s order declaring a settlement binding can be applied in international cases. In the Shell settlement, the Court decided that Dutch associations or foundations that promote and protect certain interests of individuals can be deemed sufficiently representative for foreign claimants and that, as long as a number of the claimants are domiciled in the Netherlands, it also has jurisdiction regarding foreign claimants.\textsuperscript{123} The Court similarly ruled more than a year later in an interim judgment regarding the Converium settlement, in which only around 200 of the approximately 12,000 claimants were domiciled in the Netherlands.\textsuperscript{124} Both settlements covered shareholder claims for damages; however, there are no legal grounds for not applying these principles to antitrust settlements. In principle, a decision by the Court to declare a settlement generally binding should also have effect against foreign claimants, at least insofar as they are domiciled in the European Union and the European Free Trade

\textsuperscript{118} The Amsterdam Court of Appeal rejected a settlement proposal on this basis. After adjustments were made, the Court approved the second amended and restated settlement agreement and declared it binding on all investors that would fall within the scope of the settlement class: Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (Fortis/Ageas). More information and the English translation of the ruling can be found at www.forsettlement.com.

\textsuperscript{119} Article 7:907 of the CC.

\textsuperscript{120} Article 7:908 of the CC.

\textsuperscript{121} Supreme Court 19 May 2017, ECLI:NL:HR:2017:936 (Dexia).

\textsuperscript{122} Article 1017 of the CCP.


\textsuperscript{124} Amsterdam Court of Appeal, 12 November 2010, ECLI:NL:GHAMS:2010:BO3908.
Association, although one cannot exclude the risk that a foreign court (outside or within the European Union and the European Free Trade Association) will consider the Dutch opt out a breach under public policy rules (Brussels I recast).

In 2018, two representative organisations acting on behalf of claimants in Trucks and CRT requested the Amsterdam District Court to order a pre-procedural hearing before starting collective proceedings. The purpose of such a hearing is either to discuss a settlement agreement under the WCAM, or to discuss procedural arrangements for future proceedings. The Court rejected the requests. The defendants had no intention of settling. In addition, because the alleged claim was not sufficiently substantiated and the proceedings had not yet been initiated, the Court did not consider it meaningful to discuss procedural arrangements.

XIII ARBITRATION

In the Netherlands, antitrust claims may also be decided through arbitration, provided the parties agree to arbitration. The rules for arbitration are provided in Articles 1020 to 1076 of the CCP. Given that arbitration decisions are not published, the confidential nature of arbitration proceedings may make arbitration preferable, particularly for defendants in antitrust claims. Another advantage is that arbitration could take less time as compared to civil proceedings given the caseload of Dutch courts.

Pursuant to the CJEU’s judgment in Eco Swiss v. Benetton, a decision by arbitrators that is contrary to Article 101 TFEU must be annulled if it is challenged before a national court. After all, one of the available grounds for annulment under Dutch arbitration law is a failure to observe national rules of public policy; according to the CJEU, Article 101 TFEU falls within that scope. The same rule applies to exequatur requests, as evidenced in a ruling by the Court of Appeal in The Hague in March 2005. In that case, the parties had submitted their dispute on the payment of royalties under a licence agreement to arbitration by the American Arbitration Association. Upon requesting an exequatur for the arbitration decisions in the Netherlands, the Court of Appeal in The Hague confirmed the first instance court’s decision to deny the exequatur on the grounds that the licence agreement was in part contrary to Article 101 TFEU and did not fall within the scope of any block exemption regulation.

In light of the Eco Swiss v. Benetton judgment, it is undisputed that arbitrators are obliged to apply provisions such as Article 101 TFEU to disputes before them even when the party with an interest therein has not relied on those rules. However, there is some debate within Dutch legal literature about whether this obligation goes so far as to oblige arbitrators to raise, of their own motion, issues of European competition law where examination of that issue would oblige them to abandon the passive role assigned to them or the scope of their arbitration task. According to an earlier judgment by the CJEU in Van Schijndel, this obligation does not exist for the national courts if – as is the case in the Netherlands – according to national rules of law they are bound by the ambit of the dispute as defined by

127 CJEU, 1 June 1999, C-126/97.
the parties themselves and the facts and circumstances upon which parties have based their claims and defences. Whether the *Eco Swiss v. Benetton* judgment implies a farther-reaching and more active obligation for arbitrators than the national courts has yet to be decided.

The validity of arbitration clauses is discussed in Section III.

**XIV INDEMNIFICATION AND CONTRIBUTION**

Under Dutch law, if one or more persons are liable for the same damages, the claimant may hold each jointly and severally liable for the full amount. Article 6: 193m Paragraphs 2 and 4 CC stipulate exemptions to this principle (facilitating certain exemptions for small or medium-sized enterprises and immunity recipients respectively). Assuming that a joint and several liability of each cartel member for the entire damages of the cartel will be accepted by the courts, then a defendant to a cartel damages claim who pays more than its share in the whole of the damages is entitled to seek contribution from the other cartel members.

Contribution can only be sought for each co-cartelist's share in the damages. Each party's share in the damages is determined proportionately to their contribution to the damages. How exactly courts will determine the size of each party's contribution in cartel damages claims cases (e.g., by reference to each party's market share or blameworthiness, or both) is something that will have to be clarified in future case law.

Contribution proceedings may be started separately or by way of a motion in the main proceedings that must be raised prior to or with the submission of the statement of defence. The contribution and main proceedings may be dealt with and decided jointly by the court. This is an administrative measure, and both proceedings remain separate cases with the decisions in each proceedings only having binding legal effect against the parties in those proceedings. Defendants in contribution proceedings therefore do not automatically become parties to the main proceedings, although they may voluntarily join the main proceedings as a party or can – in exceptional circumstances – be forced to join the main proceeding.

The statute of limitations for a contribution claim is five years. The Supreme Court has ruled that the statute of limitations for such a claim commences on the date the claimant seeking contribution paid more than its share in the damages. This means that the statute of limitations may begin (many) years after the fact and after the claimant was first sued for damages.

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130 Article 6:102 of the CC.
131 Articles 6:10 and 6:12 of the CC.
132 Article 6:102 of the CC.
133 Article 210 of the CCP.
134 Article 215 of the CCP.
135 Article 214 of the CCP.
136 Article 118 of the CCP.
137 Supreme Court, 6 April 2012, ECLI:NL:HR:2012:BU3784.
The Netherlands is a preferred venue to bring claims for private enforcement of European competition law. A considerable number of follow-on cartel damages claims have already been submitted to the Dutch courts, and more claims have been announced. The Netherlands is fiercely competing with, notably, the United Kingdom and Germany as the preferred forum for bringing this type of claim. Most likely this originates from the advantages of the Dutch system and practice, including:

a. the (relatively) low costs of the proceedings and external counsel;

b. the expertise and pragmatic approach of the judiciary;

c. rather well-developed possibilities to obtain disclosure compared to other civil law jurisdictions;

d. the efficiency of the proceedings; and

e. the fact that claim vehicles (and their funding) as such are not regulated, and hence generally face few barriers in starting proceedings.

In addition, it can be expected that the number of (competition law-related) claims will increase after the entry into force of a legislative proposal abolishing limitations to collective damages actions.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

For more than 75 years, the Philippines has been without a comprehensive antitrust law. Instead, the adverse consequences of anticompetitive conduct have been addressed through isolated provisions scattered across various pieces of general legislation, including the Revised Penal Code of 1930. Indeed, despite the clear state policy against combinations in restraint of trade or unfair competition and the mandate to ‘protect Filipino enterprises against unfair competition and trade practices’ in the 1987 Philippine Constitution, more than 25 years lapsed before the Philippine Congress passed a special antitrust statute aimed at consolidating the state’s competition legislation.

In June 2015, the Philippine Congress enacted the Philippine Competition Act. Citing the need to level the playing field for investors and driven by foreign and domestic business groups, the Competition Act was endorsed to the President as a priority bill and finally signed into law on 21 July 2015. Almost a year later, on 31 May 2016, the implementing rules and regulations (IRR) of the Competition Act were signed, adopted and promulgated by the Philippine Competition Commission (PCC). The Rules of Procedure of the PCC (PCC Rules of Procedure) were approved on 11 September 2017 and became effective on 30 September 2017. The PCC Rules on Merger Procedure (PCC Merger Rules) were approved on 9 November 2017 and became effective on 8 December 2017. Recently, the PCC issued Memorandum Circular No. 18-001 dated 1 March 2018, increasing the threshold for compulsory notification of mergers and acquisitions. On 29 August 2018, the PCC adopted Resolution No. 20-2018, promulgating an enforcement strategy and prioritisation guidelines. The PCC’s leniency programme rules, which may entitle applicants to immunity from a suit commenced not just by the PCC but also by third parties, took effect commencing January 2019.

Like other models of antitrust legislation, the Competition Act covers not only acts of any person or entity engaged in any trade, industry or commerce in the Philippines,
but explicitly authorises its extraterritorial application. Thus, the Competition Act will be enforced even against acts in international trade provided the same have direct, substantial and reasonably foreseeable effects in trade, industry or commerce in the Philippines.

The new Philippine antitrust law identifies prohibited anticompetitive agreements. Proscribed as illegal are agreements, between and among competitors, restricting competition as to price or components thereof, or other terms of trade; and fixing prices at auctions or in any form of bidding. Moreover, agreements between and among competitors setting, limiting or controlling production, markets, technical development or investments, and through dividing or sharing the market, are deemed violative of the Competition Act if these ‘have the object or effect of substantially preventing, restricting, or lessening competition’. All other agreements between or among competitors that have anticompetitive effects are also prohibited unless the same ‘contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits’.

The Competition Act also prohibits abuses of a market player’s dominant position as well as mergers and acquisitions where they substantially prevent, restrict or lessen competition.

To implement this legislation, the Competition Act created the PCC, an independent quasi-judicial body attached to the Office of the President of the Philippines. Established in February 2016, the PCC will act as a central body to police anticompetitive practices. The PCC is conferred with original and primary jurisdiction over the enforcement and implementation of the Competition Act, and is thus empowered to investigate violations thereof and other existing competition laws motu proprio or upon receipt of a verified complaint. Significantly, included among its various powers is the authority of the PCC to conduct administrative proceedings as well as institute appropriate civil or criminal proceedings. To give teeth to the PCC’s authority, the Competition Act expressly empowers the PCC:

a. to issue subpoena duces tecum and subpoena ad testificandum requiring the production of books, records or other documents or data;
b. to summon witnesses;
c. to issue interim orders such as show cause and cease and desist orders; and
d. to deputise any and all government enforcement agencies, or enlist the aid and support of any private institution, corporation, entity or association.

**Notes:**
6 Competition Act, Section 14.
7 Ibid., at Section 14(a).
8 Id., at Section 14(b).
9 Id., at Section 14(c).
10 Id., at Section 15.
11 Id., at Section 20.
12 Id., at Section 5.
13 Id., at Section 12.
14 Id., at Section 12(a).
15 Id., at Section 12(c).
16 Id., at Section 12(a).
In addition, the Competition Act recognises the continued existence of the Office for Competition under the Department of Justice (DOJ-OFC), albeit with the limited power and jurisdiction of conducting preliminary investigations and undertaking the prosecution of all criminal offences arising under the Competition Act and other competition-related laws.

In relation to its power to conduct administrative proceedings and institute civil or criminal suits arising from a violation of the Competition Act, the PCC is conferred with the sole and exclusive authority to initiate and conduct a fact-finding or preliminary inquiry into compliance with the provisions of the Competition Act. The inquiry may be initiated by the PCC at its own initiative, upon the filing of a verified complaint by an interested party or upon referral by a regulatory agency. After due notice and hearing, and on the basis of the facts and evidence presented, the PCC may issue a cease and desist order against the respondent entity.

Ultimately, the PCC will conclude its inquiry by either issuing a resolution ordering the closure of the inquiry if no violation or infringement is found or proceeding, on the basis of reasonable grounds, to a full administrative investigation. Where warranted by the evidence, the PCC may also file a criminal complaint with the Department of Justice.

The law requires the PCC to complete its preliminary inquiry, in all cases, within 90 days reckoned from the submission of the verified complaint, referral or date of initiation by the PCC. Although drafted in mandatory terms, the Competition Act itself does not prescribe the consequences for the PCC’s failure to complete the preliminary inquiry stage within the stated period. The PCC Rules of Procedure, however, clarify that, if the facts and information available at the end of the 90-day period are insufficient to proceed to the conduct of a full administrative investigation, the PCC’s Enforcement Office shall terminate the preliminary inquiry by issuing a resolution closing the preliminary inquiry without prejudice.

The initiation, conduct and termination of the preliminary inquiry of the PCC are significant milestones in private enforcement litigation because, by express provision of the Competition Act, no independent civil action for violation of the Competition Act may be instituted in court by a private party until the PCC has completed its preliminary inquiry. The lack of sanctions for the PCC’s failure to complete its preliminary inquiry within the prescribed 90-day period, and the absence of any clear suspensive or tolling effect of such inquiry on the statute of limitations to commence a civil suit, adversely impact on the private enforcement of the Competition Act. Significantly, the Competition Act authorises the PCC to institute civil suits. Unfortunately, the law does not prescribe the requirements for, as well as the procedure leading to, such civil action on the part of the PCC. Indeed, it fails to even state what relief the PCC would be entitled to demand in such civil suits.

17 Established under Executive Order No. 45, series of 2011.
18 Competition Act, Section 13.
19 Ibid., at Section 31.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 PCC Rules of Procedure, Rule II, Art. 1, Section 2.6 (b).
26 Competition Act, Section 45.
27 Ibid., at Section 12(a).
In addition to administrative fines, the PCC may, upon finding that an entity has entered into an anticompetitive agreement or abused its dominant position, provide redress for such anticompetitive conduct by issuing injunctions; requiring adjustment, divestment or corporate reorganisation; and directing the disgorgement of excess profits under such reasonable parameters to be prescribed in the law’s implementing rules and regulations.28

Violation of the Competition Act may also expose the erring persons to civil liability to private persons injured by reason thereof.29 On the issue of private rights and remedies, the Competition Act contains a singular provision – Section 45 – which authorises the filing of an independent civil action arising from violations of the Competition Act but only after the preliminary inquiry conducted by the PCC has been completed. Significantly, although Section 45 does not specifically recognise the continuing availability of other causes of action to private parties seeking redress for anticompetitive conduct, the entire Competition Act repeatedly refers to other existing competition laws30 and other competition-related laws,31 which phrases implicitly acknowledge that there are statutes, other than the Competition Act, from which legal rights may spring and under which redress in damages and other relief may be obtained.

As the Competition Act has just recently been passed, there has been no occasion for Philippine courts to interpret the same. It is expected that the passage of the Competition Act and the recent coming into effect of its IRR32 will result in an increase in both public and private antitrust litigation. However, only when the provisions of the Competition Act are clarified through more specific and detailed implementing rules and regulations,33 and are interpreted by the courts, particularly the Supreme Court, will the parameters of private enforcement suits within the Competition Act be clearly delineated.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Even before the Competition Act, civil suits for damages arising from anticompetitive conduct, although infrequent, were commenced in the Philippines. These suits have mostly centred on the enforcement of non-compete clauses in contractual agreements. Jurisprudence shows that the validity and enforceability of non-compete provisions in employment and service contracts have been litigated in the Philippines since the early 1900s. In resolving against objections that such non-compete clauses constitute an undue restraint of trade, the Supreme Court has relied on general principles of Philippine contract law as provided in the Civil Code of the Philippines34 (including the freedom of parties to enter into contractual stipulations that are not contrary to law, morals, good customs, public order or public policy)35 and basic fairness.

28 Id., at Section 12(d) in relation to Section 12(h).
29 Id., at Section 45.
30 Id., at Section 12(a).
31 Id., at Sections 13 and 44.
32 The IRR of the Competition Act took effect on 18 June 2016.
33 Competition Act, Section 50.
34 Act No. 386 (1950).
35 Civil Code, Article 1306.

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In addition, civil actions for damages arising from unfair trade practices and other acts of unfair competition have been commenced and maintained on the basis of Article 28 of the Civil Code, which states: ‘Unfair competition in agricultural, commercial or industrial enterprises or in labour through the use of force, intimidation, deceit, machination or any other unjust, oppressive or high-handed method shall give rise to a right of action by the person who thereby suffers damage.’

Explaining its appropriate application, the Supreme Court stated that what is prevented under Article 28 of the Civil Code is not competition per se but the use of unjust, oppressive or high-handed methods which may deprive others of a fair chance to engage in business or to earn a living. Plainly, what the law prohibits is unfair competition and not competition where the means used are fair and legitimate.36 To be able to recover damages under Article 28 of the Civil Code, the following requirements must be met: ‘it must involve an injury to a competitor or trade rival’, and ‘it must involve acts which are characterised as “contrary to good conscience”, or “shocking to judicial sensibilities”, or otherwise unlawful’.37 In 2014, the Supreme Court affirmed that the defendant engaged in unfair competition for which the plaintiff was entitled to recover damages and attorneys’ fees when faced with the following conduct:

a. the defendant suddenly shifting his or her business from manufacturing kitchenware to plastic-made automotive parts, the plaintiff’s line of business;
b. the defendant luring the plaintiff’s employees to transfer to his or her employ;
c. the defendant trying to discover the plaintiff’s trade secrets;
d. the defendant deliberately copying the plaintiff’s products; and
e. the defendant selling those products to the plaintiff’s customers.38

As such, in the absence of an antitrust statute, Article 28 of the Civil Code has been the cornerstone of private antitrust enforcement litigation where the dispute is between competitors. Where the action is between parties who are not competitors or trade rivals and no other special law applies, a civil case may generally be brought under Articles 19,39 2040 and 2141 of the Civil Code. Together with Article 28, Articles 19, 20 and 21 of the Civil Code all form part of the ‘Human Relations’ chapter of the Civil Code.

Admittedly, the Competition Act was meant to consolidate, to the extent possible, all competition-related laws and, for that reason, expressly repealed an array of Philippine laws including Article 186 of the Revised Penal Code, which prohibits monopolies or combinations in restraint of trade.42 As a catch-all, the Competition Act repeals ‘all other laws, decrees, executive orders and regulations, or part or parts thereof inconsistent with’ any of its provisions.43

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37 Ibid.
38 Id.
39 Civil Code, Article 19, which provides: ‘Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.’
40 Id., at Article 20, which provides: ‘Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.’
41 Id., at Article 21, which provides: ‘Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.’
42 Competition Act, Section 55.
43 Ibid.
The Competition Act does not expressly repeal Article 28 of the Civil Code. Considering that Article 28 and the rest of the ‘Human Relations’ chapter of the Civil Code are not inconsistent with, much less repugnant to, the provisions of the new competition law, these provisions continue to exist and to be available as bases for redress, notwithstanding the Competition Act. Hence, one may take the view that an injured individual may still file a civil complaint for damages against a defendant under these general provisions of the Civil Code.

Indeed, it is possible that private damage actions premised on, among others, Article 28 of the Civil Code may continue to be instituted, despite the passage of the Competition Act, especially because of the express prohibition against commencing an independent civil action for violation of the Competition Act until the preliminary inquiry conducted by the PCC under Section 31 is terminated. Should the conduct complained about not be within the purview of the PCC, however, there appears to be nothing that legally bars private parties from instituting independent civil suits for damages arising from anticompetitive behaviour.

Any action arising from a violation of any penal provision of the Competition Act shall be barred unless commenced within five years from the time the criminal violation is discovered by the offended party, the authorities or their agents. With respect to administrative and civil actions, the five-year prescriptive period runs from the time the cause of action accrues, which is when the anticompetitive conduct that caused the alleged damage or injury occurred.

On the other hand, the separate civil action under Articles 19, 20, 21 or 28 of the Civil Code, which is akin to a tort under the Philippine legal system, prescribes within four years from the time the cause of action accrues.

As mentioned earlier, the institution of an independent civil action arising from a violation of the provisions of the Competition Act is prohibited until the PCC has terminated its preliminary inquiry into the conduct of the allegedly erring person or entity. Significantly, the preclusive effect appears to be limited to civil actions founded on violations of the Competition Act, and thus seemingly excludes civil actions brought under other laws, including the Civil Code. However, there is basis to argue that the period to file any civil case for damages arising from anticompetitive conduct, even if premised under Article 28 of the Civil Code, is suspended when the PCC is already conducting a preliminary inquiry. In GMA Network, Inc v. ABS-CBN Broadcasting Corporation, et al, the Supreme Court sustained the dismissal of a complaint for damages premised on unfair competition on the ground that it failed to state a cause of action. The complainant, GMA Network, Inc (GMA), alleged that the defendants took advantage of their common control and ownership, and thereby arbitrarily re-channeled GMA’s cable television broadcast on 1 February 2003, caused distortions to its signal transmission, reduced the quality of its programmes and thereby caused business interruptions to, and injured the operations of, GMA. In sustaining the dismissal of the complaint, the Supreme Court ruled that the issues of whether the conduct of the defendant cable companies had been committed and were unfairly done were within the primary jurisdiction of the National Telecommunications Communication, before

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44 Id., at Section 46(a).
45 Id., at Section 46(b).
46 Civil Code, Article 1146.
47 GR No. 160703, 23 September 2005.
48 Ibid.
which a similar complaint, also filed by GMA, was pending.\textsuperscript{49} In applying the doctrine of primary jurisdiction to dismiss the damage suit, the Supreme Court held that the questions underlying an award of damages entail specialised knowledge in the fields of communications technology and engineering, which courts do not possess.\textsuperscript{50} Thus, although regular courts have jurisdiction over actions for damages, per the Supreme Court, it would nonetheless be proper for the courts to yield their jurisdiction in favour of an administrative body with specialised expertise.\textsuperscript{51}

The doctrine laid down in \textit{GMA Network, Inc v. ABS-CBN Broadcasting Corporation, et al} may be applied to civil actions for damages grounded on the Civil Code, including Article 28 on unfair competition, and filed even before the preliminary inquiry of the PCC has been terminated. The PCC being the exclusive agency statutorily tasked to police anticompetitive conduct, the doctrine of primary jurisdiction may readily be invoked to dismiss such civil actions.

\section*{III \textsc{Extraterritoriality}}

From a criminal law perspective, the Philippines adheres to the territoriality principle,\textsuperscript{52} such that its penal laws are generally enforced only within its territory.\textsuperscript{53} From a civil law perspective, it is possible for a person found in the Philippines to file a case against another entity or person outside the country, even for acts committed abroad. The plaintiff is only required to prove that he or she has a right, such right was violated by the defendant, and he or she incurred damage by reason of the violation, the place of the commission of the violation being a non-issue. Acquiring jurisdiction over a defendant abroad or enforcing a Philippine judgment against him or her may pose certain challenges.

The Competition Act expressly prescribes the extraterritorial effect of its provisions. Thus, the Competition Act is made applicable (and enforceable) to international trade, including acts done outside the country provided they have ‘direct, substantial, and reasonably foreseeable effects in trade, industry or commerce in the Philippines’.\textsuperscript{54} Accordingly, wrongful

\begin{itemize}
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Act No. 3815 (1930), otherwise known as the Revised Penal Code, Article 2, provides:
  Except as provided in the treaties and laws of preferential application, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction, against those who:
  1. Should commit an offense while on a Philippine ship or airship;
  2. Should forge or counterfeit any coin or currency note of the Philippine Islands or obligations and securities issued by the Government of the Philippine Islands;
  3. Should be liable for acts connected with the introduction into these islands of the obligations and securities mentioned in the preceding number;
  4. While being public officers or employees, should commit an offense in the exercise of their functions; or
  5. Should commit any of the crimes against national security and the law of nations, defined in Title One of Book Two of this Code.
\item \textsuperscript{53} Civil Code, Article 14, which states: ‘Penal laws and those of public security and safety shall be obligatory upon all who live or sojourn in Philippine territory, subject to the principles of public international law and to treaty stipulations.’
\item \textsuperscript{54} Competition Act, Section 3.
\end{itemize}
acts done outside the Philippines would be considered violations of the Competition Act, and thus actionable, whether criminally or civilly, if the effects of such acts are manifested or experienced within the Philippines.

As the Competition Act was only signed into law in July 2015, the parameters of the extraterritorial application of the Competition Act and the practical implementation of such extraterritoriality have not yet been clarified. And while the IRR reaffirmed the extraterritorial application of the law, they do not provide the much-needed elaboration on the extraterritorial scope of the Competition Act, a concept that deviates from the general territorial concept of Philippine penal laws. Nonetheless, the PCC Rules of Procedure expressly state that foreign corporations, partnerships, associations or other entities — regardless of whether registered in the Philippines, resident of the Philippines or not found in the Philippines — may be served with summonses in the specific manner provided therein.

IV STANDING

For private enforcement actions under the Competition Act, any person who suffers direct injury by reason of any violation of said law may institute a separate and independent civil action. Similarly, the provisions of the Civil Code, including Article 28 thereof, vest the right of action on the person who suffers damage by reason of the act complained about. The statutory requirement that the plaintiff be the party directly injured is consistent with the provisions of the Rules of Court, which require that a civil action be prosecuted in the name of a real party in interest. A real party in interest is defined as ‘the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit’. Per the Supreme Court, the interest contemplated by the Rules of Court is ‘material interest or an interest in issue to be affected by the decree or judgment of the case, as distinguished from mere curiosity about the question involved’. A case that is not prosecuted by a real party in interest is dismissible.

The requirement of locus standi of a party plaintiff has been relaxed by the Supreme Court in exceptional cases, such as where the case raises an issue of transcendental significance or paramount importance to the people; where it advances constitutional issues that deserve the attention of the High Court in view of their seriousness, novelty and weight as precedents; or where to do so would achieve substantial justice.

Although the prohibition on anticompetitive conduct and the consequent promotion of free and fair competition are significant state policies, it is doubtful that a plaintiff’s lack of legal standing in a civil case for damages would be excused as an exception to the general rule.

55 IRR, Rule 1, Section 2(a).
56 PCC Rules of Procedure, Rule IV, Article 3, Section 4.18 (c), (f), (g).
57 Competition Act, at Section 45.
58 Rules of Court, Rule 3, Section 2.
59 Ibid.
61 Ibid.
V  THE PROCESS OF DISCOVERY
The Rules of Court set out rules on discovery, which are available in any civil proceeding. The recognised discovery modes include the following.

i  Deposition pending action
Provided there is leave of court after jurisdiction has been obtained over any defendant or over property that is the subject of an action, or even without such leave as long as an answer has already been served, the testimony of any person, whether a party or not, may be taken, at the instance of any party, by deposition upon oral examination or written interrogatories. The attendance of such witnesses at the deposition may be compelled by the use of a subpoena. As to the scope of examination, the deponent may be examined regarding any matter, as long as not privileged, which is relevant to the subject of the pending action.

ii  Interrogatories to parties
Under the same conditions as the foregoing, a party desiring to elicit material and relevant facts from any adverse party may do so by filing in court and serving upon the adverse party written interrogatories to be answered by the party served. The scope of written interrogatories is the same as depositions pending action.

iii  Written request for admission
At any time after issues have been joined, a party may file and serve upon any other party a written request for the admission by the latter of the genuineness of any material and relevant document described in and exhibited with the request, or the truth of any material and relevant matter of fact set forth in the request. Unless otherwise allowed by the court, a party who fails to file and serve a request for admission on the adverse party of material and relevant facts at issue which are, or ought to be, within the personal knowledge of the latter, shall not be permitted to present evidence on such facts.

iv  Production or inspection of documents or things
Upon motion of any party showing good cause therefor, the court in which an action is pending may:

a  order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books,

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63  Rules of Court, Rule 23.
64  Ibid., at Section 1.
65  Id.
66  Id., at Section 2.
67  Id., at Rule 25.
68  Id., at Rule 25, Section 1.
69  Id., at Section 5.
70  Id., at Rule 26.
71  Id., at Section 1.
72  Id., at Section 5.
73  Id., at Rule 27.
accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his or her possession, custody or control; or

b order any party to permit entry upon designated land or other property in his or her possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated relevant object or operation thereon.74

v Deposition before action75

Even before a court case is commenced, a person who wishes to perpetuate his or her own testimony or that of another person regarding any matter that may be cognisable in any court of the Philippines may file a verified petition in the court for such purpose.76 In such petition, which shall be served on all identified potential adverse parties, the petitioning party must state, among others, the facts that he or she desires to establish by the proposed testimony and his or her reasons for desiring to perpetuate it.77

The foregoing modes of discovery are devices to narrow and clarify the basic issues between the parties, and for ascertaining the facts relative to those issues,78 including those known to one’s adversaries. Per jurisprudence, the main purposes of discovery are to enable the parties to obtain the fullest possible knowledge of the issues and facts and thus prevent trials from being carried on in the dark (subject, of course, to recognised privileges),79 and to enable a party to discover the evidence of the adverse party and thus facilitate an amicable settlement or expedite the trial of the case.80 Accordingly, it is well settled that an objection that the discovery motion is a fishing expedition is no longer a reason to prevent a party from inquiring into the facts underlying the opposing party’s case through the discovery procedure.81

VI USE OF EXPERTS

There is a dearth of jurisprudence on the use of experts and economists to establish the existence of anticompetitive conduct or to prove the existence, and extent, of damage. In acknowledgment of the need for experts in resolving antitrust issues, the Competition Act expressly authorises the PCC to commission consultants or experts in connection with an investigation.82 Of note, the PCC established a component Economics Office that is tasked to, among other things, ‘provide economic analysis to support the detection and investigation of anticompetitive behaviour’.83

74 Id., at Section 1.
75 Id., at Rule 24.
76 Id., at Section 1.
77 Id., at Section 2.
79 Ibid.
81 Ibid.
82 Competition Act, Section 33.
The Rules of Court authorise the admission of expert opinions – that is, opinions of a witness on a matter requiring special knowledge, skills, experience or training, which he or she is shown to possess.\(^{84}\) Courts have also relied on testimony of actuaries as proof, for example, of the actual loss of a deceased’s person earning capacity.

Jurisprudence on Article 28 of the Civil Code, however, does not involve testimonies of experts and economists. Rather, the commission of acts amounting to unfair competition has been attested to by fact witnesses, and persons with personal knowledge of the plaintiff’s business and the defendant’s unlawful conduct. For private enforcement under the Competition Act, it is highly likely that experts and economists will have to be engaged to provide, \textit{inter alia}, evidence on what is the relevant market, whether a particular player has a dominant position in such market and the impact of the alleged conduct on such market.

\section*{VII \hspace{1em} CLASS ACTIONS}

In the Philippines, when the subject matter of a controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all.\(^{85}\) In class actions, any party in interest shall have the right to intervene to protect his or her individual interest.

A class action is beneficial as it creates an impression that the effects of a defendant’s anticompetitive conduct are pervasive, impacting more than just one individual, which may influence a quasi-judicial officer or a judge hearing a case to rule against the defendant. Moreover, this may give the plaintiffs the opportunity to claim a substantial (if not the maximum) amount of actual damages, including exemplary damages as a matter of public good. Finally, prosecuting a damages case as a class action spreads the potentially substantial costs and expenses (especially where experts are engaged) across all said plaintiffs, and thus affords litigants without resources an opportunity to recover damages when they would not have had the capacity to initiate the suit.

The downside to class actions is that they are difficult to commence and maintain due to the strict requirements for their propriety: community of interest, substantially numerous class membership and adequacy of representation.

In one case, the Supreme Court affirmed the dismissal of a class action brought by several stockholders arising from an alleged violation of their pre-emptive rights because the damage suffered by the complaining stockholders is limited to their respective proportion of the unsubscribed shares and not to that portion corresponding to the shares of the other stockholders. Thus, the wrong suffered by each of them would constitute a wrong separate from those suffered by the other stockholders, and hence would not create the required common or general interest in the subject matter.\(^{86}\) Following the foregoing, it is possible that the courts would opine that, in certain instances, class actions are not permissible insofar as anticompetitive conduct is concerned because an injury suffered by some consumers or competitors may not necessarily be the same as the injury sustained or to be sustained by the others in the same class. In addition, a class action suit may be dismissed more easily as all

\begin{flushleft}
\footnotesize
\begin{itemize}
\item \(^{84}\) Rules of Court, Rule 130, Section 49.
\item \(^{85}\) Ibid., at Rule 3, Section 12.
\end{itemize}
\end{flushleft}
it takes is one disagreeable member of that class. The Supreme Court has ruled that a class action will not prosper if there is a conflict of interest or opinion between those represented and those who filed the action. \(^{87}\)

**VIII CALCULATING DAMAGES**

A violation of the Competition Act or an act of unfair competition under Article 28 of the Civil Code renders the defendant liable for ‘all damages which are the natural and probable consequences of the act or omission complained of’, whether such damages have been foreseen or could have reasonably been foreseen by the defendant. \(^{88}\) As to what types of damages are recoverable, neither the Competition Act nor Article 28 of the Civil Code specifies. Thus, the general provisions of the Civil Code, which enumerates the types of damages that may be awarded by a court given a set of facts, and which specifies instances when court fees, legal costs and other litigation expenses may be recovered, are applicable.

Under the Civil Code, if proven by sufficient evidence, among the damages recoverable are actual, moral, nominal, temperate or moderate, or exemplary or corrective. Actual damages, which are awarded only when duly proved, \(^{89}\) comprehend not only the value of the pecuniary loss suffered but also the profits that the plaintiff failed to obtain. \(^{90}\) Attorneys’ fees and litigation expenses are recoverable as actual damages and may be awarded in reasonable amounts \(^{91}\) under certain circumstances, including when the case is a separate civil action to recover civil liability arising from a crime. \(^{92}\)

On the other hand, no proof of pecuniary loss is necessary for moral, nominal, temperate or exemplary damages to be awarded. The assessment of such damages is left to the discretion of the court, according to the circumstances of each case. \(^{93}\)

Moral damages compensate the injured party for physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar injury \(^{94}\) that are the proximate result of the defendant’s wrongful act or omission. \(^{95}\) Moral damages are expressly recoverable in Article 28 regarding unfair competition litigation.

Nominal damages are awarded to vindicate or recognise a right of the injured party that has been violated, and not to indemnify him or her for any loss suffered. \(^{96}\) In one Article 28 unfair competition case that was resolved by the Supreme Court in 2014, an award of nominal damages (in the amount of around US$4,400) was granted in recognition and vindication of the violation of the plaintiff’s rights and in view of its failure to quantify its losses arising from the defendant’s acts of unfair competition (initially alleged as around US$44,000). \(^{97}\)

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88 *Civil Code*, Article 2202.
89 *Ibid., at Article 2199.*
90 *Id., at Article 2200.*
91 *Id., at Article 2208.*
92 *Id., at Article 2208(9).*
93 *Id., at Article 2216.*
94 *Id., at Article 2217.*
96 *Civil Code*, Article 2221.
Temperate damages may be granted when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty. An award of nominal damages precludes the recovery of temperate damages.

The Civil Code also authorises courts to award exemplary damages, which are imposed in addition to moral, temperate, liquidated or compensatory damages, by way of example or correction for the public good. Exemplary damages are not a matter of right but are left to the discretion of the court.

Significantly, in 1917, the Philippine legislature enacted Act No. 3247, ‘An Act to Prohibit Monopolies and Combinations in Restraint of Trade’, which authorises an award of treble damages and reasonable attorneys’ fees as civil liability arising from the prohibited anticompetitive behaviour therein penalised (such as entering into price-fixing agreements or employing monopolies to restrain free competition). Sections 1, 2, 3 and 5 of Act No. 3247, which defined the prohibited acts thereunder, were expressly repealed by the Revised Penal Code. The acts prohibited by Act No. 3247 were, however, restated in Article 186 of the Revised Penal Code. The Competition Act expressly repeals Article 186 of the Revised Penal Code, but essentially restates the prohibited anticompetitive acts thereunder. Section 6 of Act No. 3247, on the availability of treble damages, has never been expressly repealed and does not appear to be inconsistent with any of the provisions of the Revised Penal Code or the Competition Act. Thus, unless clarified by the Supreme Court or the legislature to the contrary, a private litigant may arguably assert a right, under Act No. 3247, to treble damages and reasonable attorneys’ fees for a violation of the provisions of the Competition Act.

Section 6 of Act No. 3247, however, has not been interpreted by the courts to date.

IX PASS-ON DEFENCES

The concept of pass-on defences has not been recognised by the Competition Act. Moreover, there is no law, rule or jurisprudence in the Philippines which provides that damage suffered by a purchaser, and thereby the damages he or she is entitled to claim, by reason of an overprice of a cartelised product, are reduced or mitigated if he or she passes on some of the overcharge to his or her own customers. Notably, however, an award of actual damages is intended to compensate the plaintiff for pecuniary loss actually suffered by him or her as he or she has duly proved, and covers any profits that he or she had failed to obtain. Thus, it is theoretically possible for any defendant to raise the pass-on defence to disprove the actual amount of losses that the plaintiff has suffered. Significantly, however, every plaintiff under Philippine law is duty-bound to exercise the diligence of a good father of a family to minimise

98 Civil Code, Article 2224.
100 Civil Code, Article 2229.
101 Ibid., at Article 2233.
102 Act No. 3247, Section 6, which states: ‘Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.’
103 Revised Penal Code, Article 367.
104 See Competition Act, Sections 14 and 15.
105 Civil Code, Article 2199.
106 Ibid., at Article 2200.
the damages resulting from the act complained of.\(^\text{107}\) Hence, any passing on of the overcharge may be asserted as legally justified. Whether courts should take such passing on into account and thereby reduce the damages recoverable by the plaintiff is an undecided issue.

\section*{X FOLLOW-ON LITIGATION}

Because the Competition Act was only signed into law in 2015 and its IRR only took effect in June 2016, follow-on antitrust litigation has yet to materialise in the Philippines. Instead, to date private damage suits arising from anticompetitive conduct have been stand-alone civil litigation, wherein the parties solely rely, and the courts review and decide based on, the parties’ respective evidence and the applicable law. Given that an independent civil action for violation of the Competition Act may not be instituted by a private injured party until the PCC has terminated its preliminary inquiry,\(^\text{108}\) it is highly likely that there will be a surge in follow-on litigation, and especially where the PCC has, after the termination of a preliminary inquiry or the completion of an administrative proceeding, determined that there is substantial evidence to conclude that a defendant has engaged in prohibited, if not criminal, anticompetitive conduct that violates the Competition Act. Significantly, the competition law does not expressly bar the filing of a private damages suit in cases where the PCC has determined that the defendant has not engaged in any anticompetitive conduct. However, in view of the specialised know-how of the PCC, it is likely that the findings of the PCC, whether adverse to the defendant or otherwise, will be given great weight by the courts.

The Competition Act fails to provide for the tolling of the five-year prescriptive period during the PCC’s preliminary inquiry, which is supposed to be completed within 90 days. Because of the silence of the Competition Act, private injured parties must guard against prescription from barring any cause of action. As an Article 28 unfair competition case must be filed within four years from the time the cause of action accrues, should the PCC not yet have terminated its preliminary inquiry, a plaintiff would have to decide whether to file an Article 28 unfair competition case in court, or wait for the PCC to close its preliminary inquiry and be limited to a civil case founded on the Competition Act.

Note also Section 35 of the Competition Act, which mandates the PCC to develop a leniency programme to extend leniency to participants in an anticompetitive agreement that voluntarily disclose information to the PCC. The leniency that may be extended, subject to compliance with certain requirements, ranges from ‘immunity from any suit or charge of affected parties and third parties, exemption, waiver, or gradation of fines and/or penalties’.\(^\text{109}\) Such immunity may be granted prior to or during PCC fact-finding or preliminary inquiry proceedings. The DOJ-OFC may likewise grant immunity or leniency in the event that there is already a preliminary investigation for a criminal offence pending before it.

\section*{XI PRIVILEGES}

The Philippines strictly enforces the attorney–client privilege, particularly a lawyer’s duty to maintain inviolate client confidences, which is mandated in the Code of Professional

\begin{footnotes}
\item[107] Id., at Article 2203.
\item[108] Competition Act, Section 45.
\item[109] Ibid., at Section 35.
\end{footnotes}
Responsibility. Recognising this duty, the Rules of Court provide that an attorney cannot, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of, or with a view to, professional employment; nor can an attorney’s secretary, stenographer or clerk be examined, without the consent of the client and his or her employer, concerning any fact the knowledge of which has been acquired in such capacity. An attorney who divulges the secrets of his or her clients may be subject to disciplinary sanctions and possibly criminal penalties. The attorney–client privilege extends to any work product that the lawyer has provided his or her client that the client and lawyer intended to remain confidential. The privilege, however, applies only to communication between the client and his or her counsel concerning a crime already committed, and not one that the client intends to commit in the future. This privilege may be raised to oppose a compulsory process issued by the PCC in the course of its preliminary inquiry as well as discovery measures in private enforcement litigation.

The Code of Professional Responsibility and the Rules of Court fail to distinguish between private practitioners and in-house lawyers. Moreover, the Supreme Court has not had occasion to rule on the extent that an in-house lawyer may invoke the attorney–client privilege to prevent disclosure or discovery. Nevertheless, the Supreme Court has acknowledged that being a corporate lawyer (or an in-house counsel) constitutes the practice of law. Thus, it should necessarily follow that the ethical obligations in the Code of Professional Responsibility are similarly imposed on in-house lawyers.

Regarding confidential documents and business information submitted by an entity to the PCC in the course of a preliminary inquiry or an investigation, the Competition Act states that the same shall not in any manner be directly or indirectly disclosed, published, transferred, copied or disseminated, unless the entity consents to the disclosure, or the document or information is mandatorily required to be disclosed by law or by a valid order of a court or a government or a regulatory agency. Thus, should a court in a private antitrust suit order the production of the submitted documents, it appears that the PCC may disclose the same, whether or not the same was privileged in nature before its submission. Moreover, the PCC Rules of Procedure provide that disclosure of confidential business information to government agencies outside of the Philippines shall be made only upon waiver of the entity claiming confidentiality or pursuant to a cooperation or information sharing arrangement between the government agencies concerned. In stark contrast, the PCC Merger Rules expressly provide that such disclosure to government agencies outside of the Philippines shall be made only upon waiver of the entity claiming confidentiality. Significantly, facts, data and information supplied in connection with a binding ruling, show cause order or consent order, as well as all admissions made, documents filed and evidence presented, shall not be admissible as evidence in any criminal proceeding arising from the same act subject of the

110 Canon 21.
111 Rules of Court, Rule 130, Section 24(b).
114 Competition Act, Section 34.
116 PCC Merger Rules, Clause 9.15.
binding ruling, show cause order or consent order. A plea of nolo contendere cannot be used against the defendant entity to prove liability in a civil suit arising from the criminal action, nor in another cause of action.

Rule 4, Section 13 of the IRR of the Competition Act specifically provides for the treatment of confidential information submitted in the course of the notification and review process of a covered merger or acquisition. The Rule requires the party or entity submitting the information to clearly identify any material that it considers to be confidential, provide a justification for the request of confidential treatment of the information supplied and the time period within which confidentiality is requested, as well as to provide a separate non-confidential version thereof. In the event the PCC deems that the justification for confidential treatment provided by the entity or party is insufficient or not grounded, it may decide to make the information accessible. These rules are reiterated in the PCC Merger Rules. Similar rules on confidentiality are provided in the PCC’s Rules of Procedure with respect to all proceedings other than mergers and acquisitions. Considering the wording of Section 34 of the Competition Act (i.e., confidential treatment of confidential business information), the PCC may insist that, in all proceedings before it, it has the authority to determine whether or not particular information is confidential in nature. In this regard, note that the Competition Act imposes a fine for any violation of the confidentiality rule, and the officers of the PCC – including the chairperson, commissioners or any of its staff – may be penalised thereunder if the violation of the confidentiality rule results from any act or omission done in evident bad faith or gross negligence.

XII SETTLEMENT PROCEDURES

Private actions for damages, whether for antitrust claims or otherwise, are generally allowed to be settled. In addition, civil liability arising from an offence may also be compromised, but the same shall not extinguish the public action for the imposition of a legal penalty. The Competition Act itself does not prevent private parties from entering into any settlement of their antitrust dispute. The Supreme Court has adopted a policy encouraging private settlements and, towards this end, mandates that all civil cases (except those that cannot be compromised) be referred to the Philippine Mediation Center for court-annexed mediation

117 Competition Act, at Section 37.
118 Ibid., at Section 36.
119 See PCC Merger Rules, Clauses 9.1 to 9.16.
120 See PCC Rules of Procedure, Article XI.
121 Competition Act, at Section 34.
122 Ibid., at Section 42.
123 Civil Code, Article 2035 provides:
   No compromise upon the following questions shall be valid:
   (1) The civil status of persons;
   (2) The validity of a marriage or a legal separation;
   (3) Any ground for legal separation;
   (4) Future support;
   (5) The jurisdiction of courts;
   (6) Future legitime.
124 Ibid., Article 2034.
Should mediation fail, the parties would be required to go through what is called judicial dispute resolution (JDR), which effectively serves as a secondary tier of mediation conducted by the trial judge. Should a settlement be reached, whether in mediation or JDR, the compromise agreement may be submitted to the court for approval and for issuance of a decision based thereon. The decision based on the compromise agreement is immediately final and executory and, if not performed, may be enforced like a court judgment. Under the provisions of Republic Act No. 9285 (ADR Act) and Supreme Court issuances, mediation proceedings are considered strictly confidential; thus, information or evidence obtained through mediation proceedings shall not be subject to discovery and shall be inadmissible in any adversarial proceeding (unless such evidence or information was otherwise admissible or discoverable prior to being submitted in the mediation).

While settlements under CAM and JDR are pursuant to processes mandated by the Supreme Court, parties are free to explore, and conclude, a settlement outside court proceedings (and even before an actual case is filed). In doing so, parties may agree to mediate their dispute. If a settlement is reached before a court case is filed, the agreement may be deposited by the parties with the appropriate trial court. In the event of a breach, a petition may be filed with the court where the agreement was deposited, which court shall summarily hear the petition and, where warranted, enforce the mediated settlement agreement.

XIII ARBITRATION

The ADR Act does not include private antitrust claims among those disputes that may not be resolved through the various alternative dispute mechanisms. Subject to the requirement of consent, therefore, such claims may be resolved through binding arbitration, mediation, conciliation, early neutral evaluation or mini-trial, or through any combination thereof.

Private antitrust suits with a seat in the Philippines may be subject to domestic or international commercial arbitration. International commercial arbitration is governed by Chapter 4 of the ADR Act, which expressly adopts the UNCITRAL Model Law. Domestic arbitration is governed by Chapter 5 of the ADR Act, Republic Act No. 876 and certain identified provisions of the UNICTRAL Model Law. One difference between domestic and international commercial arbitration is found in the grounds upon which the award may not be set aside.

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125 Supreme Court Resolution in A.M. No. 01-10-5-SC-PHILJA dated 16 October 2001.
126 Supreme Court Resolution in A.M. No. 04-1-12-SC dated 20 January 2004.
128 Civil Code, Article 2037.
129 ADR Act, Chapter 2 (Mediation), Section 9.
130 Ibid., at Section 9(c). Note, however, exceptions to the confidentiality rule are found in Section 11 of the ADR Act.
131 Id., at Section 17.
132 Id., at Section 6 provides: The provisions of this Act shall not apply to the resolution or settlement of the following: (a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended, and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; and (h) those which by law cannot be compromised.
133 Id., at Section 18.
be vacated. Following the UNCITRAL Model Law, the grounds to vacate an international commercial award rendered in the Philippines are limited, but include the public policy exception.134 Although domestic awards may be vacated on more grounds, the same does not specifically include a public policy exception.135 This is significant, because awards in antitrust suits may impact the state policy against anticompetitive conduct.

To date, the Supreme Court has not had occasion to decide on arbitral awards relating to private damage suits involving competition issues.

XIV INDEMNIFICATION AND CONTRIBUTION

The Civil Code specifically provides that the responsibility of two or more joint tortfeasors is solidary.136 Thus, the injured party may proceed against any one or all of said tortfeasors simultaneously in seeking civil damages for unfair competition under Article 28 of the Civil Code. The Competition Act does not have an analogous provision.

Under the Rules of Court, third-party complaints and cross-claims against a co-defendant are allowed in civil actions. A cross-claim is any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein.137 Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.138 A third (fourth, etc.) party complaint is a claim that a defending party may, with leave of court, file against a person not a party to the action, calling the third (fourth, etc.) party defendant for a contribution, indemnity, subrogation or any other relief, in respect of his or her opponent’s claim.139

Per the Supreme Court, a defendant may implead a third-party defendant on an allegation of liability of the latter to the defendant for contribution, indemnity, subrogation or any other relief; on the ground of direct liability of the third-party defendant to the plaintiff; or on the ground of the liability of the third-party defendant to both the plaintiff and the defendant.140 In all cases, there must be a causal connection between the claim of the plaintiff in his or her complaint and a claim for contribution, indemnity or other relief of the defendant against the third-party defendant.141 Thus, the Supreme Court prescribed the following tests to determine the propriety of a third-party complaint:

a whether it arises out of the same transaction on which the plaintiff’s claim is based, or whether the third-party claim, although arising out of another or different contract or transaction, is connected with the plaintiff’s claim;

b whether the third-party defendant would be liable to the plaintiff or to the defendant for all or part of the plaintiff’s claim against the original defendant, although the third-party defendant’s liability arises out of another transaction; and

134 Id., at Section 19 in relation to UNCITRAL Model Law, Article 34(2)(b)(ii). See also ADR Act Implementing Rules and Regulations, Article 4.34(b)(ii)(bb).
135 Id., at Sections 32 and 41 in relation to Republic Act No. 876, Section 24.
136 Civil Code, Article 2194.
137 Rules of Court, Rule 6, Section 8.
138 Ibid.
139 Id., at Section 11.
141 Ibid.
c whether the third-party defendant may assert any defences that the third-party plaintiff has or may have to the plaintiff’s claim. 142

Where there is no connection between the third-party claim and the plaintiff’s claim (such as where the plaintiff’s claim is the defendant’s non-payment of rentals for equipment leased under a contract and the defendant’s third-party claim is the third-party defendant’s non-payment of its billings for construction work rendered using leased equipment), the third-party complaint may be dismissed. 143

XV FUTURE DEVELOPMENTS AND OUTLOOK

In view of the relatively recent enactment of the Competition Act, developments anticipated in the area of antitrust will be related to the effective and expeditious implementation thereof. In this regard it should be noted that, while the Competition Act took effect on 15 August 2015, the PCC was only formally organised on 1 February 2016, and the IRR only became effective in June 2016. Moreover, the PCC Rules of Procedure, which govern all proceedings before the PCC other than mergers and acquisitions, only became effective on 30 September 2017, and the PCC Merger Rules only on 8 December 2017. While these PCC administrative issuances provide much-needed procedural guidance, nonetheless, much remains to be done in terms of establishing standards and parameters for the proper implementation, interpretation and application of the statute, especially in terms of private enforcement.

The PCC currently appears to be actively engaged in reviewing mergers and acquisitions. Of the 42 PCC decisions published in 2018, 32 pertain to mergers and acquisitions, six to joint ventures, four to violations of compulsory notification requirements, and none to prohibited agreements, abuse of market power and other anticompetitive conduct. This trend is similar to 2017, when the PCC reviewed 46 mergers and acquisitions, 144 as well as 2016, when the PCC reviewed 66 mergers and acquisitions. 145 Significantly, the PCC issued Memorandum Circular No. 18-001 on 1 March 2018, increasing the threshold for compulsory notification of mergers and acquisitions from 1 billion Philippine pesos to 5 billion Philippine pesos in terms of the Philippine annual gross revenue or Philippine asset value of the parent company of either the acquiring or acquired entities, and transaction values of 2 billion Philippine pesos. It remains to be seen if this threshold increase will result in the PCC freeing up some of its resources and refocusing them to enforcement and advocacy activities.

The seeming emphasis on transactional review should not be equated with a lack of enforcement activities. While the PCC has not published any decision pertaining to prohibited agreements, abuse of market power and other anticompetitive conduct, it reported in its 2017 Annual Report that it has acted on 11 stakeholder complaints, four preliminary inquiries, two recommendations for motu proprio investigation, one full administrative investigation, and 45 queries and requests from the public. 146 In its 2016 Annual Report, it stated that it had acted on six complaints or queries, three preliminary inquiries, and

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142 Id.
143 Id.
one full administrative investigation. The significantly small number of enforcement cases might be due to with the transition period provided by the law, wherein the parties had two years from the law’s effectivity to renegotiate agreements or restructure their businesses to achieve compliance. While this transition period ended on 8 August 2017, the dearth of information on the PCC’s current enforcement activities renders it difficult to ascertain whether there have been any significant public or private enforcement activities at the level of the PCC. Nonetheless, the end of the transition period means that the PCC can now actively pursue its enforcement mandate, which, in turn, could open the doors to follow-on private enforcement in the near future.

In its enforcement strategy and prioritisation guidelines issued on 29 August 2018, the PCC declared that it shall prioritise potential anticompetitive practices for enforcement action based on considerations of:

- **public interest**;
- **resource allocation**;
- **likelihood of a successful outcome**; and
- **other reasonable grounds** to conduct enforcement action.

The PCC also identified priority sectors for 2018: manufacturing, rice, poultry and livestock, pharmaceuticals, land transportation, air transportation, rural finance, e-commerce, retail, telecommunications, bakery products, milk products and fertilisers. For 2019, the PCC’s priority sectors are:

- **the logistics supply chain**;
- **corn milling and trading**;
- **refined petroleum manufacturing and trading**;
- **sugar**; and
- **pesticides**.

It remains to be seen if there would be any public or private enforcement in these priority sectors soon.

In any event, the field of Philippine antitrust litigation, both private and public, is expected to experience exponential growth. The first case to be tried under the Competition Act is the much-publicised 69.1 billion Philippine peso joint acquisition of a telecommunications entity by the Philippines’ first and second-largest telecommunications entities. The case is now ripe for decision by the Philippine Supreme Court. While the issue in that case is largely procedural in nature (i.e., whether the PCC is correct in subjecting the joint acquisition to its review process notwithstanding that it was executed prior to the coming into effect of the IRR of the Competition Act), it is highly likely that the Supreme Court will make pronouncements as to the nature, extent and scope of the powers of the PCC. Following such pronouncements in a landmark case, the PCC may well be more active in exercising the full breadth of its regulatory functions, which in turn could spur private competition enforcement actions.

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148 Competition Act, Section 53.
150 Ibid., Paragraph 8 (a).
151 Id., Paragraph 8 (b).
Moreover, the much-publicised 2018 case of the acquisition by Grab Holdings, Inc and MyTaxi.PH Inc of Uber BV and Uber Systems, Inc in the Philippines (as well as in Southeast Asia) has brought to fore the potential of competition law and the power of the PCC to protect the interests of the consuming public. When reports of the acquisition surfaced, the consumers of the ride-hailing mobile applications invariably expressed concerns that the transaction would lead to monopolistic behaviour by Grab to the detriment of the consuming public. The PCC reacted by subjecting the transaction to *motu proprio* review.\(^{153}\) It also ordered interim measures, requiring Grab and Uber to maintain the independence of their business operations and other prevailing conditions *ex ante*, pending the review.\(^{154}\) When the parties implemented their transaction despite the PCC’s interim measures, the PCC imposed monetary penalties on Grab and Uber.\(^{155}\) Ultimately, the PCC issued a commitment decision, clearing the transaction but binding Grab and Uber to their voluntary undertakings of service quality and price conditions, among others.\(^{156}\) The significant public attention generated by this case has brought awareness of the remedies under competition law that are available to general consumers.

Further, non-governmental organisations (NGOs) have been active in the promotion of consumers’ rights and, in a case before the Supreme Court involving the increase in electricity distribution rates, NGOs have alleged collusion among the distributor and suppliers in the wholesale electricity spot market aimed at artificially increasing the spot prices to the disadvantage of consumers. Although tainted with procedural defects, the Supreme Court has taken cognisance of the case, and the DOJ-OFC was reported to have commenced an investigation into the collusion allegations. With the Competition Act as law, NGOs will likely initiate more suits for the protection of consumers, even before any PCC inquiry can be commenced. In addition, with the PCC being required to aggressively conduct a consumer information programme, consumers may become more aware of their rights and may, considering the litigious nature of the Filipino people, initiate complaints with the PCC.

Finally, it is also possible that court actions shall be filed to assail certain provisions of the Competition Act. These cases would provide an opportunity for the courts to interpret the meaning of the provisions of the law and thereby contribute to the body of knowledge of Philippine competition laws and policies.

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153 PCC Commission Resolution No. 08-2018 dated 3 April 2018.
Chapter 16

POLAND

Natalia Mikołajczyk and Wojciech Podlasin

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY


The Polish lawmakers decided to implement the Damages Directive in one comprehensive piece of legislation devoted specifically to antitrust litigation – the Act of 21 April 2017 on the private enforcement of competition law (Private Enforcement Act) – and amended the general civil law liability provisions concerning enforcement, as appropriate. Minor amendments were also introduced, among others, to the Act of 16 February 2007 on Competition and Consumer Protection (Competition Act) concerning the discovery of evidence. The new regime became effective on 27 June 2017.

The Private Enforcement Act systematised and introduced important changes to the Polish private antitrust enforcement regime, setting some new rules of evidence in the Polish civil court proceedings facilitating claims by parties harmed by competition law infringements. Notwithstanding, while these amendments came into force in mid-2017, we have not observed a visible increase in the amount of private antitrust litigation activity in Poland.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The key regulation enabling private antitrust enforcement in Poland is currently the Private Enforcement Act. Private antitrust enforcement is founded on the principle of the culpability of the infringer of the competition law. As such, there are three requirements for an infringer to be liable under the Act:

a culpability: that is, that a defendant’s behaviour infringing the competition law is illegal, unless the defendant is not at fault;

b harm incurred by the claimant; and

c the causal link between the defendant’s behaviour and that harm.

1 Natalia Mikołajczyk is an associate and Wojciech Podlasin is a senior associate at Linklaters C Wiśniewski i Wspólnicy.

2 Article 3 of the Private Enforcement Act.
Whether an infringer is at fault for an infringement of the competition law is determined on the basis of two premises: whether such behaviour is illegal (objective test) and whether the defendant was at fault (subjective test). Under the Private Enforcement Act, an infringement of competition law, which is understood as an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) or their Polish equivalents (i.e., Articles 6 and 9 of the Competition Act, respectively), fulfills the illegality requirement.\(^3\)

For liability to arise, a defendant must be liable for the infringement of the law, and the Private Enforcement Act introduces a statutory rebuttable presumption that the undertaking infringing the competition law is liable for that infringement.\(^4\) Consequently, it is the defendant who has to prove his or her non-liability. Further, Polish competition law provides for a statutory presumption that any infringement of the competition law causes harm,\(^5\) which includes both actual loss (*damnum emergens*) and lost revenue (*lucrum cessans*).\(^6\)  
To establish liability for an antitrust violation, there also must be a causal link\(^7\) between the infringement of the competition law and the harm incurred by the claimant. Under the applicable general provisions of Polish law, the infringer is therefore liable only for the ordinary consequences of its actions (objective test).

Cases concerning private antitrust litigation are heard before the district courts, regardless of the value of the claim.\(^8\)

The limitation period in cases of private antitrust enforcement is five years from the date the claimant became aware of the loss resulting from the competition law infringement, or should have become aware of it if it had exercised due diligence. The limitation period cannot, however, be extended to longer than 10 years from the date of the occurrence of the infringement.\(^9\) The limitation period starts running only if the competition law infringement ceases to exist or is suspended if proceedings regarding the case are launched by the President of the Office of Competition and Consumer Protection (OCCP), the European Commission or any national competition authority within the EU.\(^10\) That suspension is automatically lifted and the limitation period continues to run one year after the proceedings before the relevant authority are concluded.\(^11\) Unlike the Damages Directive,\(^12\) the Private Enforcement Act does not provide for a suspension of the limitation period while parties attempt to resolve a dispute amicably.

The Private Enforcement Act provides that an infringement of competition is deemed to be established by a final infringement decision of the OCCP or a final judgment rendered by a court as a result of an appeal of a decision of the OCCP.\(^13\) The finding of an infringement in a legally valid decision of the OCCP or judgment should be regarded as proven for the purposes of actions for damages related to that infringement filed in Polish courts. The court is bound by an infringement decision insofar as it covers the nature of the infringement and

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3 Article 2 Point 1 of the Private Enforcement Act.
4 Article 3 of the Private Enforcement Act.
5 Article 7 of the Private Enforcement Act.
6 Article 361 Paragraph 2 of the Civil Code.
7 Article 361 Paragraph 1 of the Civil Code.
8 Article 11 of the Private Enforcement Act.
9 Article 9 Paragraph 1 of the Private Enforcement Act.
10 Article 9 Paragraph 2 of the Private Enforcement Act.
11 Article 9 Paragraph 3 of the Private Enforcement Act.
12 Article 18(1) of the Damages Directive.
13 Article 30 of the Private Enforcement Act.
its material, personal, temporary and territorial scope, as determined by the OCCP in the exercise of its jurisdiction. Moreover, the court is only bound by final infringement decisions of the OCCP or final judgments rendered by a court as a result of an appeal of a decision of the OCCP. Therefore, the final infringement decision means a decision that finds the competition law infringement and that is not a subject to ordinary appeal remedies.

Furthermore, under Polish law the OCCP can present the court with an opinion on the case in question, particularly in matters concerning competition and consumer protection, when it is justified by the public interest. The OCCP’s opinion may relate to the factual circumstances of a court case or the legal assessment of those circumstances. The opinion cannot be considered as evidence in the case and is not binding on the court. Providing the court with an opinion does not make the OCCP a party or any other participant to the court proceedings.

The provisions of the Private Enforcement Act apply in their entirety only to competition law infringements that took place after 27 June 2017, that is after the Private Enforcement Act entered into force. However, procedural rules set out in the Private Enforcement Act apply to all civil proceedings concerning antitrust damages initiated after 27 June 2017, regardless of when the competition law infringement occurred, if it remains within the limitation period.

### III EXTRATERRITORIALITY

As a general rule, the application of the Competition Act extends to all actions where the anticompetitive effect took place on the territory of Poland. Thus, the Competition Act applies to both Polish and foreign entities. Moreover, the Competition Act applies each time that an agreement or a concerted practice has had an impact on competition in Poland irrespective of whether the conduct occurred in Poland or overseas (both in EU Member States and in third countries). The choice of substantive law in the private enforcement antitrust proceedings should follow the rules set out under the Rome II Regulation. According to Article 6(3) of Rome II, as a general rule, Polish law applies to all non-contractual obligations arising out of a restriction of competition that had effects in Poland.

As far as jurisdiction is concerned, in Polish private enforcement litigation, defendants may be domiciled in Poland, or domiciled outside of Poland if the infringement took place in Poland.

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14 Article 31d of the Competition Act.
15 Article 31d of the Competition Act.
16 Article 36 Paragraph 1 of the Private Enforcement Act.
17 Article 36 Paragraph 2 of the Private Enforcement Act.
18 Article 1 Paragraph 2 of the Competition Act.
21 Article 7(2) of the Brussels I bis.
IV STANDING

Any entity with legal capacity that has suffered loss, directly or indirectly (e.g., customers), from the competition law infringement can bring a claim against the infringer.

The Private Enforcement Act presumes that competition law infringements cause harm. Competition law is understood as Articles 101 or 102 TFEU or their Polish equivalents (i.e., Articles 6 and 9 of the Competition Act). Therefore, the scope of this statutory presumption applies to cartels as well as prohibited vertical agreements and instances of abuse of a dominant position. Consequently, the application of the Private Enforcement Act in Poland is wider than the Damages Directive, which mandatory application is limited to cartel infringements.

V THE PROCESS OF DISCOVERY

The general rule in Polish civil court proceedings is that the burden of proof relating to a fact shall rest on the person who attributes the legal effects to that fact,22 except in the case of rebuttable presumptions (e.g., in cases of contractual liability), where the reversed burden of proof is on the defendant.

There are no limitations on the form or kinds of evidence that can be presented, but the court can exclude evidence submitted only for the purposes of delaying the proceedings. The non-exhaustive list of forms of evidence in civil proceedings includes documents (official and private), witness statements, expert opinions, inspections and hearings.

The Private Enforcement Act introduces an entirely new, simplified procedure for obtaining evidence in antitrust civil litigation, including the claimant’s right to file a request for disclosure of evidence.

Where the claimant has presented a request for the disclosure of evidence with a reasoned justification of the plausibility of its damages claim and undertook to use the obtained evidence solely for the purposes of pending antitrust proceedings, the court may order the defendant to produce the relevant documents in its possession and custody.23 Failure by the defendant to produce documents may result in the claimant’s full reimbursement of the costs of the proceedings (regardless of the outcome of the case), or the court’s discretion to draw adverse inferences, or both. The defendant is also entitled to file a request for evidence subject to the same requirements and limitations.

Under the Private Enforcement Act, the court may also order disclosure of evidence by a third party, including the competition authority. The competition authority is under an obligation to disclose such evidence only if obtaining the relevant information in any other way is practically impossible or excessively difficult.24 The provision does not, however, provide the court with discretion to order disclosure of leniency statements and settlement submissions made by the infringer. The Act exempts such documents from disclosure as privileged at least until the antitrust proceedings before the relevant competition authority are concluded.

The decision of a court on disclosure of evidence can be appealed to the second instance court and legally binding decision ordering disclosure of evidence constitutes an enforcement

22 Article 6 of the Civil Code.
23 Article 17 of the Private Enforcement Act.
24 Article 17 Paragraph 2 of the Private Enforcement Act.
order. Misuse of disclosed evidence will result in the court disregarding that evidence and a party requesting the disclosure of evidence in bad faith may be subjected by the court to a non-discretionary fine of up to 20,000 zlotys.

VI USE OF EXPERTS

There are no specific provisions governing the use of experts in private antitrust enforcement proceedings, and the general rules of the Civil Procedure Code\(^\text{25}\) apply accordingly.

In matters requiring specific expertise, the court may appoint experts (one or more, as it finds appropriate) from the official list of court expert witnesses, or request an expert report from a scientific or specialised institution.\(^\text{26}\) The assessment of expert evidence is left for the court and the only statutory requirement for an expert opinion is for it to have a justification.\(^\text{27}\) The court may appoint an expert witness at its own discretion or at a party’s request, however in the latter case the decision ultimately rests with the court. In any case, expert witnesses must remain impartial.

Since Polish law does not recognise party-appointed expert witnesses in civil court proceedings, the evidentiary value of opinions prepared by such experts is limited – that is, that of a party position or a private document – and is subject to procedural rules applicable to any other evidence.\(^\text{28}\) Such opinion will not have the evidentiary value of an opinion issued by an expert witness appointed by the court.

Although the Private Enforcement Act introduces rebuttable legal presumptions specific to private antitrust enforcement, such as the presumption of harm, the use of experts remains key for proving other factors relevant to the claim, such as the amount of damage.

VII CLASS ACTIONS

In Poland, there is no specific class action procedure related to competition law infringements. However, the harmed parties may rely on the class action provisions in the Group Proceedings Act.\(^\text{29}\)

Under the Group Proceedings Act, class action suits may be brought in cases where at least 10 persons pursue the same type of claims based on the exact same or alike factual background.\(^\text{30}\) The closed list of categories of cases permitted under the Group Proceedings Act includes, among other torts (e.g., competition law infringements), liability suits for non-performance or improper performance of contracts, unjust enrichment and consumer protection claims. Class action suits can also be brought by groups of entrepreneurs or groups of entrepreneurs together with other entities. In the proceedings, the group is represented by a sole representative who acts in his or her own name on behalf of the group and must be approved by all group members.\(^\text{31}\)

\(^{26}\) Article 278 Paragraph 1 of the Civil Procedure Code.
\(^{27}\) Article 285 of the Civil Procedure Code.
\(^{28}\) Article 2431 – 257 of the Civil Procedure Code.
\(^{30}\) Article 1 Paragraph 1 of the Group Proceedings Act.
In addition, the Private Enforcement Act introduces two instances where non-governmental organisations (NGOs) can bring actions on behalf of claimants, subject to their written consent. NGOs can represent entrepreneurs or consumers, respectively, as long as their statutory tasks include market protection against practices that violate competition law or consumer protection. Both instances require the claimant’s written consent.

Although currently class actions in Poland are subject to lower court fees and allow for the court to award attorneys’ contingency fees of up to 20 per cent, not many such suits for competition law infringements have been initiated so far. This may be partially due to group proceedings taking considerably longer than typical civil court cases and the court’s discretion to order security for costs, if warranted.

VIII CALCULATING DAMAGES

The Private Enforcement Act establishes a rebuttable presumption that any competition law infringement (domestic or EU) results in harm. Thus, to seek damages in private enforcement, in principle, the injured party will only have to prove the extent of the harm incurred.

The key element for each damages claim is the quantification of loss (both the actual loss and lost profits) resulting from the competition law infringement. The Private Enforcement Act does not provide a specific quantification method in this regard. Rather, it refers the court to the recommendations set out in the relevant Commission guidelines.

However, those guidelines are in no way binding on the Polish court. In its damages calculation, the court must only follow the mandatory provisions of Polish civil law (i.e., award the appropriate monetary damages based on the court’s assessment and consideration of all the circumstances of the case). Under the general provisions of Polish civil law, the damages awarded are designed to restore the claimant to the position in which it would have been had the breach (e.g., the competition law infringement) not been committed. Thus, the court cannot award damages exceeding the amount of loss actually incurred by the claimant, and punitive or exemplary damages are not available under Polish law.

Notwithstanding, under the Private Enforcement Act, the court can request assistance in the calculation of damages from the OCCP or a competition authority from another Member State. None of these organs, however, are legally bound to assist; nor is the court bound by their recommendation.

In addition, the Private Enforcement Act establishes a mechanism for corrections of interest in cases where compensation is determined based on a price from a date different than the date on which the compensation was fixed. In such cases, the aggrieved party is entitled to claim additional statutory interest for the period from the date used for the determination of the price until the date on which the claim becomes due and payable.

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32 Article 14 of the Private Enforcement Act.
33 Article 7 of the Private Enforcement Act.
34 Article 31 Paragraph 2 referencing the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/08).
35 See Article 361 Paragraphs 1 and 2 of the Civil Code; Article 362 Paragraphs 1 and 2 of the Civil Code; and Article 322 of the Civil Procedure Code.
36 Article 31 Paragraph 2 of the Private Enforcement Act.
37 Article 8 of the Private Enforcement Act.
Finally, under the Private Enforcement Act the court is bound by orders and decisions of competition authorities confirming infringements of competition law regarding each specific case, which cannot be overruled in the compensation proceedings.

With regard to attorneys’ fees, retainer costs can be reimbursed according to payment rates specified in separate regulations, but awarded costs cannot exceed these rates. Awarding a retainer contingency fee of up to 20 per cent is permitted in class actions.

IX PASS-ON DEFENCES

The Private Enforcement Act contains a statutory pass-on presumption, according to which any competition law infringement resulting in an overcharge for a direct purchaser is presumed to be passed on to the indirect purchaser who bought the products. However, the pass-on presumption can be claimed and used only by the indirect purchaser seeking compensation from the antitrust infringer. The presumption is rebuttable, and the infringer has the right to contest it. To benefit from this presumption the initial competition law infringement must be proven, for instance by a decision of a competition authority (i.e., the OCCP, the European Commission or a competition authority of the EU Member State) or by a court’s judgment.

The pass-on presumption cannot be used by the infringer to defend him or herself from the compensation claims. The infringer, when raising such a defence charge, must always prove that the overcharge was passed on by the direct purchaser and therefore he or she should be awarded limited damages or no damages.

X FOLLOW-ON LITIGATION

A private enforcement claim can be brought in civil proceedings on a follow-on basis in respect of any type of practice that might be deemed anticompetitive under Polish or EU competition law. The Private Enforcement Act provides that an infringement of competition is deemed to be established by a final infringement decision of the OCCP or a final judgment rendered by a court as a result of an appeal of a decision of the OCCP. The Act does not provide any limitation on private actions or awards against parties who have been subject to public enforcement actions.

XI PRIVILEGES

The Private Enforcement Act does not explicitly mention all the circumstances establishing the privilege, that is, the obligation not to disclose information during the course of private antitrust enforcement proceedings. Nevertheless, the provisions of other legislative acts regarding confidentiality of information apply.

Polish courts must respect the confidentiality of communications between an attorney admitted to the bar and his or her client. Consequently, the content of correspondence

38 Article 4 Paragraph 1 of the Private Enforcement Act.
39 Article 4 Paragraph 2 of the Private Enforcement Act.
40 Article 4 Paragraph 2 of the Private Enforcement Act.
41 Article 30 of the Private Enforcement Act.
42 Article 261 Paragraph 2 of the Civil Procedure Code.
between a client and an attorney and the content of legal advice are privileged. Requests for disclosure of such evidence during a private antitrust litigation should be rejected by the court. The same principle applies to other kinds of information considered as confidential under Polish law, such as classified information, medical secrets, banking secrets or information falling within the scope of press privilege.

The Private Enforcement Act provides that the court shall refuse requests for the disclosure of evidence when it does not meet the proportionality requirement. When deciding whether the disclosure would be proportional, the court must consider the extent to which the evidence relates to information constituting a business secret or other secret subject to legal protection under separate regulations, and the means available to protect such information. At a party’s request, the court can allow such evidence and at the same time restrict access to it during the proceedings.

In addition, the Private Enforcement Act provides that in private antitrust enforcement proceedings, the Polish courts cannot order a party or a third party to disclose leniency statements and settlement submissions, including settlement proposals.

**XII SETTLEMENT PROCEDURES**

Settlement procedures applicable to private antitrust enforcement are governed by the general rules of Polish civil procedure and parties to a damage claim in relation to a competition law infringement can settle the case. In cases where an amicable settlement is admissible, the court should strive to reach an amicable settlement at any stage of the proceedings, in particular by encouraging the parties to use mediation. If a court settlement is reached, it must be signed by the parties and reflected in the court record.

Additionally, the Private Enforcement Act states that an injured party that has settled with one of the co-infringers can only claim from the other co-infringers an amount of damages reduced by the amount that the settling co-infringer would have been liable for if not for the settlement. Under the general Polish law provisions, the amount of the antitrust settlement does not have to be revealed. Rather than being based on the actual amount settled, the reduction is based on the co-infringer’s share of damages taking into account all circumstances of the case, including the fault of the settling co-infringer and the extent of the co-infringer’s contribution to the damage that occurred.

The indirect consequence of the rule set out in Article 6 of the Private Enforcement Act is also that the settling co-infringer is no longer jointly liable with the remaining co-infringers and cannot be subject to any recourse claims from them. Therefore, it is in the jointly liable infringer’s interest to have the settlement reflected in the claimant’s statement of claim or put on the record during the court proceedings.

Finally, the settling co-infringer is not released from joint and several liability for the entire damage that has occurred in cases where the claimant cannot recover the damages from the other non-settling co-infringers. The inability to recover from other co-infringers must

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43 Article 21 Paragraph 2 of the Private Enforcement Act.
44 Article 21 Paragraph 2 Point 4 of the Private Enforcement Act.
45 Article 23 of the Private Enforcement Act.
46 Article 18 Paragraph 1 of the Private Enforcement Act.
47 Article 6 of the Private Enforcement Act.
48 Article 441 Paragraph 1 of the Civil Procedure Code.
meet an objective test, that is, that objective circumstances exist that foreclose the claimant’s ability to effectively and fully recover damages in their entirety (e.g., due to bankruptcy). In such cases, the claimant is entitled to recover the damages also from the infringer from which it previously obtained a settlement and such a co-infringer retains the recourse rights against the others.

XIII ARBITRATION

Under Polish law, proprietary claims are admissible in arbitration and so parties can agree to submit a dispute involving infringements of competition law to the arbitration courts, provided that such disputes arise from contractual relations. The most recognised arbitral institutions in Poland are the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Court of Arbitration at the Polish Confederation Lewiatan.

In the past few years, very few cases concerning breaches of competition law (e.g., in conjunction with intellectual property law) have been heard by arbitral tribunals. Due to the confidential nature of the proceedings, no detailed information about those cases is publicly available.

XIV INDEMNIFICATION AND CONTRIBUTION

In Poland, undertakings that have infringed the competition law through joint behaviour are jointly and severally liable for the harm caused by that infringement and the claimant is thus entitled to seek full compensation from any of the co-infringers.

The Private Enforcement Act introduces two exceptions to this rule: small or medium-sized enterprises (SMEs) and infringers granted immunity under a leniency programme.

An SME will only be liable to its own direct and indirect purchasers and providers if:

- its market share in the relevant market was below 5 per cent at any time during the infringement;
- the application of the normal rules of joint and several liability would irretrievably jeopardise its liquidity or cause loss of value of its assets;
- the SME has not led the infringement;
- the SME has not coerced other undertakings to participate therein; and
- the SME has not previously been found to have infringed the competition law.

An undertaking that has been granted immunity under a leniency programme is jointly and severally liable only to its direct or indirect purchasers or providers, or if full compensation cannot be obtained from the other co-infringers.

Where an injured party contributed to the occurrence or increased the extent of the damage, the court has the right, but not the duty, to reduce the amount of damages. The court may award full damages even in the event of contributory negligence.

49 Article 362 of the Civil Code.
XV FUTURE DEVELOPMENTS AND OUTLOOK

The Private Enforcement Act introduces a number of solutions that should facilitate seeking compensation from competition law infringers through private enforcement. Yet despite the Act being in force since mid-2017, such cases remain relatively rare in Poland.

Many suggest that this is due to the limited awareness of potential claimants of the availability of private enforcement actions, the relatively expensive and lengthy litigation, and the lack of the required expertise in Polish civil courts. Private enforcement enthusiasts believe that new discovery rules, the availability of class actions and the simplified procedures introduced under the Private Enforcement Act will increase the popularity of such cases in the coming years.

Certainly, with those procedures applicable to all kinds of competition law infringements (cartels, but also vertical agreements and abuse of dominant position) and competition authority’s decisions being binding on the Polish courts, it may be the OCCP’s active role in the pursuit of competition law infringements that determine the future caseload of antitrust disputes.

It will also be interesting to see whether injured parties will look in a more favourable manner at arbitration as a forum to seek compensation for competition law infringement. The more lenient procedural rules governing the arbitration proceedings and the arbitrator’s greater discretion in awarding damages and representation fees may compensate the likely higher cost of such a solution.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private enforcement has been a reality in Portugal for some time, with a sound number of precedents, and is gaining in significance. Two major proceedings of note involve follow-on cases.\(^1\)

The first case relates to a Portuguese Competition Authority (PCA) 2009 decision establishing that Portugal Telecom (PT) had abused its dominant position in the wholesale and retail broadband access markets through a margin squeeze and a discriminatory rebate policy. Following that decision, NOS (PT’s major competitor) launched a damages action with the Lisbon Judicial Court in 2011.\(^2\) In November 2016, the Court handed down its ruling, dismissing the case on the grounds that NOS had not sufficiently established the infringement. Nevertheless, this is a novel case in the Portuguese private enforcement landscape due to the infringement involved – margin squeeze – and also due to the Court’s extensive reasoning and proximity to the jurisprudence of the Court of Justice of the European Union (CJEU).

The second case is still pending before the Portuguese courts. It involves Sport TV, a Portuguese sports-oriented premium cable and satellite television network operating in the market for premium pay-TV sports channels, which was found by the PCA to have abused its dominant position for several years by imposing discriminatory conditions on operators, and concurrently having limited development and investment in the market. Following the decision, three separate damages actions were filed with the court, one of which is a class action, representing the first of its kind in competition matters in Portugal.\(^3\) The Portuguese court deciding on one of those damages actions has submitted a referral for a preliminary ruling to the CJEU.

\(^1\) Gonçalo Anastácio and Catarina Anastácio are partners at SRS Advogados. The authors would like to thank Rita Lynce de Faria, professor of civil procedure at Universidade Católica and of counsel at SRS Advogados, for her comments on this chapter, and Luís Seifert Guincho, from the competition law department of SRS Advogados, for his research support.

\(^2\) Both PCA decisions were also appealed. The first was annulled by the Court because the administrative sanction had become time-barred; the second was upheld by the Court, although the fine was reduced.

\(^3\) Around the same time NOS filed its action, Onitelecom also sued PT for damages. However, the case was first dismissed by the Lisbon Judicial Court on the grounds that the statute of limitations had expired. The Court applied the three-year statute of limitations foreseen in Portuguese tort law, and considered that the deadline started running from the day the plaintiff filed its complaint before the PCA. The Lisbon Appeal Court confirmed the initial ruling.

\(^4\) This is, in fact, the second class action in Portugal where competition law issues have been raised. However, in the first case, *DECO v. Portugal Telecom*, competition law issues were not discussed because the case was
With Sport TV’s actions pending, there are no clear-cut awards of damages on the grounds of competition law infringements to date. Nevertheless, there are already many general private enforcement precedents (even if competition law is typically only one of the legal angles in question), and the number of these is constantly increasing. In most cases, the competition rules were brought into the litigation sphere as a means of defence, most of the precedents having a vertical restraints nature, and often the validity of agreements or of particular clauses thereof is the leitmotif to call upon competition law.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Directive 104/2014 (Directive) was transposed into the Portuguese legal system by Law No. 23/2018 of 5 June, which came into force two months later. In addition to Law No. 23/2018, the legislative framework for private antitrust enforcement in Portugal includes, besides the substantive rules on competition (laid down in the Portuguese Competition Law (PCL)), the general rules on civil liability provided for in the Civil Code (CC) (regarding substantial issues not covered by Law No. 23/2018) and the procedural rules of the Code of Civil Procedure (CCP).

Despite following the Directive very closely, Law No. 23/2018 goes beyond it in certain aspects and contains some innovative solutions.

First, Law No. 23/2018’s scope is broader than the Directive’s in two aspects: a it applies not only to damages actions, but also to other requests based on infringements of the competition law (thus including, inter alia, declarations of nullity of agreements or contractual clauses, actions aimed at obtaining a judicial declaration or an injunction, and actions on unjust enrichment); and b it applies not only to damages actions for infringements of EU competition law (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)), with or without parallel application of equivalent national rules (in Portugal, Articles 9 and 11 PCL), but also to damages actions exclusively based on infringements of the Portuguese competition law or of equivalent provisions of other Member States. In Portugal, this includes damages actions for abuse of economic dependence (Article 12 PCA).
An important substantive aspect that Law No. 23/2018 has innovated regards the scope of liability for damages. It states that in addition to the undertaking that committed the infringement, whoever has exercised a dominant influence over the infringer during the infringement shall also be liable.\textsuperscript{13} In addition, there is a presumption of dominant influence by the parent company if it holds 90 per cent or more of the subsidiary’s share capital.\textsuperscript{14}

Another aspect in which Law No. 23/2018 goes beyond what is prescribed by the Directive concerns the effect of national decisions.\textsuperscript{15} In addition to giving the effect of an irrefutable presumption of the existence of an infringement to the final decisions of the PCA and of Portuguese courts, Law No. 23/2018 also gives the effect of a refutable presumption to the final decisions of competition authorities and courts of other Member States.\textsuperscript{16}

Regarding jurisdiction, Law No. 23/2018 introduced a major novelty within the Portuguese legal system. Before its entry into force, the competence to decide on private competition actions lay with the judicial courts, as there was no specialised court for such matters.

This has changed, as Law No. 23/2018 attributes the competence for hearing claims arising from competition infringements to the specialised Competition, Regulation and Supervision Court (CRSC), whose jurisdiction in competition law matters had been limited to public enforcement (as a first instance court of appeal from PCA decisions\textsuperscript{17}). It is important to note that this competency only exists regarding actions arising purely from competition law infringements.\textsuperscript{18} It is also established that appeals from decisions of the CRSC in private enforcement cases shall be centralised in the same civil section of the Lisbon Appeal Court and of the Supreme Court.\textsuperscript{19}

\section*{III \ EXTRAORDINARY ACTIVITY}

The PCL applies to all anticompetitive practices that take place on Portuguese territory or that have, or may have, an anticompetitive effect in Portugal.\textsuperscript{20}

The applicability of Portuguese law in cases of private enforcement concerning non-contractual obligations is regulated by the Rome II Regulation,\textsuperscript{21} and concerning contractual obligations by the Rome I Regulation.\textsuperscript{22}

Regarding damages actions, pursuant to the CC,\textsuperscript{23} the law applicable to extracontractual civil liability is the law of the state where the main cause of the damage occurred. If the law of the state where the harm occurred considers the defendant liable, while the law of the state in which the activity took place does not, the former will apply, on the condition that the defendant could have foreseen that the act or omission could result in damage in that state.
Contractual liability cases are, according to the CC,\(^\text{24}\) ruled by the law agreed on by the parties, provided that such law corresponds to a real interest of the parties or is connected with some elements of the contract. Where the parties have not agreed upon a specific law, the applicable law will be the one of the state of their common residence or the law of the state where the contract was signed.

Regarding the territorial jurisdiction of national courts, Brussels I\(^\text{25}\) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Lugano Convention\(^\text{26}\) are applicable in Portugal.

If such regulations do not apply, Articles 59 to 62 of the CCP give authority to the Portuguese courts in international matters on the following grounds: the possibility of bringing the action in Portugal according to the Portuguese rules on territorial jurisdiction;\(^\text{27}\) the fact that the main ground of the action, or any of the facts substantiating it, occurred in Portugal; and the fact that the right claimed cannot be effectively enforced in courts other than the Portuguese courts, provided there is a relevant link, of an objective or subjective nature, with the Portuguese legal order. The parties are able to agree on the competence of the courts of a given state provided the question to be decided is linked to more than one jurisdiction.\(^\text{28}\)

### IV STANDING

There are no special rules in relation to the standing requirement to bring competition law actions. According to the general rules on liability,\(^\text{29}\) any legal entity or natural person who suffered harm within the Portuguese territory as a result of an unlawful act (an infringement of competition law, for the purposes of this chapter) has the right to be compensated for the harm suffered.\(^\text{30}\)

Whether the plaintiff has a direct contractual relationship with the infringing party is not relevant for standing purposes. Thus, even an indirect purchaser may have standing, provided he or she claims to have suffered harm as a result of an infringement of competition law. In this regard, no changes have been introduced by Law No. 23/2018.

That is not true, however, as regards collective redress, as Law No. 23/2018\(^\text{31}\) grants standing to associations of undertakings whose members have been harmed by a competition infringement when filing popular actions (which is not foreseen in the popular action legislation).

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24 Articles 41 and 42 of the CC.
27 Territorial jurisdiction is regulated in Articles 70 to 84 of the CCP.
28 Articles 59 and 94 of the CCP.
29 Article 483 of the CC.
30 Articles 11 and 30 of the CCP.
31 Article 19(2-a) of Law No. 23/2018.
V THE PROCESS OF DISCOVERY

Under the general civil procedure in Portugal, there is no discovery procedure as it is understood in common law systems. The courts have discretionary power to request the disclosure of information that they may consider important to the final decision of a given case from any of the parties or third persons.

In competition cases, access to the PCA’s files is regulated by Articles 32 and 33 of the PCL, according to which private parties may claim access to the PCA’s file so long as the file is not protected by judicial secrecy.

As regards private enforcement, Law No. 23/2018 is in line with the Directive, but it has gone beyond it in two aspects: the right of access is extended to pretrial situations in order to assess the existence of a cause of action or to prepare actions (which is an exceptional solution in the Portuguese legal system); and it has been clarified that urgent conservatory measures may be ordered by the court when deemed necessary to prevent the destruction of evidence.

If the proceedings are covered by judicial secrecy, the parties involved may only have access to the file after the notification of the statement of objections by the PCA. Third parties shall only have access to the file after the final decision has been issued.

VI USE OF EXPERTS

Under Portuguese law, parties may, unless otherwise provided, use any means to prove their allegations. The judge must take into account all the evidence presented by the parties, and may freely make or order the production of any kind of evidence deemed necessary for the truth to be reached. A defence hearing with the party to whom it is opposed is required. Expert evidence is admissible. It can either be requested by the parties or ordered ex officio by the court. Most commonly, a panel of experts is appointed, with the court appointing one expert and each of the parties appointing another expert each. The probative value of the expert evidence is left to the appreciation of the judge.

Despite the lack of experience in Portugal concerning the use of experts in the context of an action for damage arising from a competition infringement, it is expected that in the future, such expertise will mostly be requested on economic issues (as an action for damages frequently requires a complex economic analysis), namely for the quantification of damages.

VII CLASS ACTIONS

The form of class action available for damages claims is the ‘popular action’ established in Article 52 of the Constitution of the Portuguese Republic and regulated by Law No. 83/95 of 31 August, amended by Decree Law 214-G/2015 of 2 October. According to that Law, citizens (companies and professionals being excluded) or associations or foundations
promoting certain general interests (including the promotion and respect of competition) have the right to file a popular action to protect those interests. The claiming party will have the right to obtain redress for harm suffered in violation of the general interest concerned.

The system provided for in the above-mentioned Law may be considered to be an opt-out system. Holders of the interests covered by the popular action that do not intervene in the action are notified through a press announcement, and shall decide whether they accept representation in that action.

Law No. 23/2018 expressly refers to the popular action and provides for several new specific rules not contemplated in the popular action law, namely in respect of standing (it grants standing to associations of undertakings), identification of the harmed parties, quantification of damages, and management and payment of compensation.39

This type of action continues to be very rare, but in March 2015, a landmark follow-on class action for damages was filed by the Observatório da Concorrência, an association that represents consumers in class actions related to competition infringements, in civil court, based on a June 2013 PCA decision. In this decision, the PCA imposed a fine of €3.7 million on Sport TV, having found that it had abused its dominant position in the market for premium pay-TV sports channels for a period of at least six years by imposing discriminatory conditions on operators and limiting development and investment in the market.

This much-anticipated case represents an important step forward in private enforcement in Portugal, as it is one of the first private competition cases, and the first class action in which damages for an infringement of competition law are being claimed. It is, however, still pending, following a decision by the court that Observatório da Concorrência has no standing to file the action being challenged.

VIII CALCULATING DAMAGES

Law No. 23/2018 does not make any significant changes as regards the calculation of damages, as Portuguese law already complies with the main features of the Directive in this matter.

Damages awarded are purely compensatory, as punitive damages are not commonly available, although doctrine and jurisprudence have accepted punitive damages that have been contractually provided for. The amount of the compensation to be awarded shall correspond to the difference between the current patrimonial situation of the injured party and the patrimonial situation of such party if the damage had not occurred. Monetary compensation includes the amount of the damage caused by the illicit conduct plus interest.

Compensation covers the harm actually suffered by the injured party (actual loss, *damnum emergens*) and the loss of profit or the advantages that, as a result of the illicit act, will not enter the patrimony of the injured party (loss of profits, *lucrum cessans*).

The loss of a chance can also be indemnified, in particular if expenses were undertaken in light thereof. The indemnity also allows for the compensation of moral harm suffered by an individual only, and future harm suffered that the judge may foresee.

Despite the rules regarding the calculation of damages provided for in the CC, the judge has a significant amount of discretion. Considering the complexity of quantifying antitrust harm, assessing the exact amount of the damages may be impossible or extremely difficult in a given case. In that event, the judge may decide in accordance with equity, within the limits of the evidence produced.

39 Article 19 of Law No. 23/2018.
However, Law No. 23/2018 changed the legal landscape in respect of these cases by providing that the court may resort to the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, and, as per the Directive, that the PCA may assist the court in calculating the damages.

If the injured party has contributed to the occurrence of the injury, the court may decide, considering the seriousness of both parties’ conduct and the consequences thereof, that the amount of the compensation shall be reduced or even totally excluded.

Contingency fees are not allowed, as the by-laws of the Bar Association do not consent to fees exclusively dependent on the result (palmarium) or to fees consisting of a percentage of the result (quota litis). Fees should be calculated based on several factors related to the service provided, such as the importance and complexity of the cause, the urgency of the matter, the time spent and, to a certain extent, the results obtained.

IX PASS-ON DEFENCES

In line with the Directive, Law No. 23/2018 expressly states that the defendant may argue that the harm allegedly suffered by the plaintiff has been passed on to the claimant. Law No. 23/2018 also provides that the court deciding on a private enforcement claim shall take into account proceedings initiated by parties at different levels of the production or distribution chain. Additionally, it includes three examples of factors to be considered by the court: (1) damages claims referring to the same infringement filed by the plaintiffs at different levels of the production chain; (2) public information regarding the enforcement of competition law by public entities; and (3) judicial decisions rendered in respect of the damages actions foreseen in (1) and (2).

X FOLLOW-ON LITIGATION

Judicial and administrative proceedings before the PCA are completely independent from each other, according to the constitutional principle of the separation of powers. In this regard, it is relevant to note that a large majority of the Portuguese private enforcement precedents (not typically claims for damages) are either stand-alone actions or hybrid actions partially related to the subject matter of a PCA decision but wider in scope.

Therefore, the existence of a decision from the PCA establishing an infringement of competition law is not required for a private enforcement action to be initiated. The judicial court decides upon an action for damages arising from an infringement of the competition rules irrespective of any previous decision already issued by the PCA on the same matter and relating to any other pending proceedings.

Before the entry into force of Law No. 23/2018, there were no rules regulating the way in which proceedings before the PCA and judicial actions for damages related to the same infringement of competition rules should be coordinated. This has now changed: Law No.

40 Article 9(2) of Law No. 23/2018.
41 Article 9(3) of Law No. 23/2018.
42 Law No. 15/2005, of 26 January.
43 Article 101 of the by-laws of the Portuguese Bar Association.
44 Article 8(1) of Law No. 23/2018.
45 Article 12 of Directive 104/2014 and Article 10(1) of Law No. 23/2018.
23/2018, in line with the Directive, foresees that a final condemnatory decision issued by it or by a Portuguese appeal court shall be deemed an irrefutable presumption of the existence of the infringement. In addition, Law No. 23/2018, going beyond the Directive, states that a final condemnatory decision issued by a foreign competition authority or appeal court shall be deemed as a refutable presumption of the existence of the infringement (whereas the Directive merely requires that such decisions be considered as prima facie evidence).46

The judicial limitation period is different from the administrative limitation period, i.e., for the PCA to initiate proceedings (the limitation period for non-contractual liability is three years after the injured party becomes aware of his or her right to claim damages, while the limitation period for the PCA to initiate proceedings for antitrust infringements is five years47), which could make it more difficult in practice for the plaintiff to usefully conciliate both proceedings. That problem has now been solved with the transposition of the Directive: Law No. 23/2018 provides for rules on the beginning, duration (five years, as per the Directive, and not three, as in general cases), suspension or interruption of limitation periods to allow for conciliation between judicial and administrative proceedings.48

Under the Directive and Law No. 23/2018 (Article 6(4)), the judge may now suspend the procedure until a decision is reached by the PCA, stopping the clock for statute of limitations purposes.

XI PRIVILEGES

Attorney legal privilege is protected before judicial courts and administrative authorities (including the PCA) by the Portuguese Bar Association by-laws, and both external and in-house counsel are protected as long as they are validly registered with the Portuguese Bar Association.

Some questions will arise when plaintiffs to an action for damages intend to access the PCA’s files to obtain documents deemed necessary to sustain their action. Despite the principle of publicity, access may be denied by the PCA either in relation to certain categories of documents or to the entire file.

The PCA may declare some documents confidential on the grounds of its obligation to protect business secrets49 or otherwise confidential information, including professional secrets50 (attorneys, medical doctors, bank secrecy, etc.).

Documents submitted within the scope of a leniency application are also protected during the administrative proceedings.51 The PCA shall declare a request for immunity or for a reduction of the fine as well as all the documents and information presented by the leniency applicant as confidential. Access to those documents and information is granted to

46 Articles 7(1) and (2) of Law No. 23/2018(Article 9 of Directive 104/2014).
47 Article 74 of the PCL.
48 Article 6 of Law No. 23/2018.
49 Article 195 of the Criminal Code.
50 Article 195 of the Criminal Code and Article 87 of the Bar Association by-laws.
51 Article 81 of the PCL. Here the Pfleiderer doctrine will surely be very relevant. For a Portuguese language review and comment on the 2011 Pfleiderer ruling by the European Court of Justice, see Catarina Anastácio in C&R – Revista de Concorrência e Regulação, No. 10, April–June 2012, pp. 291–314.
the co-infringers for right of defence purposes, but they will not be allowed to obtain copies thereof unless duly authorised by the leniency applicant. Access by third parties to these documents will only be granted when authorised by the leniency applicant.

Before the transposition of the Directive, Portuguese law protected not only leniency documents (as is binding under the Directive) but also pre-existing documents. In this context, Law No. 23/2018 foresees that, for damages action purposes, only leniency documents are protected; for all purposes other than damages actions, pre-existing documents continue to be protected under Portuguese competition law. Therefore, a practical consequence of the Directive in Portugal is that, for the purpose of damages actions, pre-existing documents are not to be protected anymore.

As regards joint and several liability, the rule is set out in the CC for infringements in which multiple companies take part, and therefore the rule provided in Article 11(1) of the Directive already exists. The same, however, is not true for the two exceptions provided for in Article 11(2) and 11(4) of the Directive. In this respect, Law No. 23/2018 2018 has followed the text of the Directive, which is rather challenging for the Portuguese legal system as these exceptions may create conflicts with classic rules and principles of extracontractual liability.

No protection exists in relation to documents issued in a proceeding before the PCA that has ended in a settlement decision.52

Note that the entire file may have been declared to be under judicial secrecy by the PCA.53 In that case, third parties (namely plaintiffs in an action for damages) may only be allowed to access the file after a final decision has been issued.54

XII SETTLEMENT PROCEDURES

Unlike public enforcement by the PCA,55 there is no specific judicial settlement procedure available within the scope of a damages action.

According to the CCP, parties can reach a settlement both before and during a court proceeding56 provided that no non-disposable rights are involved.57 The settlement may be reached by agreement of the parties or through conciliation (which can take place at any stage of the proceedings further to the parties’ joint requirement or when the court finds it appropriate).58

Any settlement between the parties during a court proceeding must be subject to confirmation by the court to have the value of a judicial ruling.

52 Outside the leniency regime, protection for documents follows the general rule, as established in Articles 30, 32 and 33 of the PCL.
53 Article 32(1) of the PCL.
54 Article 32(2) of the PCL.
55 See Articles 22 and 27 of the PCL and respective commentaries by Gonçalo Anastácio and Marta Flores and Gonçalo Anastácio and Diana Alfafar, respectively, in Lei da Concorrência Anotada, Comentário Conimbricense, Almedina, 2013.
56 Article 283 of the CCP.
57 Article 289 of the CCP.
58 Article 594 of the CCP.
XIII ARBITRATION

Competition law issues can be resolved through private arbitration⁵⁹ and, despite the fact that arbitration is in principle not public, there seem to be a number of precedents⁶⁰ and at least one significant arbitral decision that was appealed before the Lisbon Court of Appeals and confirmed by such upper court in 2014 (declaring an abuse of dominance in the health sector).

Any dispute with an economic value and not mandatorily submitted to judicial courts or to necessary arbitration by a special law can be submitted to an arbitral tribunal by way of an arbitration agreement. The agreement can relate to current disputes even if such are being dealt with in a judicial court (submission agreement⁶¹) or to events that may occur in the future, whether arising from a contractual or non-contractual relationship (arbitration clause).⁶²

Arbitrators shall decide in accordance with the law, unless the parties have authorised them to decide according to equity (ex aequo et bono).⁶³ The award given by arbitrators has the same legal force as a first instance court decision and cannot be submitted to an appeal unless otherwise agreed by the parties.⁶⁴

Arbitration procedures are confidential unless otherwise decided by the parties,⁶⁵ appealed to the state courts⁶⁶ or subject to enforcement actions⁶⁷ by a state court (as state proceedings are public by nature).⁶⁸

XIV INDEMNIFICATION AND CONTRIBUTION

Under Portuguese law, there is joint and several liability in relation to actions for damages.⁶⁹ Therefore, if the damage was caused by several persons, the plaintiff may recover the full amount of damages from any one of them. If one defendant pays the full award, he or she then retains a right of redress against the other defendants, claiming the corresponding parts

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⁶¹ Pursuant to Article 277(b) of the CCP, the court will stay its proceedings in the event the parties reach an arbitration agreement.
⁶² Article 1(3) of the Arbitration Law.
⁶³ Article 39 of the Arbitration Law.
⁶⁴ Article 39(4) of the Arbitration Law.
⁶⁵ Article 30(5) of the Arbitration Law.
⁶⁶ Article 46 of the Arbitration Law.
⁶⁷ Article 47 and 48 of the Arbitration Law.
⁶⁸ As regards arbitration and competition law, see the following articles: Luís Silva Morais, 'Aplicação do Direito da Concorrência, nacional e comunitário, por Tribunais Arbitrais: o possível papel da Comissão Europeia e das Autoridades Nacionais de Concorrência nesses processos', Presentation at the Portuguese Competition Authority, 15 October 2007; Cláudia Trabuco and Mariana França Gouveia, 'A Arbitrabilidade das questões de concorrência no direito português: the meeting of two black arts', in Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida, Vol. I, Almedina, Coimbra, 2011; and José Robin de Andrade, 'Apresentação sobre a nova Lei de Arbitragem voluntária e a aplicação do Direito da Concorrência pelos tribunais arbitrais', in Revista de Concorrência e Regulação, No. 11/12, July–December 2012, pp. 196–213.
⁶⁹ Article 497 of the CC. The government’s legislative proposal is in line with previous legislation and jurisprudence.
from them. The contribution of each infringer is determined by the court on the basis of its individual guilt and the effects arising from it. As regards private enforcement, Law No. 23/2018 (under Article 5(5)) changes the general presumption under the CC (Article 497) that all infringers share equal guilt, replacing it, for the purposes of competition damages actions, with a market share-based allocation.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The transposition of the Directive into the Portuguese legal system constituted an important legal development. Despite the fact that the general legal framework applicable to civil liability and invalidity of contracts already provided sufficient tools for private antitrust enforcement in Portugal, it is undeniable that some of the provisions introduced by Law No. 23/2018, both those necessary to implement the Directive and the most innovative ones, represent an important step forward.

We would point out the following:

a. the regime is also applicable to purely national competition law infringements, including those consisting of abuses of economic dependence;

b. jurisdiction to decide on private enforcement actions that are exclusively based on competition law infringements and on all other civil claims also exclusively based on competition law infringements was attributed to the specialised tribunal, the CRSC;

c. the civil responsibility of economic groups and the right of recourse are now regulated;

d. measures are foreseen to preserve the means of evidence where a serious infringement capable of harming the plaintiff is suspected; a request for such measures will also interrupt the statute of limitation;

e. the general presumption under the CC that all infringing parties share the same guilt has been replaced, for the purposes of damages actions, with a market share-based allocation;

f. the scope of application of competition private enforcement to collective redress has been clarified through the introduction of several specific rules not provided for in the general legislation; and

g. specific information systems to facilitate the intervention of the PCA in relation to observations on the proportionality of requests for access to documents included in its files as provided for in the Directive, and in relation to amicus curiae interventions pursuant to Article 15(3) of Regulation 1/2003, were introduced. This possibility already existed under general law, but the introduction of specific information systems is expected to make a major difference in the level of actual intervention of the PCA.

A further information exchange mechanism set out in Law No. 23/201870 and relevant to private enforcement (although unrelated to the Directive) aims at facilitating the obligation set out under Article 15(2) of Regulation 1/2003, pursuant to which Member States must inform the European Commission of all written decisions where Articles 101 or 102 of the TFEU were applied. To date, this rule has rarely been enforced, and the new rule (introduced by means of an amendment to the PCL) states that the courts must inform the PCA, which will inform the European Commission.

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70 Article 21 of Law No. 23/2018, adding an article (94° A) to the PCL.
Despite these important steps forward, the dramatic increase in and uncertainty about court fees in Portugal as a consequence of the country's financial crisis, and the respective international bail-out at the beginning of the decade, pose a serious constraint to actions for damages, as they very much raise the financial risk in bringing such actions. Such increased risk (the extent of which is yet to be determined), together with the uncertainty of the outcome due to factors such as a lack of precedents, the passing-on defence and the Bar Association limits on contingency fees, may indeed act as deterrents to the development of actions for damages in the country.

Considering the above and the fact that there is only so much public enforcement any competition authority can conduct, together with the importance of private enforcement for the overall level of compliance with the competition law in a developed economy, the PCA is likely to play an increased and friendlier role in the advocacy and promotion of private enforcement. As its public enforcement profile is constantly increasing and its leniency programme is bearing fruit (thus alleviating the fear that private enforcement could jeopardise the appetite for leniency), the PCA is now expected to follow in the footsteps of the European Commission by supporting private enforcement\textsuperscript{71} as a key complementary dimension of its mission.

\textsuperscript{71} This could, \textit{inter alia}, include information on private enforcement; development and publicity on the website of a list of precedents on private enforcement; public availability for a role of \textit{amicus curiae}; quantification of damages within public enforcement cases (already done under very limited precedents); and the development of training for judges and other magistrates that has occurred over the past decade.
Chapter 18

ROMANIA

Mihaela Ion and Laura Ambrozie

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The legal framework for cartel damages claims is the specific competition legislation set out in the Romanian Competition Act (Competition Act) and Government Emergency Ordinance No. 39/2017 (New Rules), which transposed the provisions of Directive 2014/104 on private enforcement (Directive), the Council Regulation on the analysis and solving of complaints regarding breaches of Articles 5, 6 and 9 of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (Regulation), as well as Articles 101 and 102 of the TFEU. The specific validity conditions for the relevant legal actions and applicable procedural rules are supplemented by the Romanian Civil Code (Civil Code) and the Romanian Civil Procedural Code (CPC).

As a result of the entry into force of the New Rules, the Romanian legal framework regarding private enforcement has been substantially modified. These amendments removed many of the obstacles to private enforcement of competition law, facilitating the full reparation of harm caused by competition law infringements.

Having this objective, the New Rules have set up a clear, more detailed legal framework for private enforcement of competition law, clarifying and providing supplementary guidance on disclosure procedures, passing-on defences and other procedural issues.

Currently, private enforcement tools remain relatively underused, as public enforcement still prevails in Romania. Nonetheless, there are series of damages claims brought under the old legislation are currently pending. To date, no damages have been awarded based on the New Rules, but we are expecting to slowly see parties launch private enforcement actions. Such increase in the use of private enforcement tools will mainly concern follow-on actions, as final sanctioning decisions issued by the national competition authority (Competition Council or Council) constitute conclusive evidence of the existence of an infringement.

1 Mihaela Ion is a partner and Laura Ambrozie is a senior associate at Popovici Nițu Stoica & Asociații.
2 Romanian Competition Act No. 21/1996.
5 Approved by Council's President Order No. 499/2010.
6 The current Civil Code entered into force on 1 October 2011.
7 The current Civil Procedural Code entered into force on 15 February 2013.

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To date, the national courts have dealt with only two private litigation cases on antitrust matters (i.e., stand-alone actions).\(^8\) In both cases, the first instance court stated that the claimants did not prove breaches of the Competition Act, and the actions were dismissed for being ungrounded. In one of the cases, the Bucharest Court of Appeal approved the claim,\(^9\) and obliged the defendant to pay the plaintiff approximately €930,000 as indemnification; this decision was upheld by the High Court of Cassation and Justice.\(^10\)

### II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The Competition Act prohibits:

- any express or tacit agreement between undertakings or associations of undertakings, any decisions taken by associations of undertakings and any concerted practices that have as their object or effect the restriction, prevention or distortion of competition on the Romanian market or on part of it; and
- the abusive use of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it that, by way of anticompetitive deeds, may harm competition.\(^11\)

Article 3 of the New Rules and Article 66 of the Competition Act state that both legal and natural persons, as well as associations, harmed directly or indirectly as a result of anticompetitive practices are entitled to seek relief in court. It is expressly provided in the New Rules that such claims may be brought based of both infringements of the national or European rules (Articles 101 and 102 of the TFEU).

The New Rules transposed the following already existing principles:

- any person responsible for any conduct (practice, act or deed) that caused damage to another person has the obligation to repair the damage;
- if the damage was caused by more than one person, they will be held jointly liable;
- legal persons may also be held liable for their representatives’ infringements;
- the losses caused by the infringement are to be recovered in full, including the effective loss (\textit{damnum emergens}), lost profits (\textit{lucrum cessans}) and interest: indeed, the New Rules state that damages are awarded according to the principle of full reparation of the harm suffered; and
- claims may be filed both before (stand-alone actions) and after (follow-on actions) the issuance of a sanctioning decision by the Council.

As mentioned above, the New Rules have also amended substantially the existing legal framework as follows.

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\(^{8}\) According to OECD Working Party No. 3 on Co-operation and Enforcement – ‘Relationship between public and private antitrust enforcement’ – Romania, 15 June 2015.

\(^{9}\) Court of Appeal of Bucharest, Decision No. 1701/2015 of 30 October 2015.

\(^{10}\) High Court of Cassation and Justice, Decision No. 1979/2016 of 23 November 2016.

\(^{11}\) In accordance with the provisions of Article 6(3) of the Competition Act, it is presumed, until proven otherwise, that one or several undertakings are in a dominant position if the accumulated market share on the relevant market, registered for the analysed period, is over 40 per cent.
For follow-on claims, the New Rules establish a presumption of the existence of an infringement in cases where a final decision has established such infringement. One specific distinction is made here: while definitive decisions issued by the Competition Council, a national court or the European Commission represent conclusive evidence, sanctioning decisions issued by other competition authorities or definitive decisions issued by other national courts than those where the action for damages is introduced represent only rebuttable presumptions of competition law violations.

The exclusive subject matter over the award of damages to individuals, as well as territorial jurisdiction, vests with the Bucharest Tribunal, and on appeal with the Bucharest Court of Appeal.

The establishment of a cartel creates a rebuttable presumption of the existence of harm suffered by the plaintiff. Thus, in this case the burden of proof is shifted, and the defendant has to demonstrate that no harm was caused.

In both stand-alone and follow-on actions, damage claims must be brought within five years starting from when the infringement has ceased; and from when the plaintiff knew, or should have known, of the behaviour and the fact that it constitutes an infringement of competition law, the damage and the person responsible for it. If the victim of a competition law infringement submits a complaint to the Competition Council, the statute of limitations will start running, as it will be considered that when it submitted the complaint, the plaintiff knew of the infringement.

A distinction previously existed between stand-alone and follow-on actions. Indeed, the general civil procedure rules for stand-alone actions provided that the limitation period was five years starting from the date when the damage was known or was reasonably expected to have been known by the plaintiff. For follow-on actions, the statute of limitations was different: namely, actions were to be brought within two years as of the date when the Council's sanctioning decision became final.

Thus, for infringements that were committed before the entry into force of the New Rules, once two years have elapsed following a Competition Council decision becoming final, private enforcement claims can no longer be introduced as such claims are time-barred.

The limitation period will be suspended for the period of the administrative measures taken by the competition authority from the opening of an investigation and for the duration of the investigation. In addition, the time limit elapses one year after an infringement decision becomes final or after the proceedings are otherwise terminated. Moreover, the limitation period does not start or is suspended for the duration of any consensual dispute resolution process.

Specific rules governing the disclosure procedure have been adopted by the New Rules. We have detailed these provisions in Section V.

To be compensated for damage, the victim of an anticompetitive practice will have to prove that all of the following conditions triggering tort liability are met:

- an infringement of national or EU competition rules has occurred;
- the defendant's fault, regardless of its form (negligence, wilfulness);
- the damage caused to the claimant; and
- the link between the infringement and the damage caused to the claimant.

In the case of stand-alone actions, the burden of proof for an infringement of the competition legislation and the harm caused to a person lies with the plaintiff. In contrast, in follow-on actions, as final decisions of the Competition Council, a national court or the European Commission.
Commission constitute conclusive evidence, the infringement no longer needs to be proved by the plaintiff. Therefore, in cases where a final decision has been issued, the plaintiff has to prove only that a final decision truly exists (i.e., he or she did not challenge the decision). Afterwards, the plaintiff will only have to demonstrate points (b) to (d) above.

III EXTRATERRITORIALITY

The Competition Act is clear on its extraterritorial application to anticompetitive acts and practices committed by Romanian or foreign undertakings in Romania, or committed abroad but having effects in Romania; therefore, nationality or location have no relevance as long as an infringement has effects in Romania. Based on these principles, the Council has issued a series of decisions sanctioning foreign undertakings for having breached the provisions of the Competition Act and of the TFEU.12 In all cases, the Council imposed the fines directly on the foreign undertakings.

Thus, infringements of competition law committed by foreign undertakings in Romania or committed abroad but having effects in Romania may serve as basis for claim damages filed before the Bucharest Tribunal.

IV STANDING

As mentioned above, claims of relief in courts are governed by Articles 3 and 14 of the New Rules, Article 66 of the Competition Act and Article 10 of the Regulation, under which both the persons directly and indirectly affected by an anticompetitive behaviour may bring a private antitrust action to seek compensation for any damage incurred due to a prohibited practice under the provisions of the Competition Act or of Articles 101 or 102 of the TFEU.

Third parties, either natural or legal persons, may intervene in a case in accordance with the CPC if they can prove an interest. Furthermore, if a judge considers that it is necessary to involve third parties in a case, he or she will bring up this issue with the parties.

The Competition Act expressly provides the Council’s right to intervene in competition cases before the national courts. In addition, Article 16 of the New Rules states that the Competition Council may assist the court with respect to the determination of the quantum of damages, if the court requests its assistance.

V THE PROCESS OF DISCOVERY

Before the entry into force of the New Rules, the legal framework was set up under general civil procedure rules that did not provide an extensive or specific discovery procedure. The New Rules have extended the scope of discovery and set up specific conditions under which disclosure of evidence can be ordered by courts.

The New Rules follow the principle of proportionality as the main condition under which disclosure of evidence can be ordered. To establish whether a disclosure claim is

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proportional, the court takes into consideration all parties’ legitimate interests. The New Rules also provide the measures and instruments for ensuring that the confidential nature of the information subject to the disclosure procedure is observed.

In addition, to ensure the effectiveness of court orders for disclosure, the New Rules provide sanctions related to the non-disclosure and destruction of evidence that apply to individuals, legal entities and even their legal representatives. Indeed, the court may sanction a defendant, a plaintiff, other third parties and their legal representatives with a fine ranging from 500 to 5000 lei for individuals, and from 0.1 to 1 per cent of the turnover realised in the year preceding the sanctioning for corporations. The New Rules mention specifically the deeds that may be sanctioned:

\( a \) failure or refusal to comply with a disclosure order;
\( b \) destruction of relevant evidence;
\( c \) failure or refusal to comply with the obligations imposed with respect to the protection of confidential information; and
\( d \) breaches of the limits on the use of evidence provided in the New Rules.

**General rules regarding evidence disclosure**

As previously mentioned, the principle of proportionality governs the disclosure procedure regardless of the moment at which it takes places (i.e., before or during the action for damages).

Under the New Rules, when a plaintiff provides a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, the courts can order the defendant or a third party to disclose relevant evidence that lies in their control. Likewise, the court, if requested by a defendant, can order a plaintiff to produce relevant evidence. The criteria set out by the New Rules for assessing the proportionality of the disclosure include, *inter alia*, the extent to which the claim or defence reasonably justifies the disclosure of evidence, the scope and cost of disclosure, and the confidential character of the information requested to be disclosed.

To ensure the protection of the confidential nature of the disclosed information, the court may use one or more of the following measures:

\( a \) removing sensitive information from the document disclosed;
\( b \) holding hearings without a public presence;
\( c \) limiting the number of persons that may have access to the evidence to appointed experts and legal representatives of the parties;
\( d \) issuing expert appraisals to ensure the protection of confidential information; and
\( e \) taking any other measures provided by law to ensure the protection of confidential information.

In addition, note that under the general civil procedure rules, the court may reject a request for evidence disclosure if the documents could expose personal issues regarding a person’s dignity or personal life, if producing the evidence would violate the legal duty to keep the document secret, or if such disclosure could trigger criminal prosecution against the party, his or her spouse, or his or her relatives or in-laws until the third degree.\(^{13}\)

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\(^{13}\) Article 294, Civil Procedure Code.
Specific rules applicable to disclosure of evidence included in the Competition Council’s file

The New Rules also establish the legal framework for claims of disclosure of evidence contained in the Council’s file. Besides the general rules described above, specific rules apply.

When assessing the proportionality of a claim, the court will take into consideration whether the evidence requested is specific, and is not a mere request to gain access to the file; whether the party requesting disclosure is doing so in relation to an action for damage before the court; and the need to safeguard the effectiveness of the public enforcement of competition law. The Competition Council can also submit observations regarding the proportionality of the request for evidence disclosure.

Only when the court cannot obtain some proof from another party can it request that the Council provide evidence, including proof of the basis on which a sanctioning decision was issued. If one of the parties provides evidence contained in the Council’s file obtained exclusively through exercising his or her right to access to the file, such proof is deemed inadmissible if the Council has not yet finalised its investigation.

The court must ensure that confidential information and business secrets considered under the competition law are protected. However, the reasons under which the Council has granted confidentiality for certain documents or information may not subsist in the litigation phase (i.e., financial data, information regarding costs or prices) if they are qualified by the court as historical data, and the Council may be bound to disclose the documents or information in question.

Thus, the court can order disclosure of various types of evidence included in the Competition Council’s file. Nonetheless, in addition to the proportionality principle, some limits are set out concerning specific categories of evidence included on the grey list: observations submitted by the parties, investigation reports and written recognition statements of anticompetitive practices that were withdrawn. Such evidence may be disclosed only when the administrative proceedings before the Council are finalised.

In addition, certain categories of evidence are included on the black list, which means that they shall never be disclosed: leniency statements and recognition statements. Indeed, these types of proof are deemed to be inadmissible, and thus cannot be used in actions for damages. Nonetheless, a plaintiff can provide a reasoned request to obtain access to these documents, but only for the sole purpose of ensuring that their contents correspond to the definitions set by the New Rules.

VI USE OF EXPERTS

In court actions, in the absence of relevant case law and specific legal provisions, it should be determined how and what type of experts will be used in private competition law litigation in addition to certified accountants. The CPC provides general principles that allow judges to request the opinion of one or more experts in the relevant field, and one or all of the parties to produce experts’ reports or opinions that support their allegations. Nevertheless, to date, in contrast with the accounting field, there have been no certified experts officially acknowledged in the competition field.

Therefore, we have to rely once again on general principles provided by the CPC that state that, in domains that are strictly specialised, and where there are no authorised ex officio experts or experts requested by any of the parties, the judge may request the viewpoint of one or more independent specialists in such field. The members of the Competition Council
plenum may not be appointed as experts or arbitrators by the parties, the court or any other institution, as they lack independence. Interestingly, the courts have increasingly tended to appoint experts, both national and European specialists. Under the general rules, the court may also order an appraisal of the damage in which experts appointed by the parties may also participate. Due to damage quantification difficulties, the need for economic expertise will increase.

Experts’ or specialists’ opinions are not binding, meaning that the court will consider them together with all other evidence. In addition, the court has the right to refer a case to the Council to obtain a specific opinion on competition aspects (e.g., relevant market definition).

VII  CLASS ACTIONS

The Competition Act expressly regulates the rights of specified bodies (i.e., registered consumer protection associations and professional or employers’ associations having these powers within their statutes or being mandated in this respect by their members) to bring representative damages actions on behalf of consumers. The regulator seems to have chosen the opt-in system for collective damages claims based on the Competition Act. Class actions are exempted from the obligation to pay stamp duty.14

VIII  CALCULATING DAMAGES

The New Rules now set a unitary legal framework regarding damage determination. The Rules have also brought some useful clarification regarding damage appraisal, providing that the court will evaluate the quantum of the damages awarded, ensuring that the burden and standard of proof necessary for damage appraisal does not render impossible or excessively difficult the right to full reparation. As in the past, the fines imposed by the competition authorities do not represent a criterion for settling damages in private enforcement claims.

The New Rules follow the general principles of tort law, including the main principle of full reparation of the harm suffered. In this respect, the New Rules state the damage caused by breaching competition law shall be fully repaired so as to put the victim in the situation it would have been in prior to the infringement. In line with this principle, the victim is entitled to recover both the actual damages incurred, any lost profits, as well as interest. Moreover, the Civil Code provides that if an illegal deed caused the loss of an opportunity to obtain an advantage or to avoid damage, the victim shall be entitled to recover the incurred damages. Future damage, if certain to occur, can also be compensated. Moreover, a victim may also request penalties for delay calculated as from the date when the judgment became final up to the date of the actual payment of the damages. Punitive damages are not allowed under Romanian law.

The CPC provides for the potential to recover attorneys’ fees. In general, legal costs are imposed on the losing party upon the request of the winning party. To qualify for recovery, damages have to be proven and they may not have been already recovered (e.g., under an insurance policy).

14 Article 29(f) of Government Emergency Ordinance No. 80/2013.
In practice, the reference date for calculating the value of damages is still uncertain. Some court decisions take into consideration the value available when the actual damage was caused, while others consider the prices applicable at the time of the court decision awarding damages.

The Council proposed that for class actions, a representative consumer should be found and the principles applying to him or her should apply to a broader range of plaintiffs, including undertakings subject to exclusionary practices. Thus, the damage incurred by this consumer would be used as a reference when computing compensation for a whole class of plaintiffs. In this manner, plaintiffs will have to show that they incurred damage without being required to quantify the exact value of the damage, which most of the time implies a costly analysis.\(^{15}\)

IX  PASS-ON DEFENCES

The New Rules include specific provisions on passing-on defences that have changed the previous national provisions.

Article 14 of the New Rules establishes the conditions under which an indirect buyer can file a claim for damages. The indirect buyer has to prove that the harm was passed on to him or her (more precisely, he or she must prove that the defendant has committed an infringement of the competition law); the infringement of the competition law has resulted in an overcharge for the direct purchaser of the defendant; and the indirect purchaser has purchased the goods or services that were the object of the infringement of the competition law, or has purchased goods or services derived from or containing them.

An indirect buyer can bring before the courts an action for damages, but only if he or she did not pass on the overcharged price generated by the competition law infringement. If he or she overcharged in his or her prices, the defendant can invoke the pass-on defence against him or her: in other words, the indirect claim is deemed to be ungrounded, as the indirect buyer has already repaired the harm suffered. In such cases, damages actions might be introduced by the next indirect buyer. If all buyers have overcharged in their prices, then the one who is entitled to bring an action for damages will be the final consumer. In this scenario, the discovery procedure will likely be a reciprocal one involving all parties on the sale chain until the last buyer.

X  FOLLOW-ON LITIGATION

The New Rules establish a special regime for follow-on actions. In such cases, since liability arises from the prior infringement decision, a claimant must establish that he or she has suffered a loss as a result of the infringement. The statute of limitations, both for stand-alone actions and for follow-on actions, starts running from the date where the plaintiff knew or should have known about the infringement, the damage and the identity of the infringer, and not before the anticompetitive practice has ceased.

A decision of the Council becomes final if the term during which the Council decision may be challenged expires and no interested party has challenged it; or, after being challenged, the decision is upheld (totally or partially) or annulled and declared by the court as being

\(^{15}\) The Council’s standpoint on quantification of harm suffered because of an infringement of Article 101 or Article 102 of the TFEU.
final. Our national legislation does not make a distinction between court actions through which a party challenges the existence of the anticompetitive deed itself, and the imposition of a penalty and the amount thereof. If no appeal is filed against a decision or the decision is upheld by the courts, the Council decision will have all the effects of a court judgment, including a *res judicata* effect. The *res judicata* effect establishes a legal presumption that is twofold: on the one hand, the losing party will not be able to re-examine the right in another dispute, and on the other, the winning party can avail itself of the recognised right in another dispute.

**XI PRIVILEGES**

Under the New Rules, leniency and recognition statements are included in the black list and thus may never be disclosed.

In addition, the information and documents contained in the Council’s investigation file are also protected by the Council’s confidentiality obligation. The following are deemed confidential:

a. business secrets (technical or financial information relating to the know-how of an undertaking, costs evaluation methods, production processes and secrets, supply sources, manufactured and sold quantities, market shares, lists of customers and distributors, marketing plans, cost and price structures, sale strategy); and

b. other confidential information (such as information communicated by third parties about the respective undertakings that could exert a significant economic and commercial pressure on competitors or commercial partners, customers or suppliers) that may cause access to the file to be totally or partly restricted.

Moreover, general rules acknowledge the privilege of confidentiality of communications between lawyers and their clients.

**XII SETTLEMENT PROCEDURES**

Given the nature of claims for damages, parties are allowed to use settlement negotiations either before or even during litigation proceedings. Settlement procedures include mediation and negotiation that arise during in transactions.

Parties may agree upon the value of the damages and methods of reparation. If the parties settle their dispute, the court cannot be called to rule on such legal action; the court accepts the settlement without analysing the merits. Furthermore, the parties are able, at any time during a trial, even without being summoned, to go to court and request a judgment acknowledging their settlement. The settlement must be submitted in writing to the court, which will include it in the operative part of the judgment.

The New Rules regulate the effect of the settlement procedure on the quantification of damages when there are various infringers and only one is involved in the settlement procedure. In this case, the victim can claim only the part of the prejudice caused by the infringers that did not participate in the settlement procedure. In addition, the New Rules provide that the national court may suspend its proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by the action for damages.
In addition, the New Rules contain a provision that is not included in the Directive: the payment of damages following a settlement procedure is qualified as a mitigating circumstance by the Competition Council when individual sanctions are imposed for competition law infringements. Separately, payment of damages is considered to be a self-cleaning measure in cases of exclusion from public tenders under the Law on public acquisition.16

XIII ARBITRATION

Parties may agree to arbitration being conducted by a permanent arbitration institution or even by a third party. The New Rules do not refer to arbitration separately from settlement procedures. Thus, the provisions regarding the suspension of court proceedings and the determination of damages described at Section XII also apply to arbitration.

XIV INDEMNIFICATION AND CONTRIBUTION

The rule established by the Civil Code and also by the New Rules is that the defaulting party must repair any damage caused to another party. Where an infringement may be attributed to more than one party, they should be held jointly liable towards the victim, who may initiate legal proceedings against any of them for the full amount of the damages. Before the entry into force of the New Rules, successful applicants for leniency could not be held jointly and severally liable for their participation in anticompetitive practices. Under the New Rules, this exemption no longer exists: the company that benefited from full leniency can be held jointly liable towards its own indirect and direct suppliers and buyers, and other injured parties, but only in cases where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of the competition law. As regards the infringing parties, the division of liability should be made on a pro rata basis according to the seriousness of each party’s fault. When one of the companies has benefited from a fine exemption, its contribution cannot be higher than the prejudice suffered by its direct or indirect suppliers or buyers.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In addition to the modest increase in the number of private enforcement litigations, especially with respect to follow-on actions, further specific consequences and developments are expected as a result of the entry into force of the New Rules.

As claims for damages may be brought premised on infringements of European competition regulations, whenever such infringements of European regulations arise, parties tend to seek relief before national courts in jurisdictions that have greater private enforcement experience: in other words, claims forum shopping to bring claims before the courts most likely to render a favourable judgment.

Another immediate consequence of the New Rules is the increase in the degree of awareness of the importance of compliance with competition law and the necessity of

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implementing competition compliance. In this area, the Competition Council has recently issued a set of guidelines that establish the criteria that an effective competition compliance programme must fulfil.17

In addition, the use of the leniency procedure may decrease. Even if leniency may lead to fine immunity, undertakings may be reluctant to use the leniency procedure as they still face the risk of private enforcement actions. Indeed, leniency may lead to fine immunity, but undertakings may still face the risk of private enforcement actions.

Moreover, the recognition procedure may also be affected by the New Rules, as access to withdrawn acknowledgment statements may be granted to the plaintiff, while access to successful acknowledgement statements are never granted. Such provisions seek to reinforce the acknowledgement procedure by avoiding the withdrawal of acknowledgement statements.

In addition, from our perspective, some additional amendments to the New Rules would be useful to clarify and ensure their effectiveness:

- precise and clear guidelines with respect to their proportionality should be further developed to protect confidential information subject to disclosure claims. Currently, the New Rules only provide general guidelines;
- since, independent of a trial already brought before a court, there is no pre-action disclosure procedure under the New Rules or under the general civil rules, it would be useful to regulate such specific issues. Otherwise, the provision of evidence to bring a private enforcement claim may be hindered; and
- it should be clarified whether decisions issued by the Competition Council accepting commitments proposed by alleged infringers may serve as basis for follow-on claims, as the existence of an infringement is not expressly ascertained by the Council, which only states the competition concerns identified.

Chapter 19

SOUTH AFRICA

Candice Upfold

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Few civil claims for damages related to contraventions of antitrust legislation have been brought to date in South Africa. One example is the claim by South African airline Nationwide against national carrier South African Airways (SAA), arising from findings that SAA had abused a dominant position through anticompetitive agreements it entered into with South African travel agents. Nationwide’s claims arose out of two complaints against SAA. The first claim was settled by means of a confidential out-of-court settlement; the second is the first of its kind in which follow-on damages have been awarded by the High Court in South Africa.2

The City of Cape Town has taken steps to institute action against certain construction companies for civil damages arising from their agreement to rig bids in relation to the construction of the Green Point Stadium in Cape Town. This arises from the rigging of bids by construction companies for the 2010 FIFA World Cup stadiums and other major infrastructure projects.

On 31 March 2017, the City of Cape Town was granted leave to amend its particulars of claim in relation to its claim for damages. The amendments were largely designed to include allegations that the various collusive agreements were implemented and to indicate what resulted from the implementation thereof (and thus what prejudice was sustained by the City of Cape Town). These amendments were required to assist in the claim for damages.3 The High Court action for civil damages has been set down for hearing in 2020.

Private actions in the form of class actions are expected to increase following a decision by the Supreme Court of Appeal (SCA) in the Pioneer bread cartel case,4 which clarified the requirements for bringing a class action. A number of non-government organisations and five individuals attempted to launch a class action against Tiger Brands, Pioneer Foods and Premier Foods following the successful prosecution of their bread price-fixing cartel by the Competition Commission in 2010.5 The High Court initially refused to certify the action as a class (a prerequisite for bringing a class action in South African law), which led to an appeal to the SCA. In 2012, the SCA sent the case back to the High Court for reconsideration. The same process was followed in the Mukkadem case, which involved distributors taking action

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1 Candice Upfold is a senior associate at Norton Rose Fullbright South Africa Inc.
3 City of Cape Town v. WBHO Construction (Pty) Ltd and Others (86873/2014) [2017] ZAGPPHC 271 (31 March 2017) at paragraph 25.
against Tiger Brands, Pioneer Foods and Premier Foods for their participation in the bread cartel. In this case, however, the matter had to go all the way to the Constitutional Court before being sent back to the High Court for reconsideration.\(^6\) The High Court has yet to decide whether these classes should be certified. The cases are still pending, but if successful are likely to be the first class actions arising from a competition law infringement in South Africa.

**II  GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT**

i  Private antitrust enforcement

The Competition Tribunal and the Competition Appeal Court have exclusive jurisdiction in respect of the interpretation and application of, *inter alia*, Chapter 2 of the Competition Act, 1998 (Competition Act), which regulates prohibited practices.\(^7\) However, Section 62(5) of the Competition Act precludes the Competition Tribunal and the Competition Appeal Court from making an assessment of the amount of damages and awarding damages arising from a prohibited practice: only the South African civil courts can award damages for a contravention of the Competition Act (Section 65(2) of the Competition Act).

Sections 62 and 65(2) of the Competition Act thus provide that the competition authorities have exclusive jurisdiction to determine whether a prohibited practice under the Competition Act has occurred, but the civil courts have exclusive jurisdiction to determine whether a claimant is entitled to damages, and if so, how much.\(^8\)

The substantive requirements for instituting civil action are set out in Section 65 of the Competition Act, and a finding by the competition authorities of a prohibited practice is a prerequisite for a civil claim for damages.

If requested by a claimant, the Chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court must issue a certificate certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Competition Act.\(^9\) A certificate issued in terms of Section 65(6)(b) of the Competition Act is conclusive proof of its contents and is binding on a civil court.\(^10\) This means that a claimant will not need to prove any prohibited conduct before the civil court, and any action will relate only to whether the other elements of a delictual (tort) claim for damages have been met.

In a 2015 SCA decision, the SCA considered a situation where the leniency applicant had not been cited as a respondent to a complaint referral of the cartel complaint by the Competition Commission to the Competition Tribunal. The SCA found that civil action could not be pursued against the bread manufacturer Premier (although it was granted leniency) because the Competition Commission had failed to cite it as a respondent.\(^11\) In December 2015, the Competition Commission brought an application for leave to appeal this decision to the Constitutional Court in an effort to protect the rights of those that had


\(^{7}\) *Section 62(1) and (2) of the Competition Act.*

\(^{8}\) There is provision in the Competition Act for an amount of damages to be awarded in terms of a consent order settling a complaint; however, this is seldom used in practice.

\(^{9}\) *Section 65(6)(b) of the Competition Act.*

\(^{10}\) *Section 65(7) of the Competition Act.*

suffered damage as a result of the prohibited practice. Prior to the application for leave to appeal being heard, a settlement agreement was reached between Premier and civil society organisations including Black Sash, COSATU, the Children’s Resources Centre and the National Consumer Forum. The application for leave to appeal has therefore been withdrawn.

ii Limitation to bringing a claim for damages

Any action for a civil claim for damages must be instituted within three years from the date on which the action arose.\(12\)

A person’s right to bring a claim for damages arising out of a prohibited practice comes into existence on the date that the Competition Tribunal made a determination in respect of a matter that affects that person (i.e., the finding of prohibited practice); or in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.\(13\)

III EXTRATERRITORIALITY

The Competition Act applies to ‘all economic activity within, or having an effect within, the Republic’, with limited exceptions for collective bargaining between employees and employers and agreements in terms of the Labour Relations Act, as well as concerted conduct that is designed to achieve a non-commercial socioeconomic objective or similar purpose.\(14\)

To the extent that a public or private entity is engaged in economic activity with an effect in South Africa, they will be subject to the Competition Act.

In the ANSAC decision,\(\text{15}\) the Competition Appeal Court and then the SCA considered the extraterritorial application of the Competition Act, and in particular the meaning of the word ‘effect’ contained in Section 3 of the Competition Act. The case involved a complaint lodged by Botswana Ash and Chemserve against ANSAC and CHC Global (Pty) Ltd (CHC) that they had contravened Sections 4(1)(b)(i) and 4(1)(b)(ii) of the Competition Act. ANSAC is an association whose members are competing producers of soda ash in the United States. The association is incorporated in accordance with the provisions of the United States Export Trade Act 1918, commonly known as the Webb-Pomerene Act.\(\text{16}\)

ANSAC did not dispute that the statutory phrase ‘an effect’ was wide and unqualified, but it argued that Section 3(1), when placed in its proper context and purposively interpreted, had to be read as bringing only anticompetitive activity within its ambit. The Competition Appeal Court and the SCA found that this argument flies in the face of the plain meaning of the statute’s wording. ANSAC’s argument also required that words be read into Section

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\(12\) Section 11 of the Prescription Act 1969.  
\(13\) Section 65(9) of the Competition Act.  
\(14\) Section 3 of the Competition Act.  
\(16\) The purpose of this Act is to exempt United States associations engaged in export trade from the application of the Sherman Act, which is the counterpart of South Africa’s Competition Act. The Competition Commission’s investigation found that members of ANSAC were obliged (in terms of their membership agreement) to sell soda ash for export exclusively through ANSAC to any country outside the United States other than Canada. ANSAC through its board of directors determined prices and trading conditions in respect of the sales. In South Africa, ANSAC had engaged CHC as its agent to give effect to the pricing decisions made by ANSAC.
3(1). The SCA found that there ‘was no discernible justification for doing so’. The SCA ultimately found that the correct approach is that all effects are captured (i.e., both positive and negative). The SCA quoted the Competition Appeal Court, which pointed out that Section 3(1):

\[
\text{does not involve a consideration of the positive or negative effects on competition in the regulating country, but merely whether there are sufficient jurisdictional links between the conduct and the consequences . . . The question is . . . one relating to the ambit of the legislation: the Act in the matter under consideration, its regulatory “net”, concerns not only anti-competitive conduct but also conduct the import of which still has to be determined.}\]

Accordingly, the territorial scope of the application of the Competition Act is wide in the South African context. This is demonstrated further by the fact that a number of consent agreements have been concluded with foreign entities whose conduct elsewhere in the world has had an effect in South Africa.

IV STANDING

The Competition Act provides an express mandate for private actions both before the competition authorities and the civil courts.

i Standing to bring a complaint about anticompetitive conduct in terms of Section 49B of the Competition Act

Section 49B of the Competition Act recognises the right of any person to submit a complaint to the Competition Commission for investigation. If the Competition Commission issues a notice of non-referral in respect of a complaint submitted by a complainant, the complainant may, in terms of Section 51(1) of the Competition Act, refer the complaint directly to the Competition Tribunal.

ii Standing to bring a claim for damages arising from anticompetitive conduct in terms of Section 65 of the Competition Act

Any party who has suffered loss as a result of a contravention of the Competition Act may commence civil action to recover the loss once the Competition Tribunal has certified that the prohibited conduct has occurred. In principle, the Competition Act affords an indirect purchaser the right to institute a claim for damages if the plaintiff can prove he or she suffered a loss or damage as a result of a prohibited practice. In the Pioneer bread class action case, the High Court did not make a ruling on whether an indirect purchaser claim is available; however, the High Court

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20 Section 65 of the Competition Act.
did recognise that Section 38 of the Constitution of the Republic of South Africa, 1996 (Constitution) identifies the following persons that may approach a court to institute a class action:

- anyone acting in his or her own interest;
- anyone acting on behalf of another person who cannot act in his or her own name;
- anyone acting as a member of, or in the interest of, a group or class of persons;
- anyone acting in the public interest; and
- an association acting in the interests of its members.  

While there is no clarity yet in South Africa on the availability of an indirect purchaser claim, the remission of the matter by the SCA to the High Court for certification may suggest that the South African courts may be willing to accept that class actions can be brought on behalf of both direct and indirect purchasers: what will be important is whether a causal link between the anticompetitive conduct and harm caused can be established.

V THE PROCESS OF DISCOVERY

i Discovery procedures before the competition authorities

Pretrial discovery procedures apply to both stages of private antitrust litigation in South Africa (i.e., proceedings before the competition authorities, and damages actions before the civil courts).

Section 27 of the Competition Act, read with Rule 22(1)(c)(v) of the Rules for the conduct of proceedings in the Competition Tribunal (Tribunal Rules), states that the Competition Tribunal may give directions in respect of the production and discovery of documents (whether formal or informal) at a pre-hearing conference.

There are no specific provisions in the Competition Act or the Tribunal Rules relating to discovery procedures. The Competition Tribunal has, in terms of Rule 55(1)(b) of the Tribunal Rules, a discretion to apply the High Court Rules. In practice, strict adherence to the formalities of the civil courts does not occur. For example, in *Allens Mescho (Pty) Ltd and others v. the Commission and others*, the Competition Tribunal confirmed that Rule 55 of the Tribunal Rules confers on it a discretion to apply the High Court Rules. The Competition Tribunal found this is something less exacting than importing the entire rule once one has identified a lacuna in the Tribunal Rules. The reason for this is that the proceedings in the two forums are not *sui generis*. Uncritical borrowing of a High Court Rule, the Competition Tribunal found, may lead to impracticality.

Owing to the more informal nature of proceedings before the competition authorities, orders relating to the *ad hoc* production of relevant documents are not uncommon at

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22 Published under GG 22025 of 1 February 2001.
23 Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.
25 Ibid. at paragraph 6.
appropriate times during the course of proceedings. For example, prior to the close of pleadings, respondents in proceedings before the competition authorities regularly make use of Rules 35(12)\(^{26}\) and 35(14)\(^{27}\) of the High Court Rules to request the production of documents. In addition, recent decisions have confirmed that litigants are entitled to access the Commission’s investigation record in terms of Rule 15 of the Competition Commission Rules.\(^{28}\)

Rule 15 of the Competition Commission’s Rules does not provide a time period within which the Commission must provide the record to a requesting party. In *Group Five Ltd v. Competition Commission*,\(^{29}\) the Competition Appeal Court found that the Competition Commission must do so within a reasonable time period.\(^{30}\) The concept of a reasonable time period was tested in *The Standard Bank of South Africa Limited v. The Competition Commission of South Africa*.\(^{31}\) Standard Bank is one of the 18 respondents in a complaint referral that the Competition Commission has brought against local and international banks concerning alleged collusive conduct with regard to trading in foreign currencies. As part of the proceedings, Standard Bank requested, in terms of Rule 15 of the Competition Commission’s Rules, that the Competition Commission make a copy of its record available to it. After various requests over a two-month period, Standard Bank brought an application to compel delivery of the record. The Competition Tribunal was required to consider what a reasonable time period would be within which to produce a record.

The Competition Tribunal noted that there are two points to consider when determining what constitutes a reasonable time. This includes how soon the requestor needs the record and what challenges confront the Competition Commission in responding to such a request.\(^{32}\)

The Competition Tribunal found that, in complex cases involving a lengthy record that is subject to numerous claims, the documents in the record may constitute restricted information, and where discovery has not yet taken place, may justify delaying production of the record until the record is ready to be discovered in the underlying case.\(^{33}\)\(^{34}\)

In light of the fact that Standard Bank had not advanced any facts as to why the record was required prior to discovery, the complaint referral relates to a period of at least seven years and there are at least five separate accounts of alleged co-operation between the respondents, the record is likely to be voluminous and raise logistical issues.\(^{35}\) The Competition Tribunal therefore found that it would not be unreasonable for the Competition Commission to

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26 This rule permits the respondent to request access to documents that have been referred to in the applicant’s papers.
27 This rule permits the respondent to request access to a clearly specified document that is necessary for the purpose of pleading.
29 Ibid.
30 Ibid. at paragraph 10.
32 Ibid. at paragraph 60.
33 Ibid. at paragraph 68.
34 The discovery process before the competition authorities will only take place once pleadings have closed.
35 Footnote 31 at paragraph 72.
provide the record when it makes discovery. However, the Competition Tribunal did go on to state that if Standard Bank had reasons for requiring the record more urgently, there was nothing that prevented it from bringing a further request in terms of Rule 15.36

Standard Bank took the decision on appeal arguing that there was no rationale on the part of the Competition Tribunal to link the production of the record under Rule 15 of the Competition Commission Rules relating to discovery.37

The Competition Appeal Court found that the decision in Group Five ‘applies unabatedly in the present matter’.38 In other words, the fact that Standard Bank was a litigant should not have been a factor in determining a reasonable time.39 The Competition Appeal Court ordered that the record be produced to Standard Bank within five days. The Competition Commission has taken the decision on appeal to the Constitutional Court. The hearing is scheduled to take place on 5 March 2019.

Owing to the commercially sensitive nature of certain documents likely to be required to be produced during complaint proceedings (e.g., pricing schedules and strategic plans), Section 44 of the Competition Act permits a person who submits information to the Competition Commission or Competition Tribunal to identify information that he or she claims to be confidential. In practice, legal representatives and expert economists sign confidentiality undertakings, which then allow them to access these confidential documents for the purpose of advising their clients in Competition Tribunal or Competition Appeal Court proceedings.

On 12 November 2018, the Minister of Economic Development published proposed amendments to Rule 15 of the Competition Commission Rules for public comment.40 According to the explanatory note, the rationale for the amendments is to bring Rule 15 in line with Section 7 of the Promotion of Access to Information Act, 2000.

The proposed amendments provide an exception to the general rule that the record may be copied or inspected upon request.41 The proposed amended rules will not permit the copying or inspection of a document that is requested for (1) pending criminal, civil or administrative proceedings, (2) after proceedings have commenced and (3) where another law or the rules of any court or administrative body already provide for such production or access to the records.42

Furthermore, if implemented in its current form, a record obtained in contravention of Rule 15(5) of the amended Competition Commission’s Rules will not be admissible as evidence in the proceedings unless the relevant court or administrative body determines that the exclusion of the record would be detrimental to the interests of justice.43

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36 Ibid, at paragraph 73.
38 Ibid, at paragraph 34.
39 Ibid, at paragraph 35.
40 Government Gazette Number 42030 of 12 November 2018.
41 Subject to the information not constituting restricted information.
Discovery procedures before the civil courts

Discovery procedures in all civil actions instituted in the High Court or Magistrates’ Court are determined by Rule 35 and Rule 23 of the High Court Rules and Magistrate Court Rules respectively. Parties to a civil action are obliged to disclose to the other party all documents, tapes or recordings relating to any matter in question in their possession, under their control or that were previously in their possession or under their control that either serve to advance their case or adversely affect their case, or that advance the case of the other party to the proceedings. A party’s failure to discover any document will result in that party not being able to rely upon such document in the action. Furthermore, there are procedures in place that permit an application to compel the discovery of documents that have a bearing on the action. In practice, the courts will not hear a matter if discovery has not been finalised.

A party can also request the other party to make further and better discovery in addition to the documents they have already discovered. Either party can call on the other to provide copies of its discovered documents or to make the same available for inspection. Any documentation that is subject to privilege is not discoverable, but a list of these documents must nonetheless be produced.

In a 2015 case, City of Cape Town v. South African National Roads Authority Limited & Others, the SCA dealt with the issue of confidential information in discovery. In this case, the respondent sought to prevent the appellant from referring to its confidential information in its affidavits. The confidential information was obtained by the appellant through the application of civil procedure discovery rules.

When providing the confidential information, the parties agreed that the appellant would provide a confidentiality undertaking that would prevent the appellant from using or disclosing any information received from the appellant for any purpose other than the matter at hand, and only in a manner agreed between the parties or in accordance with the directions of a court or judge. In breach of the agreement between the parties, the appellant filed an affidavit that contained references to the respondent’s confidential information. The SCA held that the High Court prohibited the publication of all information from the Rule 53 record (a record filed in a review application), including the non-confidential record, whereas the respondent’s case was that all such information, apart from certain specified portions, could be made public immediately, while other parts of the information must be kept secret.
only until the respondent filed its answering papers, not until the hearing of the matter. This judgment confirms that, in relation to confidential information and public access to court records, the position is now that:

> court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified.\(^{56}\)

While confidential documents will need to be discovered, in certain circumstances a party can approach the court to order a regime where confidentiality can be specifically dealt with.\(^ {57}\)

**VI USE OF EXPERTS**

Experts play a key role in prohibited practices cases before the competition authorities and damages actions before the courts in South Africa. In particular, economists are crucial in identifying substantive competition law issues such as market definition and anticompetitive effect.

In England and Wales, the use of expert evidence in competition matters is subject to the guidelines of the court. The courts generally aim to control the manner of production of expert evidence in competition matters by, for example, giving directions on the issues in relation to which expert evidence may be produced, guiding the parties to narrow the issues of the matter or sanctioning discussions between the various experts involved in the matter.\(^ {58}\)

In the United States, the courts have narrowed down the instances where expert testimony may be utilised in competition cases to the following cases: when the expert has sufficient specialist knowledge and expertise with respect to the field in question; when the methodology and data used to reach the expert’s conclusions are sufficiently reliable; and when the expert’s testimony is sufficiently relevant to assist the trier of fact.\(^ {59}\)

The reliability of the expert evidence is a second factor to the inclusion of expert evidence, and is frequently the cause of most expert evidence being excluded from antitrust cases.\(^ {60}\)

In contrast to England and Wales as well as the US, however, in South Africa there are no specific rules on the use of expert evidence in antitrust cases heard by the competition authority.

In the absence of specific rules in relation to the calling of expert witnesses, and in particular economists in Competition Tribunal proceedings, the High Court Rules relating to the use of expert evidence will generally apply. In terms of Rule 36(9) of the High Court Rules, no person shall, save with the leave of the court or the consent of all parties to the

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56 Footnote 54 at paragraph 47.
57 Crown Cork + Seal Co Inc + Another v. Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093(W).
suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he or she shall, not less than 15 days before the hearing, have delivered notice of his or her intention so to do; and not less than 10 days before the trial, have delivered a summary of such expert’s opinions and his or her reasons therefor. Typically in matters before the Competition Tribunal, provision is made in the pretrial timetable for the exchange of expert witness statements with an opportunity for the parties to supplement their expert witness statements in reply. In a 2015 decision, the SCA dealt with the issue of the use of expert evidence to prove damages. The SCA held that courts in South Africa and other jurisdictions have experienced difficulties dealing with evidence from expert witnesses who are often described as ‘hired guns’. The SCA made reference to a passage from the judgment of Justice Marie St-Pierre in Widdrington (Estate of) v. Wightman, which stated the following in relation to the standard that should be met in the use of expert evidence in civil proceedings:

Legal principles and tools to assess credibility and reliability

[326] Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist.

[327] As long as there is some admissible evidence on which the expert’s testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish.

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness’s opinion.

[330] An expert witness’s objectivity and the credibility of his opinions may be called into question, namely, where he or she:

accepts to perform his or her mandate in a restricted manner;
presents a product influenced as to form or content by the exigencies of litigation;
shows a lack of independence or a bias;
has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
adovocates the position of the party that retained his or her services; or
selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.

The SCA evaluated the expert evidence adduced in this case in terms of these principles, thereby creating a precedent in South Africa for the standards to be met for the use of expert evidence in civil claims.

61 The parties can by agreement set longer time periods for compliance with this rule.
63 Ibid.
64 2011 QCCS 1788 (CanLII).
Following the SCA decision, the Competition Appeal Court stated that the guidelines from the Ikarian Reefer case should be followed in future hearings before the Competition Tribunal. The duties and responsibilities of expert witnesses as recorded in Ikarian Reefer include:

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his or her expertise. An expert witness in the High Court should never assume the role of an advocate.
- An expert witness should state the facts or assumption upon which his or her opinion is based and not omit to consider material facts that could detract from the concluded opinion.
- An expert witness should make it clear when a particular quotation or issue falls outside his or her expertise.
- If an expert's opinion is not properly researched because insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

In a novel decision in South Africa, the Competition Tribunal introduced the concept of a hot-tub hearing in the Timrite–Tufbag merger. The principle of hot-tubbing has been used in recent years in other jurisdictions to allow opposing experts to meet and independently discuss and identify points of agreement. This process ensures that only issues in contention are ultimately argued at the hearing before the Competition Tribunal.

Each expert gave a short opening presentation, and the remainder of the experts' testimony took the form of direct discussion between the experts.

As mentioned above, the competition authorities have discretion in applying the High Court rules. In a claim for damages before the civil courts, the High Court rules would apply. In the Nationwide decision, extensive expert evidence was used to demonstrate what the value of damages should be. The High Court did not, in this case, set out defined

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69 Re J sup.
70 Ibid.
71 Ibid at paragraph 181.
72 ‘Derby & Co Ltd and Others v. Weldon and Others’, The Times, 9 November 1990 per Lord Justice Staughton.
74 Footnote 2.
parameters for the standards to be applied in the use of expert evidence. It is, however, clear from the conclusions reached that it is the role of the relevant forum (the competition authorities or the civil court) at which the expert or economist evidence is being presented to determine the value that should be attached to the evidence.

VII CLASS ACTIONS

Unlike the legislation of some other jurisdictions, South Africa’s Competition Act does not provide for class actions in antitrust cases. However, Section 38(c) of the Constitution allows for class actions for an infringement of any fundamental right in the Bill of Rights. There is no specific class action legislation in South Africa.

The Pioneer bread class action was the first of its kind in South Africa, and confirmed that class actions for damages are possible in South Africa. In this case, the SCA gave the following guidance on class action proceedings:

a. class action proceedings may be sanctioned by a court where constitutional rights are invoked and in other appropriate cases;
b. it is necessary to apply to court for certification to institute a class action;
c. there must be a clear and explicit definition of the class to be encompassed, the identification of some claim or issue that could be determined by way of a class action, and evidence of the existence of a valid cause of action;
d. the court must be satisfied that the class representative is suitable to represent the members of the class;
e. the court must be satisfied that the class action is the most appropriate procedure to adopt for the underlying claims; and
f. the definition of the class must have sufficient precision so that a particular individual’s membership can be objectively determined by examining the situation in the light of the class definition. This test and commonality are likely to give rise to the most difficulties that litigants will experience in getting a class certified.

Following the Pioneer case, class action case law in South Africa has been developing, as demonstrated in the case of Nkala. On 13 May 2016, judgment was handed down by the High Court in relation to an application by 69 mine workers seeking to bring a class action against 32 mining companies for compensation for contracting silicosis and pulmonary tuberculosis while working in their mines. The Court issued an order for certification of the class after finding that, in this context, a class action was the only realistic option through which the applicants could assert their claims effectively against the mining companies. Applications for leave to appeal the judgment were in the main denied. The SCA has, however, given leave to appeal. On 3 December 2018, the South Gauteng High Court certified a class action in respect of a listeriosis outbreak early in 2018 that affected over 1,000 people. The defendant, a processed meat manufacturer, has elected not to challenge the certification, and

76 The Court noted that the factors are merely guidelines to be considered on a case-by-case basis. Footnote 4 at paragraph 15.
77 Footnote 4.
as such we are likely to see significant developments in class action law through this case in
the near future. In both of these cases, international law firms have been involved in funding
the South African class actions.

These developments in advancing the law applicable to class actions for damages claims
are likely to lead to an increase in the prevalence of such private actions in South Africa.

VIII CALCULATING DAMAGES

Section 65(6)(a) excludes a civil claim for damages by persons who have already been
compensated for damage in a consent order. In practice, however, damages are seldom agreed
to by respondents in consent orders, and accordingly a civil claim may be brought where a
finding that a party had contravened the Competition Act has been made.79

While the plaintiff will not need to prove the cause of action (that is, that the
Competition Act has been contravened), he or she will be required to prove the damage they
allege was suffered as a result of the prohibited practice. The general common law principles
relating to civil damages claims apply.

In South African common law, to sustain a civil claim for damages, the plaintiff must
show that the prohibited practice caused the plaintiff to suffer a loss and the amount of the
loss. In other words, the plaintiff must prove, on a balance of probability, that there is a causal
nexus between the alleged unlawful conduct and the damages that it claims.

The amount claimed as damages must be capable of being quantified in monetary
terms,80 and should only restore the plaintiff to the financial position he or she was in before
the wrongful conduct causing the damage took place. The onus is on the plaintiff to quantify
and prove the damages sought, and the court will determine the amount of damages to be
awarded, although these will not exceed the actual amount claimed by the plaintiff.81

The ‘once and for all’ rule has the effect that a complainant may generally only claim
damages that flow from a single cause of action once.82 A distinction must be drawn between
a single wrongful act that gives rise to a single cause of action and a continuing wrongful act
that causes damage over a period of time, which may give rise to a series of rights of action
arising from time to time.83 In Nkala, for example, the class action is seeking damages as
a result of alleged liability against the mine owners for silicosis and tuberculosis over an
extended period of time.

Prospective loss is accepted as part of the concept of damage in South African law.84 The
following forms of prospective damages are recognised in South African law:

- future expenses on account of a damage-causing event;
- loss of future income (or loss of earning capacity);
- loss of prospective business and professional profit;
- loss of prospective support;

79 In practice, many claims for damages are agreed to by way of private settlement negotiations.
80 The courts in South Africa are entitled to award nominal damages in the event that damages cannot be
quantified.
83 John Newmark & Co (Pty) Ltd v. Durban City Council 1959 (1) SA 169 (N); D & D Deliveries (Pty) Ltd
v. Pinetown Borough 1991 (3) SA 250 (D); Gijsen v. Verrinder 1965 (1) SA 806 (D). Claims for delictual
damages and subsidence are based on different causes of action.
e loss of a chance; and
f future non-patrimonial loss (injury to personality).  

Non-patrimonial loss is defined as the deterioration of highly personal or personality interests. South African law recognises personality rights (and interests) in regard to physical and mental integrity, bodily freedom, reputation, dignity, privacy, feelings and identity. A deterioration of the quality of any of these interests constitutes non-patrimonial damage. Such damages are, however, unlikely to arise as a result of a contravention of the Competition Act.

In *Nationwide*, the court stated that to determine the damage suffered by Nationwide, it had to compare the performance of Nationwide before and after the abuse period to try and reach some estimation of how it would have performed absent SAA’s unlawful agreements with travel agents.

The primary object of an award for damages is to compensate the person who has suffered harm. Plaintiffs may not profit from defendants’ wrongdoing. No punitive damages for contraventions of the Competition Act can be awarded by the South African courts.

Ordinarily in a civil case, the unsuccessful party will be responsible for the reasonable legal fees incurred by the successful party, which normally include legal fees. The costs of advocates and experts are generally not included in costs orders unless specifically stated or the expert is declared a necessary witness. There is, however, more than one tariff at which the legal fees are taxed, and the court has the discretion of whether to order costs and the tariff at which it is to be taxed.

IX PASS-ON DEFENCES

The passing-on defence has not yet been tested in South Africa.

In contrast, the US has rules dealing directly with pass-on defences. In the US, antitrust defendants are barred from using pass-on defences against a direct purchaser with three exceptions to this rule that have been recognised by lower courts in the US: pre-existing, fixed quantity cost-plus contracts; claims where the direct purchaser is owned or controlled by either the defendant or the indirect purchaser; and claims where the intermediary is a direct participant in a conspiracy with the defendant.
X FOLLOW-ON LITIGATION

The Competition Act makes provision for follow-on litigation following a finding of prohibited practice, provided damages were not awarded as part of a consent order.

Leniency is available for firms for cartel conduct (the direct or indirect fixing of prices or trading conditions, market allocation or collusive tendering that contravenes Section 4(1)(b) of the Competition Act). However, leniency awarded to a firm by the Competition Commission in terms of the Commission’s Corporate Leniency Policy\(^93\) only provides immunity from prosecution by the competition authorities and administrative penalties in terms of the Competition Act, and does not protect the applicant from civil or criminal liability.

There are proposed amendments to the Competition Act that will require the Competition Commission to develop and publish a policy on leniency.\(^94\) Accordingly, there are likely to be amendments to the current corporate leniency policy.

XI PRIVILEGES

Privilege is a fundamental right that protects communication between a legal representative and his or her client from being disclosed.\(^95\) Communication is privileged if it is made to a legal adviser acting within a professional capacity in confidence for the purpose of obtaining professional advice, for the purpose of use in contemplated or pending litigation or prosecution, or for both; and where the client claims the privilege.\(^96\)

i Legal adviser acting within a professional capacity

South African courts have held that there is no distinction drawn between internal legal advisers and attorneys acting within private practice for the purposes of legal privilege.\(^97\) The High Court in \textit{Mohamed}\(^98\) concluded that in the circumstances, confidential communication made between the government and its internal legal advisers was no different from confidential advice obtained from an independent legal adviser.

ii Communication made in confidence

Confidentiality is a question of fact. Courts tend to infer that communication is confidential where it is proven that the legal adviser was consulted in his or her professional capacity to obtain legal advice.\(^99\) Nevertheless, in \textit{Bank of Lisbon}, the Court held that ‘the basis of privilege is confidentiality. When confidence ceases, privilege ceases.’\(^100\)

\(^94\) See the insertion of Section 49E of the Competition Amendment Bill published in Government Gazette Number 41756 of 5 July 2018.
\(^95\) \textit{S v. Safatts} 1988 (1) SA 868 (A) 886.
\(^97\) \textit{Van der Heever v. Die Meester and Mohamed v. President of the RSA} 2001 (2) SA 1145 (C) 1151.
\(^98\) Ibid.
\(^99\) \textit{R v. Fouché} 1953 (1) SA 440 (W).
\(^100\) \textit{Bank of Lisbon and South Africa Ltd v. Tandrien Beleggings (Pty) Ltd and Others} (2) 1983 (2) SA 621 (W) at 629G.
iii  **Purpose of obtaining legal advice**

Communication made for the purpose of obtaining legal advice is also a question of fact. The communication is not limited to advice connected to actual or pending litigation.\(^{101}\)

It has also been held that legal advice need not be the primary purpose of the communication provided that the purpose is connected with obtaining legal advice.\(^{102}\) Therefore, a statement made that is unconnected with the giving of legal advice will not be privileged merely because it was made in confidence to a legal adviser.

iv  **The client must claim the privilege**

Privilege attaches to the client, not the legal adviser. The legal representative is obliged to raise the privilege on behalf of his or her client or is bound by the waiver depending on the client’s decision.

v  **Waiver**

Privilege can be waived either expressly, impliedly or through imputation. The courts may impute waiver where the client discloses privileged information. In *Wagner*, the Court held that an implied waiver involves ‘an element of publication of the document or part of it which can serve as a ground for the inference that the litigant or the prosecutor no longer wishes to keep the contents of the document a secret’.\(^{103}\)

vi  **Impact of producing documents to the competition authorities**

Leniency applications and the documents attached to such applications have not, to date, been disclosed by the Competition Commission to any complainants or third parties. The Competition Commission’s view is that both leniency applications and the documents produced in support of them are protected by legal privilege and also constitute restricted information in terms of Rule 14 of the Competition Commission’s Rules.\(^{104}\) To qualify as subject to a claim of legal privilege, the leniency application documents must have been compiled for the dominant purpose of litigation before the Competition Tribunal in contested complaint proceedings and have been placed before legal advisers for advice in respect of such litigation.\(^{105}\)

However, in a 2013 judgment,\(^{106}\) the SCA held that although leniency applications are protected from disclosure by a claim of legal privilege (by the Competition Commission), in this particular case the Competition Commission had waived its claim of litigation privilege by referring to the leniency application in the referral document filed with the Competition Tribunal.

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\(^{101}\) *Savides v. Varsamopolus* 1942 WLD 49.

\(^{102}\) *Lane and Another NO v. Magistrate, Wynberg* 1997 (2) SA 869 (C).

\(^{103}\) *Ex parte Minister of Justice: In re S v. Wagner* 1965 (4) SA 507 (A) 514.

\(^{104}\) *Rules for the conduct of proceedings in the Competition Commission published under GG 22025 of 1 February 2001.*

\(^{105}\) *Arcelormittal South Africa Limited and Another v. Competition Commission and Others* (103/CAC/Sep10) [2012] ZACAC 1 (2 April 2012).

\(^{106}\) *Competition Commission of South Africa v. Arcelormittal South Africa Limited and Others* (680/12) [2013] ZASCA 84 (31 May 2013).
It is, however, possible that information contained in a leniency application will still be protected if it has been claimed as confidential in a confidentiality claim submitted by the disclosing party. 107 This principle was reiterated in a 2016 Competition Appeal Court case in which the Competition Appeal Court found that the Competition Commission’s investigative record ought to be disclosed to any person who requests it in terms of Rule 15 of the Competition Commission’s Rules 108 provided that those documents are not legally privileged or confidential and do not constitute restricted information. 109

A person who seeks access to information that is subject to a claim of confidentiality must apply to the Competition Tribunal in the prescribed manner and form for access to the information. The Competition Tribunal will determine whether the information is confidential, and if it finds that the information is confidential, it may make an appropriate order concerning access to that confidential information. 110

The Competition Amendment Bill 111 contains significant amendments to both Section 44 and Section 45 of the Competition Act. In particular, with regards to information submitted to the Competition Commission, the Competition Commission will determine whether the information is confidential information and, if it determines that the information is confidential, may make any appropriate determination concerning access to that information. 112 An aggrieved party will be entitled to refer the Competition Commission’s decision to the Competition Tribunal, which may confirm or substitute the decision. The Competition Tribunal will be entitled to make a determination in respect of confidential information submitted to it.

The effect of these proposed amendments is that it will no longer be necessary to approach the Competition Tribunal to make a determination on whether information submitted to the Competition Commission, which has been claimed as confidential, is confidential information. It bears mention that if confidentiality has been claimed over information, it will continue to remain confidential until a determination to the contrary has been made. However, proposed amendments to Section 45 of the Competition Act will allow for the Minister of Economic Development, any other relevant minister and any relevant regulatory authority to access confidential information in merger proceedings for the purposes of their participation in merger proceedings.

Confidential information is defined in Section 1 of the Competition Act as ‘trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others’.

**XII SETTLEMENT PROCEDURES**

In terms of Rule 34 of the High Court Rules and Rule 18 of the Magistrate Court Rules, provision is made that in an action where a sum of money is claimed, a defendant may at

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107 Section 44 of the Competition Act.
108 Footnote 28.
109 Footnote 28.
110 Section 45(1) of the Competition Act.
111 Competition Amendment Bill published in Government Gazette Number 41756 of 5 July 2018.
112 See Item 27 of the Competition Amendment Bill.
any time, unconditionally and without prejudice, make a written offer to settle the plaintiff’s claim, which must be signed by the defendant him or herself, or by his or her attorney authorised in writing to do so.

Where a settlement offer is made on a without prejudice basis and the offer is not accepted, then the offer may not be used or referred to in court or in arbitration proceedings except insofar as a cost order is concerned. In the case of an unconditional formal settlement offer, should the offer not be accepted, either party is entitled to refer to the offer in proceedings.\(^{113}\)

An example of this in a civil action for damages in an antitrust case is the settlement reached between Premier and civil society organisations including Black Sash, COSATU, the Children’s Resources Centre and the National Consumer Forum for damage suffered as a result of Premier Foods’ participation in the bread cartel.\(^{114}\)

**XIII ARBITRATION**

There is nothing preventing parties from agreeing to arbitration or other alternative dispute resolution mechanisms as a means of addressing a damages claim after a finding of prohibited practice has been made.

**XIV INDEMNIFICATION AND CONTRIBUTION**

The Competition Act does not provide for joint and several liability. In terms of Section 2(6) of the Apportionment of Damages Act, 1956, if judgment is given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the joint wrongdoer has, if the judgment has been paid in full, a right of recourse against other joint wrongdoers in the proceedings for a contribution in respect of such an amount. Such a claim will prescribe 12 months from the date of the judgment.\(^{115}\)

In the US, the Supreme Court has held that an antitrust defendant is not permitted to seek a contribution from the other participants in an anticompetitive arrangement.\(^{116}\) This decision was based on the finding by the Supreme Court that Congress in the US had not explicitly or implicitly created any statutory right to contribution for an antitrust defendant, and also had not conferred any authority on the US federal courts to create a common law right to contribution in favour of an antitrust defendant.\(^{117}\) There are no clear rules in US antitrust law in relation to the right of a defendant to indemnification.\(^{118}\)

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

Criminal liability for individual managers or directors who participate or knowingly acquiesce in price fixing, market allocation or collusive tendering in contravention of Section 4(1)(b)
of the Competition Act was introduced in South Africa on 1 May 2016. Individuals face administrative penalties of up to 500,000 rand and prison sentences of up to 10 years if found guilty. No individuals have been prosecuted yet, but this development will likely lead to some interesting developments in the future; only time will tell how it will be applied.

The Competition Amendment Bill, 2018 is awaiting presidential signature to be promulgated into law. The amendments are far-reaching, and are likely to result in increased cartel litigation and private enforcement in respect of abuse of dominance contraventions.

With continued public enforcement of high-profile cartel cases, and with further clarity arising in respect of civil claims, private enforcement is likely to increase in South Africa, albeit slowly.
OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private antitrust actions have traditionally been rare in Spain, in proportion to the increase in cases that have been sanctioned by the National Commission on Markets and Competition (CNMC) and the European competition authorities, over the past few years.

Despite the low number of disputes, Spanish courts have already had the opportunity to analyse a number of standalone nullity and damages actions, and also a few follow-on actions, in particular the Sugar cartel case. As a result of the rulings in this case, the Supreme Court has decided several substantive issues on private antitrust actions, and has developed a body of case law applicable to such actions consistent with the existing legislation.

In addition, and prior to the entry into force of the Damages Directive, a series of legal reforms was implemented to modernise the rules on private antitrust litigation at the national level. As a consequence of the reforms, the commercial courts have become competent to hear cases involving antitrust litigation, and the new Competition Act has eliminated certain hurdles to bring follow-on actions before the courts, in line with EU Regulation 1/2003.

However, it was not until last year that the number of actions increased, attracting the attention of legal practitioners.

2018: increase in private antitrust enforcement

Several factors explain the rise in private antitrust litigation in Spain, starting with the implementation of the Damages Directive into the Spanish legal system and continuing with the discovery of a mainstream cartel by the European Commission (EC) involving manufacturers of medium and heavy-duty trucks that illegally and artificially increased the prices of trucks throughout Europe (Trucks).

In addition, the issuance of several rulings by the commercial courts of Barcelona and Madrid regarding actions for damages against several paper envelope producers for their participation in a price-fixing and market-sharing cartel in Spain from 1977 to 2010 (Envelopes) has also contributed to the rise in the popularity of actions for damages arising from antitrust infringements.

1 Albert Poch Tort and Andoni de la Llosa Galarza are founding partners at Redi Litigation.
2 Supreme Court rulings Nos. 344/2012 and 651/2013.
3 Directive 2014/104/EU.
Trucks

On 19 July 2016, the EC announced that it had fined manufacturers of medium and heavy-duty trucks over €2.93 billion for their participation in the price-fixing Trucks cartel, which covered the entire European Economic Area and lasted 14 years from 1997 to 2011, as a result of an investigation under Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The Trucks cartel has had an enormous impact on litigation due to the large number of vehicles affected, and has led thousands of trucks owners affected by the cartel to file claims before the commercial courts in order to claim damages.

Although only the start of a long judicial process that will ultimately be decided by the Supreme Court, the first relevant rulings in this matter to clarify some of the key procedural issues of the action for damages have already been issued by the commercial courts.

In this regard, several judgments have affirmed the international competence of the Spanish courts to hear civil actions arising out of the Trucks cartel, considering the commercial courts in the place where claimants are domiciled to be competent, when resolving the plea as to jurisdiction filed by the defendants.

In addition, Commercial Court Number 1 of Murcia issued the first ruling in Spain in the Trucks cartel with a decision in favour of the claimants. The judgment, issued on 15 October 2018, condemned the Spanish subsidiary of Volvo Trucks to compensate the claimants €128,756.78 as a result of their acquisition of five Renault trucks during the cartel period. The ruling, which is not final because it can be appealed before the provincial court, determined that an overcharge of 20.7 per cent occurred in the price of trucks charged by the manufacturers, which is in line with the average overcharge observed in the cartel by the EC.

Envelopes

In March 2013, the Spanish National Competition Commission (CNC) fined several envelope producers for their participation in a price-fixing and market-sharing cartel in Spain that occurred from 1977 to 2010.

Before the judgments of the contentious-administrative courts that declared the CNC decision correct were final, several claimants filed actions for damages before the commercial courts of Madrid and Barcelona seeking compensation, and, after several procedural hurdles, in 2018 the commercial courts of Barcelona and Madrid issued their first judgments, with different results.

The commercial courts of Madrid ruled in favour of the defendants, finding that the expert evidence was insufficient to justify the harm; therefore, the courts dismissed the claims.

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5 Case COMP/39824, Trucks.
6 Judgment of Commercial Court Number 3 of Valencia, 4 October 2018.
8 The CNC was integrated into the CNMC in 2013 with the following five entities: the National Energy Commission, the Commission on the Telecommunications Market, the National Commission on the Postal Sector, the State Council on Audio-visual Media, and the Committee on Railway and Airport Regulation.
9 Judgments of the Commercial Court Number 3 of Madrid, 7 May 2018, Chamber of Commerce of Madrid, and Commercial Court Number 11 of Madrid, 8 June 2018, Pontifical Missions.
In contrast, Commercial Court Number 3 of Barcelona ruled in favour of the claimants, awarding damages to the companies affected by the Envelopes cartel in three different cases for a total amount of approximately €2 million.\(^{10}\)

Even if they are not final, the judgments are very useful for future damages claims arising out of antitrust infringements (especially the judgments of the Commercial Court of Barcelona, since they approach the actions from a very constructive perspective), as they analyse in great detail all the procedural issues involved and confirm the application of the doctrine that emanated from the Supreme Court in the Sugar cartel case.

ii Legal expenses

Finally, the rise in private antitrust enforcement in Spain is linked to the attractive commercial conditions that can be offered by law firms based on the contingency fee, including conditional fee arrangements, that are currently available in Spain, because the Supreme Court established that bar associations’ prohibitions in this regard were contrary to antitrust law, and therefore null and void.\(^{11}\)

In addition to the attractiveness of the contingency fee, a second determining factor that explains the rise of antitrust claims is the emergence of international litigation funds in Spain, which have been very active in the Trucks cartel, both in terms of funding and acquiring claims.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal framework

The declaration of a competition infringement may be based on EU law (Articles 101 and 102 TFEU) or Spanish competition law (Articles 1 and 2 of the Competition Act). Both regulations are substantially identical, and their scope depends on the market affected, that is, whether it involves trade between EU Member States or within the domestic market, respectively.

Regarding civil claims arising from antitrust infringements, Spanish civil law offers the following possibilities:

\(a\) if a claim seeks the nullity of a contract, this purpose will be based on Article 6.3 of the Civil Code, and the economic consequence of such nullity will imply the reciprocal restoration of the economic contributions made by the parties (Article 1.303 of the Civil Code); and

\(b\) if a claim seeks damages on a non-contractual basis, Article 1.902 of the Civil Code has historically been the legal provision commonly used when claiming compensatory damages caused by an antitrust infringement, either as a follow-on or stand-alone action.

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\(^{10}\) Judgments of 6 June 2018, Cortefiel, 5 September 2018, CIFDSA and 10 September 2010, Mutua Madrileña.

However, since the entry into force of Royal Decree-Law 9/2017, approved as a consequence of the Damages Directive, the new Title VI of the Competition Act provides claimants with a new and complete framework for antitrust claims that encourages the filing of claims as a way of deterring undertakings from competition law infringements.

The new regulation provides multiple provisions to strengthen the position of claimants, such as:

a an increase of the time-barring period;
b the presumption of harm where a cartel has resulted in fines;
c the joint and several liability of all the offenders; and
d the binding effect of the decisions of the Spanish Competition Authority.

Finally, non-compliance with the competition law can also be regarded as unfair competition under Article 15 of the Unfair Competition Act, which could lead to an action for damages specified in Article 32.1.5 of the Act.

ii Jurisdiction

Damages claims for antitrust infringements are filed before commercial courts, which are specialised civil courts that only deal with some commercial issues. Moreover, in big cities like Barcelona and Madrid, these types of claim are only judged by specialised commercial courts.12

There has been some controversy about the jurisdiction of the commercial courts when there is a follow-on claim that is based on a final decision by a competition authority, as some believe that these claims should not be different from other civil compensatory claims, which go to ordinary civil judges.

However, since a judgment issued by the Provincial Court of Madrid of 22 June 2017, the debate appears to have been closed in favour of the commercial courts’ jurisdiction in both follow-on and stand-alone antitrust claims for damages.

iii Limitation periods

Claims seeking the nullity of a contract for antitrust infringements are limited to four years under Article 1.301 of the Civil Code.

Nevertheless, actions for damages that follow a non-contractual approach can benefit from the new prescription period of five years stated in the Competition Act, which is rather longer than the previous prescription period: if not for this new regulation, damages claims for antitrust infringements would still have the same limitation period as other damages civil claims in Spain, which is one year (except in Catalonia, whose Civil Code provides a three-year limitation period for non-contractual claims).13

In any case, following Article 74 of the Competition Act, the prescription period only begins to run when an infringement is over and the claimant knows or could have reasonably known about the unlawful conduct, the damages caused and the identity of the infringer.

12 For instance, in Barcelona, only Commercial Court Number 11 now deals with the private application of competition law.
13 See Article 121-21 of the Catalan Civil Code.
III EXTRATERRITORIALITY

Spain does not have specific rules regarding extraterritoriality when dealing with private competition enforcement.

Therefore, the Spanish legal system will apply to actions related to the prevention, restriction or distortion of competition in all or part of the domestic market, regardless of the nationality of the parties.

A case may be brought before the Spanish courts according to Regulation (EC) No. 1215/2012 of 12 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, mainly under Articles 4.1 (domicile of the defendant) and 7.2 (place where the harmful event occurred).

IV STANDING

Any person who may have suffered damage due to a competition infringement is entitled to claim damages before the courts. This includes consumers or providers of offenders, and also those who may have suffered indirect (umbrella) damage and, therefore, have never had a direct relationship with the infringers. Additionally, those who acquire an action shall also be entitled to bring that action for damages before the court, according to the Competition Act.

Regarding the defendant, actions for damages must be brought against the undertakings who have participated in an unlawful act. Again, it must be taken into account that Royal Decree-Law 9/2017 introduces the joint and several liability ex lege of all the offenders.

This new regulation does not expressly mention the possibility of suing a Spanish subsidiary of a foreign company found guilty in an antitrust infringement, but this possibility has already been applied by a recent judgment from Commercial Court Number 1 of Murcia: the Court awarded damages against the Spanish subsidiary of Volvo Trucks, which was found guilty in the Trucks case. Since this judgment is not final, the subject is still open for discussion.

Finally, and as a consequence of joint and several liability, as a general rule all defendants that have fully compensated their victims are entitled to recover the part of the damages that has been paid on the other offenders’ behalves. However, there are three exceptions to this:

a the beneficiaries of leniency programmes, who will only be responsible for compensating their own buyers or suppliers (directly and indirectly), unless full compensation cannot be obtained from the other offenders in the same conduct;

b small and medium-sized enterprises (SMEs), which are only responsible to their (direct and indirect) buyers or suppliers if they have not been sanctioned before, unless they have led an infringement or coerced other undertakings to participate; and

c offenders that have settled with a claimant.

V THE PROCESS OF DISCOVERY

Spain’s legal culture has traditionally been very reluctant to require the disclosure of evidence. This explains not only the absence of a discovery proceedings in the Civil Procedure Act, but also the conservative approach, from a judiciary perspective, when dealing with preliminary measures to prepare subsequent proceedings, especially in areas such as unfair competition and intellectual property.

In terms of antitrust infringements, the approval of Royal Decree-Law 9/2017 has modified the Spanish Civil Procedure Act to include 11 new articles in order to provide access
to sources of evidence when facing damages claims arising out of antitrust infringements in line with the Damages Directive. According to this new regulation, which is not available in other civil claims, both claimants and defendants may request categories of documents in each other’s possession or in the possession of a third party, or relevant parts of the Competition Authority’s case file, providing that such request is proportionate in general terms.

The Civil Procedure Act has incorporated the Damages Directive’s rules on access to confidential information, which means that evidence obtained unlawfully will not be admissible, and cannot be voluntarily provided or requested from other parties. The duty of legal privilege and professional secrecy relating to the testimony of parties and witnesses is also protected by the law, which has been interpreted restrictively by the Spanish courts.

Finally, the use and dissemination of industrial or trade secrets is also protected, and can even be considered a criminal offence under the Criminal Code. Until the transposition of EU Directive 2016/943 into Spanish law, there is no specific definition of trade secrets under Spanish law, although Spanish courts have developed a consistent body of case law in this regard, and have interpreted very restrictively the access of the parties to relevant commercial information of other parties.

VI USE OF EXPERTS

As is common in private competition enforcement claims, experts have a leading role in proving damage, as a lack of evidence of damage caused by an antitrust infringement or an incorrect approach by experts may lead a judge to dismiss a claim because damage was insufficiently proved.14

According to the Spanish Procedural Act, the claimant has the burden of proof in this regard; therefore, expert reports are absolutely necessary in any damages claim, and are particularly important when dealing with private competition enforcement where the damages claimed for is the result of a counter-factual scenario, which will always be abstract.

Regarding the content of an expert’s report, the Supreme Court has stated in the Sugar cartel case that the claimant’s expert report must provide a technically well-founded methodology based on a reasonable and testable hypothesis and accurate and verifiable data, comparing the actual situation (the price and loss of sales data) with the counter-factual analysis (a ‘but-for’ scenario). The defendant’s expert report must not be limited to criticising the methodology of the claimant’s expert report, but must also provide an accurate, alternative and better-founded quantification of damages. An unreasonable hypothesis is sufficient for the defendant’s expert report to be found to be unreliable.

Expert reports must be presented in writing (Article 299 of the Civil Procedure Act) and will be attached to the claim or counterclaim, and experts must appear in court during a trial to answer the questions of both parties. The claimant can also request the court to appoint an independent expert (Article 355 of the Civil Procedure Act) and, according to Article 5.2 (b) of Law 3/2013 of 4 June 2013 on the creation of the Spanish Markets and Competition Commission, the CNMC can also assist courts as amicus curiae in quantifying damages.

14 See judgment of Commercial Court Number 3 of Madrid, 7 May 2018.
VII  CLASS ACTIONS

The Spanish legal system restricts the scope of actions seeking collective redress to consumers and final users and, contrary to other legislation with a longer tradition, establishes a representative system that only grants consumer associations and the public prosecutor the procedural standing to initiate the action. Therefore, our legal system is still far from reaching EU recommendations on this issue.15

The same applies for private competition enforcement, although the Spanish Parliament is currently analysing an ambitious proposal that aims to create a real opt-out class action to enable any consumer in the representation of a class, and not only consumer associations, to claim damages and bring class actions before the court. Until and unless that happens, victims of antitrust infringements can still join their claims and have the same judge and the same process for all of them, given that there is a link between all the actions in view of the same object or the same petition. This will be presumed if all claims are based on the same grounds.

VIII  CALCULATING DAMAGES

Punitive or exemplary damages are not available under Spanish law, therefore antitrust civil claims will be focused on restoring the affected party to the exact position that he or she would have been in if the harm had never occurred, which has to be established in natura when possible and, if not, by the calculation of the monetary sum equivalent to the harm caused (including both material and moral damage).

In line with the Damages Directive, Article 72 of the Competition Act expressly recognises the right of any victim to full compensation, which includes emerging damage, loss of profit and the payment of interest. Therefore, establishing the precise amount of the overcharge is one of the most important issues in antitrust claims, which reinforces the importance of experts’ reports to provide a very well-grounded counterfactual scenario to compare with the real scenario, thereby determining the damage caused to parties.

Due to the difficulties of this process, and despite the EU guidelines on the subject, Royal Decree-Law 9/2017 has introduced some provisions into the Competition Act to make it at least a little easier for claimants. For instance, it provides for the presumption of harm in cartel cases and the capacity of the judge to estimate the amount of damages when the calculation of the overcharge is too complicated.16

IX  PASS-ON DEFENCES

Spanish tort law is very concerned with avoiding overcompensation of victims. As such, the passing-on defence has been accepted, and was expressly recognised by the Supreme Court in the Sugar cartel case.

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15 See the Recommendation of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under the Union Law.

16 See Article 76 of the Competition Act. However, see also the judgment of the Commercial Court of Madrid, Section 3, 7 May 2018, where the claim was dismissed simply because the amount of damages was not adequately proved. The judge stated obiter dicta that, even if the Damages Directive were applicable to the case, this does not prevent the claimant from proving the concrete harm suffered (page 8).
The new regulation introduced into the Competition Act by Royal Decree 9/2017 also includes a specific regulation of the passing-on defence. It states that if the claimant is the direct buyer or supplier, the burden of proof of the passing-on remains with the defendant. In contrast, if the claimant is an indirect buyer or supplier, it will have to prove that damage has gone downstream or upstream.

However, due to the difficulty of proving the passing-on and as a way of encouraging consumers to claim for damage caused by manufacturers (hence indirect buyers), the new regulation also provides the claimant with a presumption that the harm has been passed-on to indirect buyers or suppliers whenever the defendant infringed competition rules, this infringement caused harm, and the claimant purchased the products or services affected by the unlawful conduct.

Even when the passing-on is proven, it will not necessarily imply the full dismissal of a claim of a direct buyer, because this claimant could prove that, even in the event that the overcharge was passed on his or her customers, there still has been a loss of sales as a consequence of the overcharge, which could have led to a loss of profit.

X  FOLLOW-ON LITIGATION

Prior to the new Competition Act, the Spanish legislation required decisions of the Competition Authority to be final before a claim for damages could be filed before the courts. This is no longer the case, and parties can file claims whenever they want, although with different implications.

If a claim follows a final decision of the European Commission or the CNMC, this decision will be binding on the courts. However, the fact that most CNMC decisions are challenged before the contentious administrative courts must be taken into consideration, as this means that decisions will not be final before a five to seven-year period has elapsed.

If a claim follows a final decision of the competition authority of another EU Member State, then there is a rebuttable presumption that the unlawful antitrust conduct actually occurred. Again, the problem with this option lies in time issues, and not in its effectiveness.

Finally, if a claimant decides to file a follow-on claim based on a decision made by a competition authority that is not final (i.e., it has been challenged before the courts), the antitrust infringement will not be considered irrebuttable, although it may be considered qualified proof before the courts and the claimant will clearly be in a better position than without having the non-final resolution.

A question may arise in relation to this third option: what if a judge estimates the claim and, afterwards, the resolution is declared null and void? This has already happened. Mussat, one of the companies affected by the Construction Insurance cartel, claimed for damages against the insurance companies that took part in the cartel that was declared by the CNMC. Damages were awarded by Commercial Court Number 12 of Madrid, and were confirmed afterwards by the Provincial Court even though the decision of the CNMC had been previously set aside by the National High Court.

17 Competition Act 15/2017.
18 See 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 and Article 75.1 of the Competition Act.
19 This judgment was afterwards partially revoked by the Supreme Court in sentence No. 481/2013 of 22 May 2015.
XI PRIVILEGES

Evidence subject to legal privilege or professional secrecy is protected, which means that attorney–client communications are privileged. Lawyers have an obligation not to reveal any information provided by a client for the purpose of obtaining advice. The flip side is the right of clients to not disclose any information provided to a lawyer either in processes before a competition authority or in private competition enforcement.

Whistle-blowers are also protected. When an undertaking that took part in an antitrust infringement has participated in a leniency programme of any competition authority, all documents sent and produced for this purpose cannot be disclosed in a subsequent damages claim. The same holds for settlement requests made by offenders.20

As such, if a judge requests a copy of the administrative file from a competition authority following Article 15 bis of the Civil Procedure Act (ex officio or at the request of any of the parties), these pieces of information shall be omitted.

XII SETTLEMENT PROCEDURES

Parties can reach an agreement to avoid or terminate litigation under Article 1809 of the Civil Code at any time during the proceedings. The judge must expressly ask the parties if they can reach an agreement at the beginning of the preliminary hearing (Article 415 of the Civil Procedure Act) and once the contested facts have been defined (Article 428 of the Civil Procedure Act). The parties may choose whether to submit their agreement to the judge to get his or her approval, in which case it has the same effect as a judgment; otherwise, it would have the effect of a private agreement.

Since its modification because of the Damages Directive, the Competition Act tries to encourage parties to reach agreements in damages claims. This is why Article 81 enables the judge to suspend proceedings when both parties are trying to settle their discussion about the damage caused by a competition infringement.

In the same vein, Article 77 of the Competition Act states that if a defendant settles with the claimants, it will be released from joint and several liability. This could encourage settlements with the smaller offenders, which would benefit the claimants, who would obtain part of the damages; and the offenders that settle, which would only pay a small part of the damages.

XIII ARBITRATION

Private arbitration is permitted in Spain when dealing with disputes on issues that are under the parties’ free disposal, according to Article 2 of Law 60/2003 of 23 December. As such, public policy issues cannot be arbitrated.

Although EU antitrust legislation is considered to be a public policy matter, the European Court of Justice’s decision in Eco Swiss allows arbitrators to apply competition

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20 See Article 283 bis i), 6 of the Civil Procedure Act in relation to the definition of ‘statements in the framework of a leniency programme’ provided by the fourth additional provision of the Competition Act.
rules to determine the validity of a certain contract or commercial conduct.  

However, the possibility of arbitrating a dispute regarding damage caused by antitrust infringements that have not been previously and finally declared by a competition authority remains controversial.

XIV INDEMNIFICATION AND CONTRIBUTION

Spanish tort law regards joint and several liability as an exception to the general rule, so whenever it is possible to individualise the harm caused by every single offender, there will be joint liability.

An exception to joint and several liability, however, has been widely applied when there is a plurality of parties whose participation in the offence cannot be individualised. This could be the case in a claim for damages arising out of an antitrust infringement such as a cartel.

Regarding private competition enforcement, however, Royal Decree-Law 9/2017 approves the current Article 73 of the Competition Act, which establishes the joint and several liability of all infringers of any provision related to competition law, and hence the capacity of claimants to bring actions against only one infringer. The exceptions to this joint and several liability are, as previously stated, those who benefit from a leniency programme, SMEs in some cases and defendants who settle with the claimant.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Actions for damages against the manufacturers in the Trucks cartel will be a particular focus of the judiciary in 2019.

The consolidation of Spain’s jurisdiction to hear actions for damages arising out of the cartel has considerably reduced the legal uncertainties of the case argued by the defendant’s lawyers in order to halt or slow down the claims. In addition, the issuance of the first judgments in favour of the claimants has contributed to optimism about the future success of the thousands of claims filed before the Spanish commercial courts against the truck manufacturers.

In addition to the Trucks cartel, in 2019 Spanish courts will also hear more actions for damages arising out of the Envelopes, Raw Milk and Basketball Clubs Association cartels, among others. The result of those judgments will also be important for evaluating the success of actions for damages arising out of antitrust infringements declared by the CNMC, which have their own peculiarities due to the length of the judiciary proceedings before the contentious administrative courts.

On a regulatory level, the possible amendment of the Spanish system for collective actions under the Civil Procedure Act will inevitably be in the spotlight, as the current regulation of collective actions will be improved in line with the Recommendation of the European Commission 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.

In this regard, Parliament is currently analysing an ambitious proposal that may amend Article 11 of the Civil Procedure Law to create opt-out class actions to enable any consumer

in representation of a class, and not only consumer associations, to claim damages and bring class actions before the court in line with the US regulations on class actions under Federal Rule No. 23.

Until and unless that happens, alternative methods for individuals to appear before the courts, including by assigning their claims to a special purpose vehicle that acquires the claims and may bring an action on its own behalf, will increasingly be used to claim damages arising out of antitrust infringements, as is already common in other jurisdictions such as the Netherlands.
SWEDEN

Elsa Arbrandt and Fredrik Lindblom

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Competition Damages Act\(^2\) governs actions for damages for infringements of competition law provisions and implements the EU Damages Directive.\(^3\)

The purpose of the legislation is to facilitate companies’ and consumers’ ability to claim compensation for competition damages. The legislation clarifies liability, limitation periods, compensation, right of recourse, the passing-on defence, disclosure and other procedural issues.

In February 2018, the Patent and Market Court dismissed a claim for damages by Net at Once, a telecommunications operator, against GothNet, a data communications service provider, for having abused its dominant position through price discrimination, margin squeeze, or both. Net at Once claimed that GothNet was the only market player with access to the relevant input needed to submit a tender in a public procurement for fibre connectivity. Net at Once stated that GothNet had applied lower prices in its own tender in the public procurement than it had offered to Net at Once for the same input, even though Net at Once was a wholesaler and not the end customer. The Court found that Net at Once had not proved that GothNet had a dominant position, and therefore the case was dismissed. The judgment has been appealed and is pending before the Patent and Market Court of Appeal.

In May 2018, the Supreme Court decided to not grant Tele2 and Yarps leave to appeal their follow-on damages cases brought against Telia, which in 2013 was found to have abused its dominant position through margin squeeze. The judgment of the Svea Court of Appeal thus became final, whereby both parties’ claims were dismissed.

In July 2018, the Patent and Market Court delivered a judgment involving vertical price parity clauses. Visita, the organisation for the Swedish hospitality sector, had filed an action asking the Court to impose an injunction against Booking.com (Booking) to remove its vertical price parity clauses (clauses preventing hotels from setting lower prices on their own websites than the prices offered on Booking) in its agreements with hotels. Booking’s horizontal price parity clauses had been found anticompetitive by the Swedish Competition Authority in 2015, resulting in a commitment from Booking to remove the clauses from their agreements. The Patent and Market Court found that the vertical price parity clauses had an anticompetitive effect and ordered Booking to cease applying such clauses, subject to a fine if non-compliant. The judgment has been appealed and is pending before the Patent and Market Court of Appeal.

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1 Elsa Arbrandt and Fredrik Lindblom are partners at Advokatfirman Cederquist KB.
2 Competition Damages Act 2016:964.
3 EU Damages Directive 2014/104/EU.
II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The basic antitrust prohibitions in Swedish competition law mirror the prohibitions in Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU), and include prohibitions against agreements between undertakings that restrict competition (Chapter 2, Section 1 of the Competition Act\(^4\)) and abuse of a dominant position (Chapter 2, Section 7 of the Competition Act).

Agreements and clauses that infringe the competition prohibitions are void where anticompetitive cooperation is statutorily void, and conducts constituting an abuse of a dominant position are void according to established court practice.

Chapter 3, Section 25 of the Competition Act establishes a right to damages for parties injured because of infringements of Chapter 2, Sections 1 or 7 of the Competition Act or Articles 101 or 102 TFEU. Chapter 2, Section 1 of the Competition Damages Act establishes a liability to make up for the damage caused by an infringement. A private action for claims for damages on the basis that an agreement, provision or conduct is in violation of the Swedish or EU competition rules may be brought in Sweden, either as a standard private action under the general procedural rules or as a class action under the rules of the Class Action Act.\(^5\)

Since September 2016, the Patent and Market Court has jurisdiction over competition damages actions as well as competition cases brought by the Swedish Competition Authority. The Patent and Market Court of Appeal is the court of second, and final, instance in such cases. Thus, any action for competition damages in Sweden should be filed with the Patent and Market Court.

A finding of an infringement by a competition authority is not required before a private antitrust action is initiated. A claimant can provide other evidence that the defendant is in breach of the provisions of the Competition Act as basis for its claim against the defendant. However, the Competition Damages Act stipulates that a finding of a breach of the provisions in the Competition Act in a final ruling may not be reexamined in a subsequent action for damages even if the claimant is not explicitly mentioned in the decision. This is a change from the earlier Swedish legal tradition, which considered judgments as only binding between the parties and an evidentiary fact (which can be rebutted) in all other cases.

The rules on statutory limitations have also been changed. Prior to the Competition Damages Act, the right to damages for breach of the Competition Act or Articles 101 or 102 TFEU lapsed if no claim was brought within 10 years from the date on which the injury was sustained (i.e., when the infringement occurred). In practice, with the long handling times of the authorities and courts, this meant that the right to damages often had lapsed by the time of a final and binding judgment. Therefore, the Competition Damages Act stipulates a limitation period of five years from when the infringement ceased and the claimant became aware of, or would reasonably have been aware of, the anticompetitive behaviour, that this behaviour caused damages and the identity of the infringer. Previously, there were also no rules on a standstill or interruption of the limitation period during the time that a competition authority investigated the issue or while legal proceedings were conducted. Such rules are included in the Competition Damages Act, stipulating that a limitation period is suspended while a competition authority takes action in the case of the infringement to

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\(^4\) Competition Act 2008:579.  
\(^5\) Class Action Act 2002:599.
which the claim relates. A new limitation period commences from the day when there is a legally binding decision on the infringement or if the authority concludes its investigation in another manner.

As a general rule, if there is more than one infringer, the infringers are jointly and severally liable for damages caused by their infringement. However, the Competition Damages Act includes certain limitations on joint and several liability, such as when the infringer’s market share, at any point in time during the infringement, is below 5 per cent or where the infringer has been part of a leniency programme.

In proceedings for damages under Chapter 3, Section 25 of the Competition Act, the main rule is that the plaintiff has the burden of proof in relation to the infringement, intent or negligence, the injury suffered, and the causal link between the infringement and the injury. However, in relation to cartel infringements, there is a presumption that the cartel infringement caused the damage. The claimant can in those cases, therefore, concentrate on the question of proving the size of its loss. As regards the passing-on defence, the burden of proof lies with the defendant. Under general principles of Swedish procedural law, once a party has discharged its burden of proof in a given respect, the burden then shifts to the other party.

Under the Arbitration Act, § Section 1, the civil law consequences of competition law breaches may be the subject of arbitration. The main civil law consequences of competition law are that any agreement that is prohibited pursuant to the rules on anticompetitive agreements between undertakings is automatically void, and the right to damages for competition infringements.

III EXTRA TERRITORIALITY

Infringements of competition laws may cause damage in several jurisdictions. The EU Damages Directive does not regulate these jurisdictional issues. In Sweden, it will be the Brussels I Regulation and the Lugano Convention that regulate whether a Swedish court has jurisdiction in a private competition case involving EEA members. In cases involving non-EU States, there is no general rule determining whether Sweden has jurisdiction, so cases are evaluated on a case-by-case basis; however, basically the Swedish forum rules follow the general principle that actions should be brought in the state where the defendant resides or has its seat. Alternatively, Swedish courts also have jurisdiction if the infringement took place or if the damage occurred in Sweden. Swedish courts also recognise prolongation agreements, where the parties – if at least one of them is domiciled in a Member State – have agreed that Swedish courts should have jurisdiction to try a claim for antitrust damages.

As long as Swedish courts have jurisdiction, private actions may also be brought against foreign corporations or individuals and by foreign corporations or individuals. However, it should be noted that foreign (non-EEA domiciled) claimants may, if the defendant requests it, be required to provide security, usually in the form of a bank guarantee, covering all legal costs that may be awarded to the defendants.

As regards the choice of law, in cases involving companies from within the EU, Swedish courts will apply the Rome I Regulation Articles 4 to 8 to cases where the parties have a contractual relationship, and the Rome II Regulation where the claim regards indirect damages: that is, Article 4.1 (the law of the country where the damages arose), Article 6.3

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(where markets have been affected or are likely to be affected) or, where competition in several countries has been or is likely to have been affected, Swedish law, if a market in Sweden has been directly and substantially affected.

IV STANDING

Anyone who has suffered damage caused by anticompetitive behaviour may file a claim for damages. Standing is not limited to those directly affected by the anticompetitive behaviour: indirect purchasers may also bring claims. As mentioned above, corporations and individuals from other jurisdictions may also bring claims before a Swedish court provided that they are considered undertakings within the meaning of the Competition Act (i.e., a natural or legal person engaged in activities of an economic or commercial nature).

The defendant in the proceedings is the corporation that has been found to infringe a competition law provision. In other words, an action for damages cannot be brought against an employee or director of an infringing corporation.

V THE PROCESS OF DISCOVERY

The Swedish legal system does not provide for discovery in the true sense of the term. Under the Swedish system, exchanges of documents pretrial may, generally, only be made on a voluntary basis. However, within the framework of a court proceeding (i.e., shortly before or during the proceeding), there is a general obligation on a person (natural or legal) in possession of a document that may have evidentiary value to disclose the document (procedural duty of disclosure). The rules on disclosure of evidence are found in Chapter 38 of the Code of Judicial Procedure,7 and require that a party seeking an order to produce evidence should identify the document and explain what information is included in the document.

As a general principle, documents received or prepared by a public authority are public. This principle is, however, subject to a number of exceptions in the Public Access to Information and Secrecy Act:8 the Competition Authority’s file, and information about an undertaking’s business operations, inventions and research results, are treated as confidential if the undertaking may be expected to suffer injury if such information is disclosed.

Furthermore, such documents that the Competition Authority holds and that contain declarations within a leniency programme, settlement briefs, written responses and other information that have been submitted to the Competition Authority, and information provided by the Competition Authority to the parties (such as a draft statement of objection, or a draft settlement decision) and settlement briefs that have been recalled, may not be the subject of a production order as long as the Competition Authority is still handling the case. The three latter categories may be subject to a document production order once the Competition Authority has closed its proceeding.

The Competition Damages Act also stipulates that declarations made within a leniency programme and settlement briefs are not to be produced as evidence. Certain other categories of documents may also only be produced by the party who has obtained them from the

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8 Public Access to Information and Secrecy Act 2009:400.
Competition Authority, or a person who has acquired their rights. This is a limitation of the fundamental procedural rules in Sweden on free trial of evidence and free provision of evidence.

Typically, confidentiality is only maintained as regards third parties, and not as regards a party to the proceedings. However, courts have the authority, under criminal responsibility, to prohibit counsel, management or parties from providing certain documents received during the court proceedings relating to competition damages to third parties in order to prevent a 'trade with documents'.

To ensure the secrecy of documents that a court has received through access to evidence from leniency statements and any settlement submissions, new legislation entered into force in April 2018 to safeguard the secrecy of those documents when handled by the court. A party would only be allowed to access such documents to the extent the court finds it appropriate.

VI USE OF EXPERTS

Cases before the Patent and Market Court shall be heard by two legally trained judges and two economists. Swedish courts may also, at the request of one of the parties, appoint experts and economists to establish violations and prove damage. The courts may also, at the request of a party, request that the Competition Authority calculates the damage, but the Competition Authority has a right to refuse to provide such assistance. Finally, the parties may also use their own economic experts. If the other party requests so, the expert must provide a written opinion to the court. If more than one party introduces expert witnesses, they are either heard on their own or jointly, the latter being a process known as hot tubbing.

VII CLASS ACTIONS

The Competition Damages Act, Section 2, mandates class actions. Such class actions shall be brought in accordance with the Class Action Act, which already mandated class actions for competition damages. No antitrust class proceedings have thus far been brought in Sweden.

There are three forms of class actions:

a a private class action that may be initiated by any person or entity, provided that such person or entity has a claim of its own and is a member of the class;
b an organisation class action that may be brought by certain organisations without them having claims of their own. Such actions may be initiated by consumer and labour organisations, and must, as a general rule, concern disputes between consumers and providers of goods or services; and
c a public class action that may be initiated by an authority authorised by the government to act as plaintiff and litigate on behalf of a group of class members. This form of action is intended to allow authorities to pursue claims where the public interest, in a broad sense, suggests that action should be taken.

Bringing a class action requires that the questions of fact must be common or similar to the entire class. Further, the group of claimants must be suitable with regard to size and character, and be well defined to enable individuals to establish whether they are covered by the class action.

Claimants in private class actions and organisation class actions must, in general terms, be represented by a member of the Swedish Bar Association.
Note that collective settlements require judicial authorisation: the court must approve any settlement entered into by the plaintiff on behalf of the group members. Such approval will be given unless the terms of the settlement are unreasonable or discriminatory.

In practice, the procedural questions regarding whether class actions will be approved take considerable time to decide, and in one case had to be finally settled by the Supreme Court several years later. The practical obstacles have, therefore, meant that there have been only a few class actions. For the first 10 years since the law was enacted we are aware of only approximately 10 cases in total.

The main benefits of class actions are the cost-sharing aspect, and that in some cases, the initiation of preparatory acts to gather members for a class action has proved to have a definite effect on the defendant’s will to enter into settlement negotiations.

VIII CALCULATING DAMAGES

A prerequisite for receiving compensation is that the competition prohibitions were infringed willfully or through neglect.

Compensation for damage caused by an infringement includes compensation for factual loss (financial loss or loss of, or damage to, property) *(damnum emergens)* and loss of income (including loss of interest) *(lucrum cessans)*. The objective of damages awards for infringements of competition law is to restore the claimant’s financial situation to that which it would have been had the infringement never occurred. Therefore, when setting damages, the courts will compare the claimant’s actual financial situation with the hypothetical financial situation absent the infringement. Compensation will also reflect other detrimental effects on the plaintiff’s business, even those of a more long-term or difficult-to-quantify nature (such as loss of goodwill or a detrimental impact on an intellectual property right).

The burden of proof lies with the claimant. However, the Code of Procedure allows the court, on the basis of the evidence provided in the case, to estimate the damages based on generally accepted principles of experience and reasonability. However, a claimant cannot rely totally on this rule, and is still required to provide some evidence of the extent of its damage to allow the court to base its finding on some ground.

Sweden does not recognise punitive damages.

The amount of the damages can be reduced if the plaintiff has contributed, by fault or negligence, to the injury sustained. If the plaintiff has benefited from the infringement, this too would have an impact on the amount of damages awarded. Compensation will also be adjusted for any settlement or agreement between the parties. Fines imposed by competition authorities, however, are not taken into account when determining damages.

The Competition Damages Act stipulates that interest will accrue on the compensation amount, due from the time the damage occurred. The interest rate is 2 per cent above the reference rate of the Central Bank from the time the damage was caused until legal proceedings to claim compensation were initiated. Thereafter, the interest rate is 8 per cent above the reference rate.

In general, the losing party bears the legal costs. The winning party can thus recover all reasonable litigation costs from the losing party. The costs may also be apportioned between the parties depending on the degree of success of each party.

In the case of class actions, where the defendant is liable for the claimant’s litigation costs but is unable to pay, group members have a duty to use the received compensation to pay for the claimant’s litigation costs.
As mentioned in Section III, under Swedish law, a non-EEA resident bringing an action before a Swedish court against a Swedish national or legal person must, at the defendant’s request, furnish security to guarantee payment of the costs for the judicial proceedings, in the event that such person or company is ordered to reimburse the costs.

IX  PASS-ON DEFENCES

When quantifying damages, the passing-on defence is available in principle. Swedish law only recognises a right to compensation for actual damage. Thus, the compensation should be reduced by an amount equivalent to any overcharge the injured party has passed on to its buyers or any undercharge the injured party has passed on to its suppliers. It is the defendant who has the burden of proof to show that the overcharge has been passed on. An earlier judgment addressing the passing-on question will be given evidentiary effect in a case before a Swedish court.

In relation to indirect buyers or suppliers, the Competition Damages Act provides a rule corresponding to Article 14 of the Damages Directive stating that when calculating the compensation, an overcharge (or a surcharge) will, unless otherwise proven, be considered to have been passed on to an indirect buyer (or supplier) if the infringement caused an overcharge (surcharge) for the direct buyer (or supplier). Thus, an indirect buyer is only required to prove that the defendant has infringed competition law provisions, that the infringement has led to an overcharge, and that the indirect buyer has purchased the goods or services covered by the infringement or goods and services that include goods and services covered by the infringement.

X  FOLLOW-ON LITIGATION

A competition law infringement is not a criminal offence under Swedish law. There is therefore no specific provision covering the situation where criminal proceedings precede a damages case. In Sweden, corporations, with the exception of corporate fines, cannot be subject to criminal proceedings: only natural persons can be guilty of a criminal offence. On the other hand, as noted in Section IV, natural persons cannot be subject to a claim for compensation.

As regards corporations that have been part of a leniency programme, there are limitations concerning what evidence can be invoked against them. Their joint and several liability is also limited. Under Swedish law, the term joint and several liability means that if several parties are liable for damage caused by them, then a claim can be brought against any of them for the same amount as if that party alone had been liable for the damage (i.e., the whole amount). However, in relation to a corporation that has been part of a leniency programme, the obligation to pay compensation is limited to the loss that it has caused its direct and indirect buyers and suppliers. As regards damage caused to other parties than that undertaking’s direct or indirect buyers or suppliers, its responsibility is limited to an amount corresponding to its share of the damage.

XI  PRIVILEGES

Written correspondence to and from external lawyers, held by the lawyer or by the client, is protected by legal privilege and may not be subject to a court order to produce such document. External lawyers are also prevented from giving evidence on matters confided
to them in their practice. Advice from in-house lawyers is not legally privileged in Sweden (essentially due to the fact that an in-house lawyer cannot be a member of the Swedish Bar Association).

As mentioned in Section V, documents submitted to a public authority are public, and only information on an undertaking’s business operations, inventions and research results (i.e., trade secrets) is treated as confidential.

XII SETTLEMENT PROCEDURES

As regards settlements with the Swedish Competition Authority, the Competition Authority may decide on an administrative fine if the infringement is established and all parties agree. A fine order that has been accepted is considered a legally binding judgment.

It is up to the undertaking to approve or reject the suggested administrative fine. In those cases where the undertaking does not approve the suggested fine, the Competition Authority will take legal action and request the court to order the undertaking to pay the fine. In these cases, the Competition Authority is bound by its earlier request and cannot claim a higher fine than it had offered to the undertaking.

As indicated above, a settlement requires that the infringement is established. This means that the Competition Authority will not accept a settlement where there are uncertainties regarding the course of events, or where the case involves legal issues that can be of importance for the determination of similar cases. If the Competition Authority believes that a case is suitable for settlement, it will inform the undertaking of this in connection with its draft statement of objection.

XIII ARBITRATION

Under the Arbitration Act, Section 1, the civil law consequences of competition law may be the subject of arbitration. Arbitration requires an agreement between the parties to settle an issue by arbitration. A party must also invoke an arbitration agreement on the first occasion that a party pleads its case on the merits in the court. The invocation of an arbitration agreement raised at a later occasion will have no effect unless the party had a legal excuse and invoked such as soon as the excuse ceased to exist. A party will forfeit its right to invoke the arbitration agreement as a bar to court proceedings where the party has opposed a request for arbitration, has failed to appoint an arbitrator in due time, or fails, within due time, to provide its share of the requested security for compensation to the arbitrators.

During the pendency of a dispute before arbitrators or prior thereto, a court may, irrespective of the arbitration agreement, issue decisions in respect of security measures as the court has jurisdiction to issue.

XIV INDEMNIFICATION AND CONTRIBUTION

Litigation may be funded by third parties. There is nothing hindering claimants or defendants from deciding to share the cost between themselves, although they are as a rule held jointly and severally liable for the legal costs of the counterparty.
The Swedish Bar Association does not accept contingency fees, with one exception: within a class action framework, a claimant may agree with his or her counsel (who must be a member of the Swedish Bar Association) that a fee should depend on the outcome of the case. Such an agreement will, however, require the approval of the court.

Note that in the case of class actions, where the defendant is liable for the claimant’s litigation costs but is unable to pay, group members have a duty to use the received compensation to pay for the claimant’s litigation costs.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Currently, the Swedish Competition Authority investigates matters but lacks decision-making powers regarding sanctions against infringements, although it has had decision-making powers regarding mergers since 1 January 2018. To act against infringements, the Authority must bring an action in the Patent and Market Court (and subsequently the Patent and Market Court of Appeal), and it is the court that has the authority to render decisions in these matters. The total time required for processing competition law matters in the Authority and the courts today is at least three-and-a-half years from the launch of a case until a decision in the first instance. The total time for final decisions to be examined at the next level is currently estimated to be five to seven years. The recently adopted judicial reform, with the introduction of specialised courts for cases under competition law, should lead to reduced turnaround times in court.

A government-assigned public investigation has suggested in its report, SOU 2016:49, that the Swedish Competition Authority should be given enhanced powers to, in the first instance, take decisions in matters concerning also competition infringements. Financial penalties for competition infringements are suggested to be paid when the Authority’s decision is final. The processing of appeals of Authority decisions should be conducted in accordance with the rules of the Court Matters Act,9 in compliance with the procedure provided for by the Patent and Market Court Act.10 The investigation report considered that there is a need to enhance the powers of the Swedish Competition Authority as well as to increase efficiency in both the infringement proceedings and also for the leniency programme. Nevertheless, the legislator has to date only given the SCA decision-making powers for merger control matters.

It can also be noted that the SCA has recently had limited success in court proceedings. It has lost all its high-profile cases over the past few years, whereas some matters have been closed following commitments from the investigated undertakings. This has led to a discussion in the legal community about the efficiency of the competition law culture in Sweden.

10 Patent and Market Court Act 2016:188.
I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Since 2016, private competition law enforcement has been a popular topic in Turkey. Until recently, it was relatively underused; public enforcement of the competition rules by the Competition Authority prevailed. Private competition law enforcement in Turkey is regulated under Article 57 et seq. of the Protection of Competition Act (Competition Act).2

There has been no recent amendment of the Competition Act; however, the Court of Cassation has rendered several decisions in recent years that may affect the future implementation of private competition law enforcement provisions of the Competition Law. First, the Court of Cassation rendered a number of decisions concerning compensation claims resulting from competition law breaches wherein it has dealt with statute of limitation questions. As the Competition Act does not include a provision stipulating a statute of limitations for compensation claims arising from competition law infringements,3 the issue of the limitation period is currently being debated, and has yet to be resolved through Turkish doctrine and jurisprudence (see Section II). In general, the Court of Cassation determines the statute of limitations for such compensation claims as eight years, as stipulated under the Misdemeanours Act,4 commencing the date upon which the claimant became aware of the infringement and submitted a complaint to the Competition Authority.5

Further, in a decision dated 8 March 2016,6 the Court of Cassation ruled that a prior Competition Authority decision sanctioning an infringement will not constitute a cause of action for compensation claims; however, the finalisation of Competition Authority decisions will be a preliminary point for the court awarding the compensation.

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1 H Erçüment Erdem is founder and senior partner and Mert Karamustafaoğlu is a competition and compliance expert at Erdem & Erdem Law Office.
2 Protection of Competition Act No. 4054.
3 Until 8 February 2008, the Competition Act, Article 19, stipulated a five-year statute of limitations starting from the date of the infringement. Such provision was abolished by Act No. 5728, dated 23 January 2008, published in the Official Gazette dated 8 February 2008 and numbered 26781.
4 Misdemeanours Act No. 5326.
5 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/3450 (E) 2015/11139 (K) dated 27 October 2015; Decision of the Court of Cassation 11th Civil Chamber numbered 2014/13296 (E) 2015/4424 (K) dated 30 March 2015.
6 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/5134 (E) 2016/2543 (K) and dated 8 March 2016.
Apart from this jurisprudential activity, private competition law enforcement recently gained importance with regard to the increasing number of compensation claims brought against 12 Turkish banks, each of which was sanctioned with an administrative fine by the Competition Authority in 2013.\(^7\)

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition law enforcement in Turkey is regulated under Article 57 et seq. of the Competition Act. In accordance with Article 57, anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements that are contrary to the Competition Act, or abuses a dominant position in a particular market for goods or services, is required to provide compensation for any damage suffered. This provision further stipulates joint and several liability upon the infringers, given that the damage resulted from the behaviour of more than one person, and they are responsible for the damage, jointly. Article 58 determines the method through which damages will be calculated, and defines the scope of damages for private enforcement of competition law. Lastly, Article 59 stipulates the burden of proof in cases of concerted practices, mostly to be used in instances when the Competition Authority did not render a prior decision on a given competition law infringement.

It is generally accepted in Turkish doctrine and jurisprudence that the basis of compensation claims is tort liability.\(^8\) Therefore, the general provisions of the Turkish Code of Obligations\(^9\) (TCO) are applicable with regard to the conditions of liability, the scope of damages to be claimed and the statute of limitations, etc., which are not stipulated by the Competition Act. Article 49 of the TCO determines the conditions for tort liability, which are illegal act, fault, damage and causal link. All of these conditions must be cumulatively fulfilled for liability to arise. Thus, an anticompetitive practice that was not implemented, nor that caused damage, will not result in the liability of those who intended to engage in such activity. In this vein, both Articles 57 and 58 of the Competition Act point to the impact of anticompetitive practices in the market, and the damage that arises therefrom (see Section VIII). Consequently, anticompetitive practices with an anticompetitive objective cannot result in damages claims unless they cause harm to others. If the illegal act is committed by more than one undertaking, such as a cartel agreement, all of the infringers are jointly and severally liable (see Section XIV).

As compensation claims are based on tort liability, the infringer must be at fault. However, as per Article 58 of the Competition Act, the degree of fault has a significant...

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\(^7\) See Decision of the Competition Board dated 8 March 2013 and numbered 13-13/198-100.

\(^8\) İlhan Yiğit, *Rekabet İhlallerinden Doğan Tazminat Sorumluluğu*, Istanbul, 2013, p. 213. See also Orhan Sekmen, *Rekabet Hukukunda Tazminat Sorumluluğu*, Ankara, 2013, p. 61. In the same vein, the Court of Cassation acknowledged that these claims are grounded upon tort liability in several of its decisions, such as the decision of the 11th Civil Chamber numbered 2015/7405 (E) 2016/3442 (K) and dated 29 March 2016, and the decision of the 11th Civil Chamber numbered 2015/842 (E) 2015/6338 (K) and dated 5 May 2015.

\(^9\) Turkish Code of Obligation No. 6098.
effect on the amount to be awarded. Accordingly, in cases of intentional or gross negligence, the judge may award compensation amounting to treble damages. Therefore, Turkish law stipulates punitive damages for private enforcement of competition laws (see Section VIII).

With regard to the statute of limitations, as the Competition Act does not include any provision in this regard, the provisions of the TCO are applicable. In accordance with Article 72 of the TCO, claims arising from tort liability are subject to a two-year statute of limitations, starting from the date upon which the damaged party becomes aware of the damage and the infringer (short statute of limitations) and, in any case, a 10-year statute of limitations, starting from the date upon which the illegal act is committed (long statute of limitations). Furthermore, given that the damage has arisen as a result of an act punishable under criminal law, and such laws foresee a longer statute of limitations, the longer statute of limitations will be applicable (extraordinary statute of limitations). Further, where joint and several liability is in question for Competition Act infringements committed by more than one undertaking, a separate statute of limitations commences after each of the infringers is identified, as well as the damage.

Although the majority view under Turkish doctrine finds that the extraordinary statute of limitations does not apply in cases where the Competition Act is violated, the Court of Cassation has rendered a number of rulings to the contrary. According to the majority view, compensation claims arising from competition law infringements are subject to a two-year short statute of limitations, and a 10-year statute of limitations. Scholarly debate revolves around the fact that competition law infringements do not constitute crimes, because Article 16 of the Competition Act refers to the Misdemeanours Act, consequently defining such infringements as misdemeanours rather than crimes. Therefore, the extraordinary statute of limitations that is applicable when an illegal act also constitutes a criminal act should not be applicable. However, in its recent decisions as stated above, the Court of Cassation has accepted the applicability of the extraordinary statute of limitations, which, in this case, is eight years starting from the date upon which the damage and the infringer come to light. However, such decisions (yet to be finalised) are currently being debated on other grounds as well to determine whether the Misdemeanours Act, which sets out the commencement date of the (extraordinary) statute of limitations as the date of the misdemeanour – contrary to the Court of Cassation practice, which has employed the date of awareness of the damage and the infringer as the commencement date – applies before the relevant courts of first instance.

III EXTRATERRITORIALITY

Article 2 of the Competition Act accepts an effects-based principle. This is applied to all anticompetitive practices (including concentrations) that produce effects in the territories of Turkish markets. In that sense, as long as the infringement creates effects in Turkey, the Competition Authority’s jurisdiction would not be limited by the parties’ nationalities, whether they have subsidiaries or affiliated entities in Turkey, or the location of the anticompetitive activity. In contrast, the Competition Board (Board) has accepted jurisdiction in a foreign-to-foreign concentration in which both of the parties did not have production facilities in Turkey, since the transaction may create anticompetitive effects in Turkey through

10 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/3450 (E) 2015/11139 (K) and dated 27 October 2015, and decision of the Court of Cassation 11th Civil Chamber numbered 2015/7405 (E) 2016/3442 (K) and dated 29 March 2016.
the parties’ export activities. In addition, in an international cartel investigation regarding the import lump coal market, the Board stated that undertakings that are established outside of Turkey are within the Competition Authority’s jurisdiction, regardless of the generation methods or channels of their Turkish turnovers. Furthermore, in a very recent decision involving the railway freight services and block train freight intermediation services markets, the Board accepted the Competition Authority’s jurisdiction, stating that the Competition Act is applicable to those cases that create effects in the Turkish market within the meaning of Article 2, regardless of whether the relevant undertakings have subsidiaries in Turkey.

Moreover, the Board conducted an investigation regarding the activities of enterprises that are subject to investigation for acting with the intention of excluding Biblio Globus, which provides package tours for consumers coming from Russia to Turkey, from the Turkish market. The Board evaluated whether these activities had an effect on the Turkish market in the sense of Article 2 of the Competition Act, and decided that while consumers from Russia and the Community of Independent States would primarily be affected by the exclusion of Biblio Globus from the market, it would also have an impact on travel agencies that provide incoming travel services, shops and entertainment venues in Turkey, due to the decrease in the number of tourists. Therefore, these activities shall be evaluated within the scope of the Competition Act.

In accordance with Article 6 of the Civil Procedural Code (CPC), with regard to cartel damages claims with foreign undertakings, the Turkish courts have jurisdiction over disputes wherein the defendant has a domicile in Turkey, or the legal entity defendant has its business centre in Turkey, unless otherwise stated in its establishment documents. As per the CPC, Article 7, if there is more than one defendant, so long as one is domiciled in Turkey, all of the others may be jointly sued in Turkey. If the defendant’s residence is uncertain, the defendant’s habitual residence in Turkey should be used. Moreover, pursuant to the CPC, Article 16, if the lawsuit arises from a tort claim, the Turkish courts have jurisdiction at the place wherein the act has been committed, or where the damage occurred, or may occur. The lawsuit may be filed in Turkey under any of the above conditions, regardless of the nationality of the parties.

IV STANDING

Any person, whether a real person or a legal entity, who has suffered damages as a result of a competition law infringement, can bring an action for damages. Accordingly, such actions may be brought by competitors, potential competitors, purchasers, indirect purchasers and consumers who have suffered damages. However, it is important to recognise that the claimant must prove the causal link between the damage suffered and the anticompetitive

14 Decision of the Competition Board numbered 16-40/662-296 and dated 21 November 2016. The decision also defines the Community of Independent States as Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and the Ukraine.
15 Civil Procedural Code No. 6100.
conduct of the defendant. In addition, the Competition Act does not grant the right to
claim indirect damages (reflected damages), as indirect damages fall outside the scope of the
competition law. Under Turkish law, indirect damages may only be claimed if foreseen by law.

Furthermore, the purchasers of the competitors of the parties to the agreement may
potentially be able to bring an action against such parties (umbrella effect) if they prove the
damage suffered and the causal link. However, the Court of Cassation has not yet rendered
a decision on this subject.

V THE PROCESS OF DISCOVERY

Turkish law does not contain discovery rules as found in Anglo-American legal systems.
Rather, the main stages of a typical private enforcement proceeding are:

a exchange of petitions;

b preliminary proceedings;

c examination phase;

d oral proceedings;

e decision; and

f legal remedies, such as an appeal in the regional courts of appeals, or in the Court of
Cassation in cases where a decision of a regional court of appeal is made.

During the exchange of petitions stage, the parties submit their evidence, and may request
the court to order third parties to submit specific evidence.

During preliminary proceedings, the court sets forth the process for the submission and
collection of evidence. The court will also order the parties to submit undelivered documents
that have been requested by other parties, or provide an explanation with regard to the lack of
submission of the evidence, within a period of two weeks. As per the CPC, Article 140(5), if
the parties do not comply with the court’s order within the defined period, this is deemed as a
waiver of that evidence. In principle, parties cannot submit any other evidence after this stage
unless the court consents for them to do so under certain conditions. However, evidence that
comes into play after the exchange of petitions stage is not considered within the scope of
this prohibition. Furthermore, in accordance with the CPC, Article 196, once evidence is
provided, it cannot be excluded unless there is express permission by the opposing party. If a
document that is in the possession of a third party is considered to be indispensable evidence
to prove an allegation made by the parties, the court may order the third party to submit the
relevant evidence.

The Turkish legal system also regulates the evidence determination process as one of
the interim measures. Accordingly, a party may request a site visit, expert analysis or witness
statement to determine a specific fact prior to the initiation of the proceeding, or in the
evaluation process of the proceeding, if it has a legal interest in the immediate determination
of the evidence. The legal interest will be deemed present if it is likely that the evidence will be
lost, unless it is determined at the current stage that its assertion will be significantly difficult
later in the proceeding.
VI USE OF EXPERTS

It is common to appoint experts in private enforcement proceedings, since the proceedings usually require technical and specific knowledge, beyond legal knowledge, and the calculation of the amount of damages necessitates such economic analysis.

Pursuant to the CPC, Article 266, the judge may decide to appoint a third party expert *ex officio*, or upon a party's request, if specific or technical information is needed to resolve a dispute. Expert reports are discretionary proof, and therefore are not binding upon the court. On the other hand, in practice, court-appointed expert reports carry significant evidentiary value for the courts. The mission of court-appointed experts is specified in the court's order, and the expert cannot provide an opinion beyond what is delineated in the order. The cost of the expertise is borne by the parties according to the tariffs established for expert fees that are determined by the Ministry of Justice each year.

The majority of Turkish doctrine supports the regulation of the Competition Authority's expertise in compensation lawsuits, since compensation lawsuits require technical and specific knowledge regarding competition law. According to these views, the Competition Authority can serve as an expert in compensation lawsuits with regard to the 'determination of the economic facts that need to be realised to support the presence of the infringement'. The Competition Authority's expertise was also regulated in the Draft Competition Law in 2013, which has become obsolete.\(^{16,17}\)

Furthermore, the parties can provide specialist opinions that are not binding on the court. The cost of the specialist report is borne by the providing party.

VII CLASS ACTIONS

Turkish law does not include a general class action model of any kind that enables collective damages claims.

However, a class action model aimed at elimination of illegality is stipulated under Article 73(6) of the Protection of the Consumers Act\(^{18}\) (Consumers Act). Accordingly, consumers' organisations, related public bodies and the Ministry of Customs and Trade must file a lawsuit before consumer courts in order to obtain a preliminary injunction against conduct that violates the Consumers Act, as well as to request a determination and the prevention or cessation thereof (cease-and-desist order).

Further, as per the CPC, Article 113, associations and other legal entities, within the boundaries of their statutes, may file lawsuits to determine or protect their members' or related persons' current or future rights, or to eliminate illegal conduct. None of the above-mentioned lawsuits, however, give the claimant the right to claim damages.

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16. The Draft Law has not been enacted in the relevant legislative term of the Turkish parliament. Therefore, the current status of the Draft Law became obsolete.
18. Consumers Act No. 6502.
VIII  CALCULATING DAMAGES

In accordance with Article 58 of the Competition Act, those who incur damages as a result of the prevention, distortion or restriction of competition may claim as damages the difference between the cost they paid and the cost they would have paid had the competition not been limited. Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings that restricted competition. In determining damages, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of previous years as well. This method of calculating damages is intended to calculate the damage suffered by the purchasers of products who purchased at a higher price as a result of the anticompetitive conduct. In one of its decisions, the Court of Cassation compared the claimant’s net profits for the previous years, and found that the decrease in the net profits also occurred during the years in which the defendant did not engage in the abuse of dominant position, and ruled that the claimant cannot claim any damages as a result thereof.

As the Competition Act stipulates that competitors may claim all of their damages, such undertakings can seek compensation for both their actual losses (damnum emergens) and for loss of profits (lucrum cessans), as well as accrued interest. However, indirect damages cannot be claimed. In line with our explanations in Section II, damages must be proven by the claimant.

If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence thereof, the judge may, upon request of the injured party, award compensation equal to treble the material damages incurred, or of the profits gained, or likely to be gained, by those who caused the damage. Thus, there is an exception to the principle of Turkish law regarding the prohibition of punitive damages.

In accordance with the CPC, Article 323, expenses for proceedings, including attorneys’ fees to be determined pursuant to the relevant law, are also included in the compensation to be paid by the defendant, if awarded.

IX  PASS-ON DEFENCES

Under Turkish law, pass-on defences and the issue of indirect purchasers are determined by the TCO. As referred to in Section II, the conditions for tort liability are illegal act, fault, damage and causal link, which must be proven by the claimant.

After the initial sale, the purchasers (i.e., indirect purchasers) must prove the causal link between the damage and the anticompetitive conduct, even if they can prove that they have purchased the products at a price higher than normal. Although difficult in practice, such proof is theoretically possible. Under Turkish law, the damages of indirect purchasers are not considered to be indirect damages and, therefore, can be claimed if the above conditions are proven.

The applicability of the pass-on defence shows similar traits with the issue of indirect purchasers. In other words, for the pass-on defence to be recognised, the defendant must prove that the increase in prices applied by the claimant, the direct purchaser and the anticompetitive product are linked. If proven, such defence is permitted under Turkish law.

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19 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/842 (E) 2015/6338 (K) and dated 5 May 2015.
X  FOLLOW-ON LITIGATION

The Competition Act does not include a provision regarding follow-on litigation. However, the established case law of the Court of Cassation suggests that the decision of the Board ruling that an infringement occurred under the Competition Act will satisfy the preliminary question for damages claims.

In one of its decisions, the Court of Cassation confirmed that although the existence of a Board decision is not a condition for an action, it provides the preliminary basis for the court action. Therefore, even though there is no legislation in this regard, compensation for damage may only be awarded after the Board’s finding that an infringement has been made, even though an action may have been commenced, beforehand.

This approach of the Court of Cassation was affirmed in a recent decision of the General Assembly of Civil Chambers of the Court of Cassation, which indicated that the Board’s determination of an infringement is not necessary for filing a claim, but it is a circumstanced preliminary issue for ordering compensation for damage.

XI  PRIVILEGES

Turkish law does not provide a specific statutory basis for legal privilege. Legal privilege is, instead, generally provided for in different laws, such as the Legal Profession Code (LPC), the CPC and the Banking Code (BC).

The LPC regulates the attorney’s duty of confidentiality, and provides a non-disclosure privilege to attorney–client communications. According to the relevant provision: ‘Attorneys are prohibited from disclosing information that has been entrusted to them, or that has come to light during the course of the performance of their duties, both as attorneys, and as members of the Union of Bar Associations of Turkey and various bodies of bar associations.’ Attorneys may testify regarding privileged information if the client approves of such disclosure. On the other hand, the LPC, Article 36, provides attorneys the right to refuse to testify regarding such information, even if the client approves such disclosure.

In addition, the CPC regulates search and seizure of an attorney’s office, and provides the attorney with the right to object to the confiscation of documents that have been provided throughout the course of client–attorney privilege. In such a situation, the documents will be placed into a separate envelope or a package, sealed, and sent to the court for a determination of whether the document enjoys attorney–client privilege. If the court decides that the

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20 Decision of the Court of Cassation 19th Civil Chamber numbered 1999/3350 (E) 1999/732 (K) and dated 17 September 1998, decision of the Court of Cassation 19th Civil Chamber numbered 1999/1948 (E) 1999/3745 (K) and dated 10 May 1999, decision of the Court of Cassation 19th Civil Chamber numbered 1999/3350 (E) 1999/6364 (K) and dated 1 November 1999, decision of the Court of Cassation 19th Civil Chamber numbered 2002/2827 (E) 2002/7580 (K) and dated 29 November 2002, decision of the Court of Cassation 19th Civil Chamber numbered 2006/2809 (E) 2006/10346 (K) and dated 6 November 2006, and decision of the Court of Cassation 19th Civil Chamber numbered 2011/330 (E) 2011/1771 (K) and dated 14 February 2011.

21 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/5134 (E) 2016/2543 (K) and dated 8 March 2016.


23 Legal Profession Code No. 1136.

24 Banking Code No. 5411.
document is protected under attorney–client privilege, such document will be immediately returned to the attorney, and the official reports, including the relevant documents, will be destroyed. As per Article 13(2) of the Criminal Procedural Code, the relevant court decisions will be rendered within 24 hours.

Separately, the BC, Article 73, regulates the attorney–client privilege for a bank’s in-house attorneys. The BC provides that in-house attorneys, and all other employees of banks, shall not disclose any confidential information regarding the bank to any person other than those who are authorised by the BC, and those who are authorised under private law, and shall not use such information for their own or another’s benefit. Persons who do not follow these requirements will be sentenced to imprisonment from one to three years, and a judicial fine of 1,000 to 2,000 days may be imposed. The same sentence will also be applied to third persons who disclose the confidential information or documents of the clients of banks. In cases where confidential information and the documents are disclosed with a view to acquiring a benefit, the penalties will be increased and, depending on the importance of the offence, the responsible persons will be prohibited from working at these institutions temporarily or permanently.

The Board’s approach with regard to legal privilege was clear until its recent Enerjisa decision. That said, in its Dow decision, the Board set forth the following criteria for the evaluation of attorney–client privilege: written communications must be made between the client and an independent lawyer who is not bound to the client through a relationship of employment; and written communications must be made for the purposes and in the interests of the client’s rights of defence. On the other hand, the Enerjisa decision elaborated on the Board’s approach toward legal professional privilege by highlighting that any legal opinion provided by an attorney to an enterprise as to how the Competition Act could be breached will not be afforded any legal protection. According to the Enerjisa decision, any attorney and client attempting to evade the law will not benefit from the legal burden of proof of the Board. In that scenario, if they claim that their correspondence should be deemed as privileged and confidential, the legal burden of proof will fall upon the attorney and client engaged in the correspondence. However, the Administrative Court annulled this decision of the Board by stating that the subject document is related to the use of a client’s right to defence, as this report contains the attorney’s suggestions for the company’s compliance with the competition regulations and the prevention of infringements. Therefore, the Administrative Court concluded that the relevant legal opinion benefits from attorney-client privilege.

25 Criminal Procedural Code No. 5271.
26 The Turkish Criminal Code No. 5237 determines the fines as imprisonment or judicial monetary fines, or both. Judicial monetary fines appear in two ways: they may be determined as the only sanction for the crime, or they may be determined as an option, instead of imprisonment. Article 52 of Turkish Criminal Code No. 5237 stipulates that judicial monetary fines are calculated through the multiplication of the determined number of full days with a determined amount of fine.
XII SETTLEMENT PROCEDURES

Turkish law encourages parties to consider settlement. Accordingly, under the CPC, Article 140(2) and 140(3), the judge will encourage the parties to work towards settlement or mediation in the preliminary examination hearing. If the parties cannot resolve the dispute through settlement or mediation procedures, the tribunal will determine the unsolved matters through minutes, and an examination shall be made of the listed matters.

Moreover, as per the Code of Mediation for Civil Law Conflicts No. 6325, Article 13, the parties may decide to mediate prior to filing a lawsuit or during a lawsuit that is pending before the court. A party may request application to a mediator. If an affirmative answer to this request is not obtained within 30 days, the request shall be deemed to be rejected.

According to the CPC, Article 314, the parties are free to settle the dispute until a final decision is rendered. The settlement will be made by the claimant and the defendant in a bipartisan agreement. Furthermore, the settlement may be conditional. The settlement before the court will be made in compliance with the formal conditions that are determined under the law. If the parties settle out of court, they shall deliver the settlement agreement to the court, and inform the court of the settlement in a hearing. Thereafter, the fact that the parties have delivered the settlement agreement to the court will be included in the hearing minutes. The settlement agreement will be read to the parties, and the parties will sign the agreement. All of the proceedings will be included into the hearing minutes. In some exceptional cases, the parties’ disposition power is limited and, accordingly, settlement agreements cannot be made on the following matters: divorce suits, paternity suits and suits with regard to title deed registrations of immovable property.

XIII ARBITRATION

Article 1(4) of the International Arbitration Act\(^\text{30}\) provides that solely those disputes that are freely disposable by the parties shall be arbitrable. Turkish doctrine is unclear about the arbitrability of competition law disputes due to its mandatory nature, and the Competition Authority’s expertise on the issues. Accordingly, claims falling within the exclusive powers of the Competition Authority, such as implementation of administrative fines – in other words, public competition law enforcement – are not arbitrable; whereas, claims having a civil nature, such as compensation claims, are deemed arbitrable.

With regard to the *ex officio* application of competition law by the arbitral tribunals, and due to the statutory character of competition law, the arbitral tribunal should assess whether the relevant contract has anticompetitive implications or repercussions. Upon such assessment, given that the case at hand requires the application of competition rules, the arbitral tribunal should address this issue as a preliminary question and await the decision of the Board in this regard (see Section X). After the Board decision is submitted as evidence, the tribunal will render its decision on the case, ensuring that the award is enforceable. Note that the arbitral tribunal’s ruling does not affect the Competition Authority’s power to initiate an investigation and to apply measures within the scope of its exclusive powers.

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30 International Arbitration Act No. 4686.
XIV  INDEMNIFICATION AND CONTRIBUTION

Under the TCO, Article 61, the parties involved in a tort are jointly and severally liable for damages arising from such unlawful act. Moreover, the Competition Act, Article 57, accepts the joint and several liability of competition law infringers, and provides that if the damages have resulted from the behaviour of more than one person, they are responsible for such damage, jointly. Accordingly, in such a case, an injured party may claim its total damages from one cartel member.

A cartel member who is held liable as a co-debtor may seek a contribution for the damage payments that exceeds its own share from the other co-debtors. As per the TCO, Article 62(2), the respective contribution of each cartel member shall be determined according to all of the facts and conditions, in particular, each cartel member’s degree of fault and the damages that have occurred therein.

As provided by the TCO, Article 73(1), a contribution claim will be time-barred two years from the date upon which the compensation is paid in full, and the paying party becomes aware of other jointly liable parties or, in any case, 10 years from the date upon which the compensation is paid in full. Pursuant to the TCO, Article 73(2), the party who is required to pay damages should inform the other jointly liable parties of such order. If the relevant party fails to fulfil this obligation, the limitation period starts from the date upon when such notification could have been made in good faith.

XV  FUTURE DEVELOPMENTS AND OUTLOOK

In Turkey, private claims for competition law infringements have not been made very often in recent years. On the other hand, this field is a fast-developing area and, in the near future, we expect a significant increase in private party damage claims. For instance, consumer associations are very interested in Board decisions that may affect consumers and, in line with this interest, consumers have started to bring compensation claims against defendants. One recent example of this trend is the claim for compensation brought against 12 Turkish banks that had administrative fines imposed upon them by the Competition Authority in 2013.31

The Competition Authority issued a Draft Competition Act and Draft Regulation on Administrative Monetary Fines in 2013. The Draft Act was not enacted in the relevant legislative term of the Turkish parliament; therefore, the current status of the Draft Act became obsolete. On the other hand, it is stated in the Competition Authority’s 2017 Annual Report that work on the Draft Act is continuing within the Prime Ministry of Turkey.

31 Decision of the Competition Board numbered 13-13/198-100 and dated 8 March 2013.
OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Nearly every year over the past decade, the US Supreme Court has significantly changed the private antitrust litigation landscape. Starting with the establishment of a heightened plausibility pleading standard that governs whether a complaint survives a motion to dismiss, subsequent decisions have clarified that:

- a conduct must be directly linked to cognisable harm or injury to give rise to an antitrust claim;
- b activities inextricably intertwined with US Securities and Exchange Commission regulatory activity are immune from antitrust attack;
- c plaintiffs bringing antitrust actions under state law in federal court may pursue class actions or class-action remedies not otherwise available in state court;
- d a federal court’s denial of class certification for a proposed class does not preclude a state court from later adjudicating another plaintiff’s proposed class;
- e arbitrators may not impose class arbitration on parties unless it is contractually permissible;
- f express arbitration clauses trump class-action rights, even in antitrust cases;
- g expert testimony does not overcome lack of commonality in class actions;
- h class certification requires that plaintiffs establish that damage can be proven with class-wide evidence to satisfy Federal Rule of Civil Procedure (FRCP) 23(b)(3)’s predominance requirement.

1 Chul Pak is a partner and Daniel P Weick is an associate at Wilson Sonsini Goodrich & Rosati. The authors would like to thank Ken Edelson for his invaluable research and drafting assistance.


individual corporate entities that are part of a joint venture may be subject to antitrust
rule-of-reason scrutiny;\textsuperscript{11} 

an order disposing of one discrete case consolidated in a multi-district litigation under
28 USC Section 1407 is an appealable final decision under 28 USC Section 1291;\textsuperscript{12} 

\textit{stare decisis} may have less than ‘usual force in cases involving the Sherman Act’;\textsuperscript{13} 
courts must include both sides of a two-sided credit-card market (merchants and
cardholders) in defining a relevant market and evaluating anticompetitive effects;\textsuperscript{14} and

US federal courts are not bound to defer to a foreign government’s official interpretation
of its own laws, but owe the foreign government’s interpretation respectful
consideration.\textsuperscript{15}

The lower federal courts apply these Supreme Court cases, deciding issues related to antitrust
injury, standing requirements, the statute of limitations, class actions, discovery and pleading
standards.

\section{II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR
PRIVATE ANTITRUST ENFORCEMENT}

Private plaintiffs may bring suit in federal court for violations of federal antitrust law under
two provisions of the Clayton Act of 1914. Section 4 allows private plaintiffs to sue for
money damages, including reasonable attorneys’ fees as well as prejudgment interest on actual
damages at a court’s discretion if such an award is just under the circumstances.\textsuperscript{16} Section 16
allows private plaintiffs to sue for injunctive relief.\textsuperscript{17}

\textbf{Statute of limitations limit the period of potential recovery}

A four-year statute of limitations applies to Section 4 claims.\textsuperscript{18} The limitations period
commences when the cause of action accrues, which generally occurs when the plaintiff
suffers injury and damages become ascertainable.\textsuperscript{19} Section 16 claims may also be subject to
a four-year statute of limitations. Some courts have held that the four-year limitation period
also applies to Section 16 claims, while others have held that it does not.\textsuperscript{20} The defence of
laches nevertheless bars Section 16 claims four years after accrual of the cause of action, unless
the court finds equitable reasons to allow the claim.\textsuperscript{21}

\addcontentsline{toc}{section}{Statute of limitations limit the period of potential recovery

\begin{thebibliography}{9}
\bibitem{Id. Section 26} Id. Section 26.
\bibitem{Id. Section 15(b)} Id. Section 15(b).
\bibitem{E.g., Retail Credit Co} E.g., Retail Credit Co, 498 F.2d 552, 556 (4th Cir. 1974).
\bibitem{E.g., ITT v. GTE} E.g., ITT v. GTE, 518 F.2d 913, 929 (9th Cir. 1975), overruled on other grounds by California v. American Stores Co, 495 U.S. 271 (1990).
\end{thebibliography}
The statute of limitations may be tolled by government antitrust actions, the filing of a class action, fraudulent concealment, duress or equitable estoppel. Where a series of overt acts rather than one definitive act causes new injury to plaintiffs, the continuing violation doctrine restarts the statute of limitations period. Some courts allow the tacking of tolling periods.

ii State antitrust claims

Most US states and territories have adopted antitrust statutes. They generally mirror the federal scheme, and prohibit monopolies and unreasonable agreements (like the Sherman and Clayton Acts) and unfair and deceptive trade practices (like the Federal Trade Commission (FTC) Act). The vast majority provide for private rights of action. Statute of limitations periods vary by state.

The statutes and courts’ interpretations of them differ on various points, such as the availability of treble damages, restitution, class actions and availability of recovery for indirect purchasers.

III EXTRATERRITORIALITY

i General jurisdictional rule

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits the extraterritorial reach of the Sherman Act to foreign anticompetitive conduct that either involves US import commerce or has a direct, substantial, and reasonably foreseeable effect on US import or domestic commerce. Courts have construed this to require a reasonably proximate causal nexus between the conduct and the effect on US commerce or import commerce, a standard similar to a proximate causation standard. Additionally, a plaintiff’s injury must occur in the

22 15 U.S.C. Section 16(i).
24 E.g., In re Scrap Metal Antitrust Litigation, 527 F.3d 517, 536–38 (6th Cir. 2008); In re Linerboard Antitrust Litigation, 305 F.3d 145, 160 (3d Cir. 2002).
28 E.g., City of Detroit v. Grinnell Corp, 495 F.2d 448, 460–61 (2d Cir. 1974), abrogated on other grounds by Goldberger v. Integrated Resources Inc, 209 F.3d 43 (2d Cir. 2000).
30 15 U.S.C. Section 6a. Where conduct involves import trade or commerce, the FTAIA does not apply and courts instead apply the common law intended effects test, requiring that the foreign anticompetitive conduct was intended to and actually affected US trade or commerce. Hartford Fire Insurance Co v. California, 509 U.S. 764, 796 (1993); United States v. Aluminum Co of America, 148 F.2d 416, 443–44 (2d Cir. 1945). Some courts supplement the effects test with considerations of comity. See Timberlane Lumber Co v. Bank of America National Trust & Savings Association, 549 F.2d 597, 611–15 (9th Cir. 1976).
31 Lotes Co, Ltd v. Hon Hai Precision Industry Co, 753 F.3d 395, 398 (2d Cir. 2014); Motorola Mobility LLC v. AU Optronics Corp, 683 F.3d 845, 857 (7th Cir. 2014) (en banc); Minn-Chem, Inc v. Agrium, Inc, 683 F.3d
US rather than a foreign market to give rise to a claim under the Sherman Act.\textsuperscript{32} Although the US effects requirement is sometimes characterised as a jurisdictional issue, it has been treated as a substantive element of the Sherman Act.\textsuperscript{33}

When a plaintiff alleges other antitrust claims, such as under the Clayton Act, the extraterritoriality test applies,\textsuperscript{34} subject to territorial limitations found in the substantive provision asserted. For example, Section 3 of the Clayton Act only reaches transactions in which the products are sold for use, consumption or resale in the US.\textsuperscript{35} Additionally, the FTAIA extends the Sherman Act’s extraterritoriality test to apply to the FTC Act.\textsuperscript{36}

A circuit split has arisen as to whether the FTAIA bars Sherman Act claims arising out of foreign conduct of a cartel. While the Seventh Circuit has interpreted the FTAIA as barring Sherman Act claims,\textsuperscript{37} the Ninth Circuit has held that the conduct of the same cartel was within the reach of the Sherman Act.\textsuperscript{38} The US Supreme Court recently denied a petition for \textit{certiorari} to resolve this issue, so lower courts will continue to develop the law to clarify how these decisions apply.

\textbf{ii Comity considerations}

A court may employ comity considerations to decline jurisdiction, even when the FTAIA’s requirements have been satisfied.\textsuperscript{39} Comity considerations generally come into play when domestic and foreign law are in conflict, such as where one law requires a defendant to engage in acts prohibited by other laws.\textsuperscript{40}

\textbf{iii Exemptions}

Foreign sovereigns are presumptively immune from US courts’ jurisdiction under the Foreign Sovereign Immunities Act (FSIA).\textsuperscript{41} To rebut the presumption, a plaintiff must show that one of the FSIA’s seven exceptions applies.\textsuperscript{42} The most common exemption in antitrust cases is the

\begin{thebibliography}{99}
\bibitem{32} F Hoffmann-La Roche Ltd v. Empagran SA, 542 U.S. 155 (2004); Empagran SA, 417 F.3d at 1271.
\bibitem{33} Minn-Chem, Inc v. Agrium Inc, 683 F.3d 845 (7th Cir. 2012); Animal Science Products, Inc v. China Minmetals Corp, 654 F.3d 462 (3d Cir. 2011), cert denied, 565 U.S. 1260 (2012); In re TFT-LCD Antitrust Litigation, 781 F. Supp. 2d 955 (N.D. Cal. 2011); contra United Phosphorus, Ltd v. Angus Chemical Co, 322 F.3d 942 (7th Cir. 2003) (\textit{en banc}) (the FTAIA’s limitations are jurisdictional in nature).
\bibitem{36} Id. Section 45(a)(3).
\bibitem{37} Motorola Mobility v. AU Optronics Corp, 775 F.3d 816 (7th Cir. 2014).
\bibitem{38} United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015).
\bibitem{41} 28 U.S.C. Section 1604.
\bibitem{42} Id. Section 1605.
\end{thebibliography}
commercial activity exception, which precludes FSIA immunity where a foreign sovereign state’s commercial activity has a nexus with the US. The scope of commercial activity, foreign state and the specific nexus required to meet this exception has been extensively litigated.

The act-of-state doctrine requires US courts to recognise the validity of public acts performed by authorised agents of foreign sovereign states within their jurisdictions. Thus, where a plaintiff’s claim depends on the invalidity of a foreign sovereign state’s domestic act, the act-of-state doctrine may absolve the defendant of liability. Various exceptions apply, such as where an extant treaty provides applicable legal standards, where the act involves a commercial function or where US foreign policy interests would not be advanced by application of the doctrine.

A private party whose conduct was compelled (and not merely sanctioned or assisted) by a foreign sovereign state will generally be immune from antitrust liability under the assumption that the defendant’s activity was effectively foreign sovereign state activity. US federal courts must give respectful consideration to a foreign government’s official statement on the correct interpretation of its own laws, but are not bound to defer to the foreign government’s interpretation.

IV STANDING

i Standing under Section 4 of the Clayton Act

To maintain a lawsuit under Section 4 of the Clayton Act, an antitrust plaintiff must allege:

a that the plaintiff is a person under Section 1 of the Clayton Act;

b that the defendant violated the antitrust laws;

43 The commercial activity exception, Section 1605(a)(2), states that immunity does not apply when ‘the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States’.


48 15 U.S.C. Section 15. Section 12(a) defines persons as ‘corporations and associations existing under or authorized by laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country’. Courts have also interpreted persons to include individual consumers (e.g., Reiter v. Sonotone Corporation, 442 U.S. 330, 340–42 (1979)), partnerships (e.g., Coast v. Hunt Oil Co, 195 F.2d 870, 871 (5th Cir. 1952)), states (e.g., Standard Oil Co v. Arizona, 738 F.2d 1021, 1023 (9th Cir. 1984)) and foreign governments (Pfizer v. Government of India, 434 U.S. 308, 318–20 (1978)). Section 4 of the Clayton Act (15 U.S.C. Section 15(b)) generally limits recovery by foreign governments to actual, instead of treble, damages. While the United States and state attorneys general are not considered persons under the Clayton Act, they are nonetheless entitled to sue on their own behalf under Sections 4A and 4C of the Clayton Act (15 U.S.C. Sections 15a, 15c).

49 E.g., 15 U.S.C. Sections 12(a) and 15.
antitrust injury (impact or fact of damage), that is, harm to competition to a plaintiff's business or property proven by direct or circumstantial evidence or inference with a reasonable degree of certainty; and that the antitrust violation was a material and substantial cause of the injury.

Finally, the plaintiff must satisfy the remoteness doctrine, which requires that a plaintiff's injury is not too remote from the defendant's conduct, by addressing five factors:

1. causal connection between the violation and the harm to the plaintiff, and whether defendants intended to cause the harm;
2. the nature of the injury, including whether the plaintiff is a consumer or competitor;
3. directness of the injury, and how speculative or tenuous the damages are;
4. potential for duplication of recovery or complex apportionment of damages; and
5. whether more direct victims exist.

The doctrine generally limits the plaintiff class to consumers and competitors, and denies standing to creditors, employees, officers, shareholders and suppliers of antitrust victims. The remoteness doctrine may bar an indirect purchaser from bringing a Section 4 claim unless it is a competitor. Some courts require that the plaintiff is an efficient enforcer or a potential competitor sufficiently prepared to enter the market.

### ii Standing under Section 16 of the Clayton Act

A plaintiff who has standing to bring an antitrust action under Section 4 will also have standing under the more lenient requirements of Section 16, which are as follows:

1. the plaintiff is a person, firm, corporation or association;
2. the defendant violated the antitrust laws;

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51 E.g., Brunswick Corp v. Pueblo Bowl-O-Mat Inc, 429 U.S. 477, 488 (1977); see, e.g., Southeast Missouri Hospital v. CR Bard, Inc, 616 F.3d 888 (3d Cir. 2010); Race Tires America v. Hoosier Racing Tire Corp, 614 F.3d 57 (3d Cir. 2010); but see Palmyra Park Hospital v. Phoebe Putney Memorial Hospital, 604 F.3d 1291 (11th Cir. 2010).
53 Duty Free Americas, Inc v. Este Lauder Companies, 797 F.3d 1248, 1272–73 (11th Cir. 2015); Mostly Media v. USW Communications, 186 F.3d 864, 865–66 (8th Cir. 1999); OK Sand & Gravel v. Martin Marietta Technologies, 36 F.3d 565, 573 (7th Cir. 1994).
54 E.g., Tal v. Hogan, 453 F.3d 1244, 1258 (10th Cir. 2006).
55 Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 537–44 (1983). This year, the Third Circuit Court of Appeals addressed a novel standing issue and found that purchasers of products that include inputs made more expensive by the defendants’ conspiracy – but not produced by the conspirators – had standing under the Clayton Act. In re Processed Egg Prods Antitrust Litig, 881 F.3d 262 (3d Cir. 2018).
56 Campos v. Ticketmaster Corp, 140 F.3d 1166, 1169 (8th Cir. 1998).
58 Sanger Insurance Agency v. Hub International Ltd, 802 F.3d 732 (9th Cir. 2015); Sunbeam Television Corp v. Nielsen Media Research, Inc, 711 F.3d 1264 (11th Cir. 2013).
59 Palmyra Park Hospital v. Phoebe Putney Memorial Hospital, 604 F.3d 1291 (11th Cir. 2010).
61 Id.
c the threatened loss or damage proximately results from the alleged antitrust violation;\textsuperscript{62} and
d the antitrust injury, that is threatened loss or injury, is due to harm to competition.\textsuperscript{63}

However, there are differences. Section 16 requires threatened loss or damage\textsuperscript{64} that is a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur\textsuperscript{65} rather than actual loss.\textsuperscript{66} Unlike Section 4 claims, the threatened loss or injury in a Section 16 claim is not limited to injury to business or property.\textsuperscript{67} Finally, courts do not impose the remoteness doctrine on Section 16 claims, so indirect purchasers may sue for injunctive relief, even though they may not sue for monetary damages.\textsuperscript{68}

iii Indirect purchaser standing
Generally, indirect purchasers who purchase from a defendant but indirectly through a downstream distributor cannot recover under federal antitrust laws unless\textsuperscript{69} the direct purchaser had a pre-existing cost-plus contract with an overcharge, shifting the entire overcharge to the indirect purchaser;\textsuperscript{70} there is an ownership-control exception, where the direct purchaser is owned or controlled by the defendant or the indirect purchaser;\textsuperscript{71} or the direct purchaser was a co-conspirator.\textsuperscript{72}

Indirect purchasers may recover under the Illinois Brick repealer statutes of 26 states as well as state consumer protection statutes.\textsuperscript{73}

V THE PROCESS OF DISCOVERY
The scope of discovery in antitrust cases is broad. FRCP 26 allows discovery of a reasonable time period, geographical scope, and subject matter if the requested information is relevant to any claim or defence, proportional to the needs of the case, and the burden of the proposed discovery on the responding party does not outweigh its benefit. What is relevant for discovery is broader than what is admissible as evidence at trial.

\textsuperscript{63} Cargill Inc v. Monfort of Colorado Inc, 479 U.S. 104, 112–13 (1986); Zenith, 395 U.S. at 130.
\textsuperscript{64} 1675 U.S.C. Section 26.
\textsuperscript{65} 395 U.S. at 130; but see Freedom Holdings v. Cuomo, 624 F.3d 38 (2d Cir. 2010), cert denied sub nom Freedom Holdings v. Schneider, 31 S. Ct. 1810 (2011).
\textsuperscript{66} 15 U.S.C. Section 15.
\textsuperscript{67} Cargill, 479 U.S. at 111.
\textsuperscript{69} Illinois Brick, 431 U.S. at 735.
\textsuperscript{70} Hanover Shoe, Inc v. United Shoe Machine Corp, 392 U.S. 481, 494 (1968); Illinois Brick, 431 U.S. at 736.
\textsuperscript{71} Illinois Brick, 431 U.S. at 736 n16.
\textsuperscript{72} E.g., Insulate SB, Inc v. Advanced Finishing Systems, 797 F.3d 538, 542 (11th Cir. 2015), Paper Systems v. Nippon Paper Industries Co, 281 F.3d 629, 631 (7th Cir. 2002); Campos v. Ticketmaster Corp, 140 F.3d 1166, 1171, n4 (8th Cir. 1998); Arizona v. Shamrock Foods, 729 F.3d 1208, 1212–14 (9th Cir. 1984).
\textsuperscript{73} E.g., Ciardi v. F Hoffmann-La Roche, 436 Mass. 53 (Mass. 2002).
Courts may restrict unduly burdensome discovery requests where the burden and expense outweigh the prospective benefit of the requests. FRCP 26(c) allows courts to restrict discovery of confidential business information or trade secrets and privileged attorney–client communications or attorney work product. Grand jury materials are only discoverable if the party has strongly demonstrated a particularised need for the materials.

In deciding whether to allow discovery from non-party market participants, courts consider the relevance of and need for the information, whether the information is protected as a trade secret or confidential commercial information, and whether the request will cause the non-party undue hardship. A party that refuses to comply with a court order may face sanctions.

Courts generally grant requests to compel discovery from domestic or foreign affiliates or subsidiaries of corporations that are parties to the antitrust case. Generally, a foreign party subject to personal jurisdiction in the US is subject to discovery. Foreign blocking statutes do not allow a corporation present in the US to resist producing documents located abroad.

VI USE OF EXPERTS

Plaintiffs may use expert testimony to establish various elements of a private antitrust claim. Expert testimony is often key in certifying a class, and on substantive antitrust issues like market or monopoly power, anticompetitive harm, antitrust injury and damage.

Expert testimony is only admissible if the expert has sufficient specialised knowledge and expertise with respect to the field in question; the methodology and data used to reach the expert’s conclusions are sufficiently reliable; and the expert’s testimony is sufficiently relevant to assist the trier of fact.

Reliability is the most common basis on which expert testimony is excluded. Several factors are considered to determine whether the proffered testimony is reliable, such as whether the expert’s methodology has been tested, is subject to peer review or is widely accepted by the relevant scientific community.

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74 FRCP 26(b)(1); e.g., In re ATM Fee Antitrust Litigation, No. C 04-02676 CRB, 2007-1 Trade Cas (CCH) Paragraph 75, 760 (N.D. Cal. 25 June 2007).
77 FRCP 37.
78 E.g., In re ATM Fee Antitrust Litigation, 233 F.R. D. 542, 544–45 (N.D. Cal. 5 December 2005).
80 E.g., Arthur Andersen & Co v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976).
81 See Section VII.
83 Daubert, 509 U.S. at 593–94.
VII  CLASS ACTIONS

i  Requirements

FRCP 23 governs class actions, where one representative sues on behalf of all other similarly situated plaintiffs. To proceed, a class must be certified under FRCP 23(a) and 23(b).

Rule 23(a) requires that the plaintiff establish that: 84

a  the class is so numerous that joinder of all members would be impracticable;

b  common questions of law and fact apply to the class;

c  the claims or defences of the representative parties are typical of the claims or defences of the class; and

d  the representative parties will fairly and adequately protect the interests of the class.

Additionally, Rule 23(b) requires that the plaintiff establish one of the following: 85

a  separate actions would create a risk of ‘inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class’;

b  separate actions would create a risk of adjudications that ‘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’;

c  ‘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

d  ‘questions of law or fact common to class members predominate over any questions affecting only individual members’, and ‘a class action is superior to other available methods for fairly and efficiently adjudicating the controversy’.

Most antitrust class action suits are certified under the fourth provision. Only common questions under 23(b)(2) are relevant to the 23(b)(3) predominance analysis. 86

Plaintiffs must establish that damage can be proven with class-wide evidence, that is, the case is susceptible to resolution by common proof, to satisfy 23(b)(3)’s requirement that common issues predominate. 87 In some cases, plaintiffs may have recourse to representative samples to establish class-wide liability. 88 Plaintiffs also must prove class-wide impact – that all class members suffered injury to their business or their property – using common proof. 89 Courts have recently required more rigorous qualitative and quantitative assessments of plaintiffs’ proposed common methodology for analysing class-wide impact and merits-related issues related to class certification. While the depth and breadth of expert testimony and the scope of pre-certification discovery necessary is decided on a case-by-case basis, 90 a rigorous analysis of expert opinions is required. 91

84  FRCP 23(a).

85  FRCP 23(b).


90  In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305, 310 (3d Cir. 2009).

Plaintiffs’ ability to meet, rather than an intention to meet, the FRCP 23 requirements must be demonstrated by a preponderance of the evidence at the class certification stage. A plaintiff may meet FRCP 23 requirements even if the putative class includes a de minimis number of potentially uninjured parties. Thus, courts generally resolve all factual and legal disputes, including expert disputes, relevant to their certification decision at the time of class certification.

Class representatives may have to establish other threshold requirements, including that the class is in existence, ascertainable and definable with reasonable specificity, and that at least one class plaintiff is able to demonstrate standing.

ii Appointment of class counsel
After certification, the court must appoint class counsel to adequately and fairly represent the interests of the entire class.

iii Limitations on class-action settlements

Pre-certification settlements
Rule 23 also allows a settlement class to be certified prior to a ruling on class certification for trial purposes. To certify a settlement class, plaintiffs must satisfy the requirements of 23(a) and meet one requirement of 23(b). However, a district court need not inquire whether the case, if tried, would present intractable management problems, allowing settlement classes to be certified where potential conflicts would defeat class certification for trial.

Court approval of class settlements required
To prevent abuse by class representatives, Rule 23(e) requires court approval of class action settlements and voluntary dismissals. Proposed class-action settlements, voluntary dismissals or compromise proposals are generally approved if the class meets the 23(a) and 23(b) requirements, and the settlement is fair, reasonable and adequate. Under the latter inquiry, relief under the settlement will be evaluated against the class’s expected relief at trial and its likelihood of success. The settlement may be rejected if the court has concerns that the damages are inadequate or concerns regarding the class standing of the plaintiffs.

92 In re Nexium Antitrust Litigation, 777 F.3d 3, 25 (1st Cir. 2015). But see In re Asacol Antitrust Litigation, 907 F.3d 42 (1st Cir. 2018) (overturning a lower court’s grant of class certification where roughly 10 per cent of the class consisted of uninjured plaintiffs, and the plaintiffs proposed that uninjured class members could be removed after class certification).

93 Some courts have held that a class is ascertainable when defined by objective criteria that are administratively feasible for the court to identify, Brecher v. Republic of Argentina, 802 F.3d 303 (2d Cir. 2015); Marcus v. BMW of North America, 687 F.3d 583 (3d Cir. 2012).

94 E.g., Prado-Steinman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000).

95 FRCP 23(g).

96 FRCP 23(b)(3)(d); Amchem Products, Inc v. Windsor, 521 U.S. 591, 620 (1997); e.g., Sullivan v. DB Investments, Inc, 667 F.3d 273, 301 (3d Cir. 2011).

97 FRCP 23(e)(2); Amchem, 521 U.S. at 621.

98 E.g., Wal-Mart Stores Inc v. Visa USA Inc, 396 F.3d 96, 118–19 (2d Cir. 2005).

**Notice**

Upon certification, 23(b)(3) requires notice to be provided\(^{100}\) in a reasonable manner to all class members who would be bound by the proposal.\(^{101}\) Typically, plaintiffs bear the cost of notice.

**VIII CALCULATING DAMAGES**

**i Types of damages cognisable**

A fact finder may assess damages where the plaintiff can provide probable and inferential proof of a just and reasonable estimate of damages.\(^{102}\) Damages cannot be proven through speculation or guesswork.\(^{103}\) The court will award the plaintiff triple the amount of damages claimed (treble damages). Courts do not allow punitive damage awards, because antitrust plaintiffs already receive treble damages.\(^{104}\)

**ii Calculation of damages**

The appropriate measure of damages depends on the type of antitrust violation alleged. Common approaches to damages are as follows:

- **a** The difference between the plaintiff’s purchase price and the price the purchaser would have paid if not for the violation is a common approach where the alleged effect of the violation is an overcharge, such as cartel claims (e.g., price fixing, bid rigging, market allocations or output limitation agreements) or monopolisation.\(^{105}\)

- **b** The difference between the plaintiff’s purchase price and the price the purchaser would have paid on the open competitive market is a common measure of damages in tying cases.\(^{106}\) A plaintiff may be entitled to recovery only when the fair market value of the tying and tied products exceeds their combined purchase price.\(^{107}\)

- **c** The plaintiff’s lost profits are a common measure of damages in cases where the plaintiff is a competitor excluded from the market or is a disfavoured purchaser in a price discrimination case.\(^{108}\) Damages are usually limited to lost net profits, although some courts may award lost gross profits if lost net profits are negligible.\(^{109}\) When the plaintiff’s business has been almost or completely destroyed, courts may measure damages by lost goodwill or going concern value (i.e., the current value of lost future profits).\(^{110}\)

\(^{100}\) FRCP 23(c)(2).

\(^{101}\) FRCP 23(e)(1).


\(^{103}\) Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946); Dopp v. Pritzker, 38 F.3d 1239, 1249 (1st Cir. 1994).

\(^{104}\) McDonald v. Johnson & Johnson Co, 722 F.2d 1370, 1381 (8th Cir. 1983).

\(^{105}\) E.g., Howard Hess Dental Labs Inc v. Dentsply International Inc, 424 F.3d 363, 374 (3d Cir. 2005).

\(^{106}\) E.g., Crossland v. Canteen Corp, 711 F.2d 714, 722 (5th Cir. 1983).

\(^{107}\) E.g., Will v. Comprehensive Accounting Corp, 776 F.2d 665, 672–73 (7th Cir. 1985).

\(^{108}\) E.g., Trabert & Hoeffer, Inc v. Piaget Watch Corp, 633 F.2d 477, 484 (7th Cir. 1980).

\(^{109}\) Id.

\(^{110}\) Id.
iii Mitigation
A plaintiff must mitigate damage and cannot recover losses that could have been avoided.111

iv Disaggregation
A plaintiff may only collect damages for losses caused by a defendant’s antitrust violation. Therefore, the plaintiff must provide the fact finder a basis to disaggregate the losses caused by other factors.112 If it does not, a damages award may be overturned on the grounds it is based on speculation and guesswork.113

v Other costs
Section 4 also awards successful plaintiffs’ court costs, reasonable attorneys’ fees, prejudgment interest on actual damages (awarded at the court’s discretion if the court finds it just in the circumstances) and mandatory post-judgment interest.114

IX PASS-ON DEFENCES
Antitrust defendants are barred from asserting pass-on defences against direct purchasers. Therefore, defendants may not introduce evidence that indirect purchasers, rather than the direct purchasers,115 were in fact harmed by the defendants’ antitrust violations. This bar against pass-on defences is analogous to the earlier-noted bar against claims by indirect purchasers, preventing the defensive and offensive use of the pass-on theory to prevent duplicate recovery against defendants.116

Lower courts, however, have recognised three narrow exceptions to this general ban against pass-on defences and indirect purchaser claims:

a for pre-existing, fixed-quantity, cost-plus contracts, because the plaintiff may show that the indirect purchaser, not the direct purchaser, was harmed by any anticompetitive overcharge;117

b where the direct purchaser (i.e., the intermediary) is owned or controlled by either the defendant or the indirect purchaser such that the relationship involved ‘such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale’;118 and

c where the intermediary is a direct participant in a conspiracy with the defendant, such that the intermediary and defendant are then viewed as a single entity from which the plaintiff is a direct purchaser.119

111 E.g., Pierce v. Ramsey Winch Co, 753 F.2d 416, 436 (5th Cir. 1985); Litton Sys Inc v. AT&T Corp, 700 F.2d 785, 820 n47 (2d Cir. 1983).
112 E.g., Blue Cross & Blue Shield United v. Marshfield Clinic, 152 F.3d 588, 592–93 (7th Cir. 1998).
113 E.g., US Football League v. NFL, 842 F.2d 1355, 1377–79 (2d Cir. 1988).
118 Jewish Hospital Association of Louisville v. Stewart Mechanical Enterprises Inc, 628 F.2d 971, 974–75 (6th Cir. 1980).
119 E.g., In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 604 (7th Cir. 1997).
X FOLLOW-ON LITIGATION

i Prima facie evidence

A government judgment or decree may be prima facie evidence in a private antitrust suit if the government judgment or decree is:

\( a \) final;
\( b \) rendered in a civil or criminal proceeding brought by or on behalf of the United States;
\( c \) under the antitrust laws to the effect that a defendant has violated said laws; and
\( d \) is not a consent judgment or decree entered before any testimony has been taken.\(^{120}\)

Additionally, the private plaintiff must be injured in fact by the antitrust violation proven in the government action.\(^{121}\) Guilty pleas to a DOJ indictment generally are admissible as evidence in subsequent private litigation.\(^{122}\) Since DOJ and FTC consent decrees are typically for settlement purposes, they do not constitute an admission by the defendant that the law has been violated.\(^{123}\)

The prima facie effect is given to all matters distinctly put in issue and directly determined and necessarily decided against the defendant in the government proceeding,\(^{124}\) but is limited to the period, products and geographical scope adjudicated in the prior government action.\(^{125}\)

ii Collateral estoppel

The collateral estoppel doctrine applies in private antitrust suits.\(^{126}\) Generally, the doctrine bars the retrying of issues that have already been determined by a court, and gives them conclusive effect in subsequent suits that involve a party to the prior litigation.\(^{127}\) A defendant can use collateral estoppel doctrine defensively to prevent a plaintiff from re-litigating issues previously decided and lost by the government,\(^{128}\) while a plaintiff can use collateral estoppel offensively to bar a defendant from re-litigating issues lost in prior government actions. Collateral estoppel applies to prior DOJ actions, but not to findings made by the FTC.\(^{129}\)

Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)\(^{130}\) offers criminal defendants who participate in the DOJ’s corporate leniency programme the opportunity to limit civil liability to single rather than treble damages if they provide satisfactory cooperation to civil claimants. To qualify, defendants must provide a full account of relevant facts, furnish all relevant documents, and participate in interviews and depositions reasonably requested by the plaintiff. ACPERA does not affect the plaintiff’s right to recover costs, attorneys’ fees and prejudgment interest provided under the Clayton Act.

\(^{120}\) 15 U.S.C. Section 16(a); Emich Motors Corp v. General Motors Corp, 340 U.S. 558, 569 (1951).
\(^{121}\) E.g., Theatre Enterprises Inc v. Paramount Film Distribution Corp, 346 US 537, 543 (1954).
\(^{122}\) FRE 410. A guilty plea is not admissible if a plea is later withdrawn or is a nolo contendere (no contest) plea.
\(^{124}\) 15 U.S.C. Section 16(a).
\(^{126}\) 15 U.S.C. Section 16(a) (‘Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel’).
\(^{128}\) In re Microsoft Corp Antitrust Litigation, 355 F.3d 322, 325–26 (4th Cir. 2004).
\(^{129}\) 15 U.S.C. Section 16(a).
XI PRIVILEGES

i Attorney–client privilege
Attorney–client privilege protects confidential communications between an attorney and client made for the purpose of rendering or receiving legal advice, and applies in the antitrust context to the same extent as in other contexts. The privilege extends to confidential communications between corporate employees and the corporation’s lawyer when those communications are necessary to facilitate the provision of legal advice to the corporation, and covers communications with current and former employees, subsidiaries and affiliates. It does not extend to communications with a lawyer acting in a business capacity.

ii Waiver of attorney–client privilege
Privilege is waived if a communication is voluntarily disclosed to a third party, unless disclosure is necessary to provide legal advice (e.g., a secretary or an interpreter) or is part of the community-of-interest (or joint defence) privilege. Privilege may be waived if the corporation voluntarily discloses communications to third-party government agencies.

iii The crime-fraud exception
Communications made between clients and their attorneys for the purpose of furthering a current or future crime or fraud, such as an antitrust law violation, are not privileged. To invoke the exception, the moving party must make a prima facie showing that the allegation of a crime or fraud is founded in fact and was intended to further that crime or fraud.

iv Foreign communications and documents
Attorney–client communications that occur in a foreign country or involve foreign attorneys or proceedings and attorney work for foreign proceedings are governed by common law principles. Principles of international comity dictate that the law of the country with the most predominant or direct and compelling interest in whether those communications should remain confidential applies, unless it would be contrary to public policy. The predominant jurisdiction is usually the jurisdiction in which the attorney–client relationship was formed or where the relationship was centred at the time the privileged communication was sent.

132 E.g., In re Allen, 106 F.3d 582, 605–06 (4th Cir. 1997).
134 E.g., In re Allen, 106 F.3d at 600–05.
135 E.g., In re Quest Communications International Inc, 450 F.3d 1179, 1185 (10th Cir. 2006).
137 Id.
138 E.g., Clark v. United States, 289 U.S. 1, 15 (1933); In re Antitrust Grand Jury, 805 F.2d 155, 164–68 (6th Cir. 1986).
139 E.g., Clark v. United States, 289 U.S. at 15.
140 FRE 501.
142 Id.
The Hague Evidence Convention allows discovery of foreign evidence; however, Article 11 safeguards privileged and protected evidence under the law of the state of execution or state of origin.

v Attorney work product doctrine

The work product doctrine protects all documents and tangible materials prepared by or for an attorney in anticipation of litigation.143 Ordinary fact work product includes materials in which the attorney merely records or summarises information, while opinion work product includes materials that reflect the attorney's mental impressions, opinions, judgments or legal conclusions.144 While opinion work product is virtually immune from discovery,145 a discovering party may obtain fact work product if it shows substantial need for the work product and undue hardship in obtaining the information from another source.146 The crime-fraud exception applies to ordinary attorney fact work product, but courts will maintain the immunity given the more sacrosanct opinion work product if the lawyer had no knowledge of the client’s crime or fraud.147

XII SETTLEMENT PROCEDURES

Federal policy generally favours settlement over continued litigation. FRCP 16 allows federal judges to mandate pretrial conferences among the parties to, inter alia, facilitate settlement, and allows them to impose sanctions on parties for failing to appear or for failing to participate in good faith at such conferences.148 With the exception of class action settlements, courts typically accept a party’s stipulation to settle without review. However, FRCP 23 requires that proposed class-action settlements be reviewed and approved by the court only if they are fair, reasonable and adequate, as class section settlements affect the rights of all class members.149 A defendant’s unaccepted offer of settlement to a class representative does not moot the plaintiff’s claim.150 Due process requirements – giving notice to the absent class members and holding a hearing in which any such absent class member who wishes to may object to the proposed settlement – must be met prior to settlement approval.151

XIII ARBITRATION

Federal policy favours arbitration, and federal antitrust claims arising out of both international and domestic transactions generally may be arbitrated.152 Arbitration clauses are construed broadly,153 and courts refuse to recognise attempts by parties to limit the statutory remedies

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143 FRCP 26(b)(2); Hickman v. Taylor, 329 U.S. 495 (1947).
144 E.g., 805 F.2d at 163.
145 E.g., 329 U.S. at 513.
146 FRCP 26(b)(3)(A).
147 E.g., 805 F.2d at 163-64.
148 FRCP 16(a)(5), (f)(1).
149 FRCP 23(e).
151 FRCP 23(e).
and procedures available to arbitrators, invalidating, for example, portions of arbitration agreements where the parties attempted to waive rights to treble damages or class or consolidated actions.¹⁵⁴ The Supreme Court will decide this year whether courts may decline to enforce arbitration agreements that delegate to an arbitrator the question of whether a dispute should be arbitrated if the argument in favour of arbitration is wholly groundless.¹⁵⁵ In the context of class actions, however, the defendant’s arbitration rights may be deemed waived if it seeks to compel arbitration only after the class is certified and extensive discovery has occurred.¹⁵⁶ In addition, arbitrators may not impose class arbitration on parties unless it is contractually permissible.¹⁵⁷ The Supreme Court has held that express arbitration clauses trump class-action rights, even in antitrust cases.¹⁵⁸

**XIV INDEMNIFICATION AND CONTRIBUTION**

i  **Joint and several liability**

Under the doctrine of joint and several liability, each guilty defendant is liable for all the damage caused by the conduct of the entire conspiracy, not just that attributable to its own conduct.¹⁵⁹ Antitrust co-conspirators can be held jointly and severally liable for damage predicated on sales by members of the conspiracy and damage caused by entities outside the conspiracy caused by the conspiracy.

ii  **No right to contribution**

An antitrust defendant may not seek contribution from other participants in the anticompetitive scheme.¹⁶⁰ Combined with joint and several liability for antitrust damages among defendants, the absence of the right to seek contribution from others has important practical consequences for defendants in their settlement strategies.

iii  **Indemnification**

Most courts prohibit a defendant from seeking indemnification from other participants of an anticompetitive conspiracy, treating contribution and indemnification analogously.¹⁶¹ However, indemnification may be available to ‘an innocent actor whose liability stems from some legal relationship with the truly culpable party’.¹⁶²

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¹⁵⁴ Kristian v. Comcast Corp, 446 F.3d 25, 46–48, 55–62 (1st Cir. 2006).
¹⁵⁶ Healy v. Cox Communications, Inc, 790 F.3d 1112, 1118–21 (10th Cir. 2015).
¹⁶⁰ Id. at 639–46.
XV  ENFORCEMENT OF MONETARY JUDGMENTS AGAINST FOREIGN COMPANIES

Monetary judgments issued by US courts generally become enforceable promptly after entry, and taking an appeal from a judgment does not ordinarily stay enforcement. To stay enforcement pending appeal, the losing defendant (or judgment debtor) must ordinarily post a bond for the full amount of the monetary judgments. Enforcement of monetary judgments in US federal courts is governed by FRCP 69.

The principal device contemplated by that rule is the writ of execution (i.e., an order authorising US marshals to seize and sell property of the judgment debtor within the territory of the district court). The holder of a monetary judgment (or judgment creditor) may register the judgment in other district courts, in which case the judgment is treated as though it had issued from the court in which it has been registered. Rule 69 authorises proceedings in aid of enforcement, including post-judgment discovery as to the judgment debtor’s assets. The US Supreme Court recently held that such discovery may extend to assets held abroad, because the judgment creditor may be able to secure execution in the countries where the assets are held.

US courts generally do not have authority to execute against assets outside the US. However, the enforcement law of the state of New York authorises orders requiring any judgment debtor or third party over which it has personal jurisdiction to bring money or personal property belonging to the judgment debtor into the state for execution. The constitutionality of this approach remains an open question.

XVI  FUTURE DEVELOPMENTS AND OUTLOOK

Private antitrust litigation continues to be active in the United States, both in class action litigation for consumers against companies that have engaged in anticompetitive conduct and for private companies challenging the practices of other companies as anticompetitive. Additionally, follow-on litigation to government enforcement action, particularly in cartel matters, continues to be a large part of US antitrust litigation.

US courts continuously evaluate the scope of the antitrust laws and the legal framework in which plaintiffs may bring private litigation. Likewise, the appellate courts continue to

163  FRCP 62(a).
164  FRCP 62(d).
165  Judgments awarding injunctions are enforced by the issuing court through its power to hold a party that violates its orders in contempt. See 18 U.S.C. Section 401.
166  See Aetna Cas & Sur Co v. Markarian, 114 F 3d 346, 349 (1st Cir. 1997).
168  See Fed R Civ P 69(a)(2).
170  Id.
172  Koehler, 12 NY3d at 544–45 (Smith, J, dissenting) (noting potential constitutional objections).
interpret *Bell Atlantic v. Twombly* and clarify what allegations are sufficient to create a reasonably grounded expectation that discovery will reveal relevant evidence of an illegal agreement to survive dismissal.

The Supreme Court is slated to decide another antitrust case this term. Class action plaintiffs allege that Apple has monopolised the market for iPhone apps. The Court will decide whether the plaintiffs’ claims are barred under *Illinois Brick* because Apple does not sell apps, but rather software distribution services for app developers (as Apple argues), or whether the plaintiffs purchase apps directly from Apple, and thus have standing as direct purchasers under *Illinois Brick*, as the Ninth Circuit held in 2017. Last term, the Court was scheduled to decide a case concerning whether a party may immediately appeal a denial of immunity under the state action doctrine, but the parties settled the case before oral arguments.

Over the past two years, the Supreme Court has rendered several decisions concerning general litigation issues of potential relevance to antitrust disputes. In particular, in May 2017 the Court ruled that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters authorises service of process by mail. In another case, the Supreme Court further clarified the boundaries of personal jurisdiction: building upon its 2014 *Daimler* decision, the Court explained that a state court cannot establish general jurisdiction over an out-of-state defendant that is not incorporated nor maintains its principal place of business in that state.

Further developments in class action litigation and substantive antitrust law have come from the federal appellate courts in recent years. For example, in the context of settling patent infringement disputes between generic and brand-name drug manufacturers, there is still substantial disagreement between the circuits as to whether plaintiffs are required to prove that the pharmaceutical company who sought generic entry would have won the patent litigation had defendants not settled. The Third Circuit in *In re Lipitor Antitrust Litigation* rejected the heightened pleading standard the District Court applied in a recent reverse payments case. The panel explained that defendants – not plaintiffs – have the burden to justify the rather large reverse payment. In *DeHoog v. Anheuser-Busch InBev SA/NC*, the

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174 *Evergreen Partnering Group, Inc v. Forrest*, 720 F.3d 33 (1st Cir. 2013); *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314 (2d Cir. 2010).
176 Id. at 322–25.
181 Compare *In re Lidoderm Antitrust Litigation*, 2017 U.S. Dist. LEXIS 182940, at *50 (N.D. Cal. 3 November 2017) (holding that plaintiffs must only show some evidence that the pharmaceutical entrant could have won at trial) with *In re Wellbutrin XL Antitrust Litig*, 868 F.3d 132, 167 n58 (3d Cir. 2017) (explaining that the panel cannot solve the antitrust issue without considering the underlying parent dispute).
183 Id. at 256.
Ninth Circuit ruled that private plaintiffs could not challenge a merger as anticompetitive where the government had required the target to divest its business interest in the US beer market, reducing the likelihood of anticompetitive effects.\textsuperscript{184}

The development of the law on the procedures for bringing antitrust actions, including the seeming relaxation of some of the stringent pleading and class certification standards, as well as the continued enforcement by the federal antitrust agencies and state authorities against cartel activities and monopolisation across industries, virtually assures that private litigation will remain a robust and complex area of activity in the United States.

\textsuperscript{184} \textit{DeHoog v. Anheuser-Busch InBev SA/NV}, 899 F. 3d. 758 (9th Cir. 2018).
ABOUT THE AUTHORS

LAURA AMBROZIE
*Popovici Nițu Stoica & Asociații*

Laura Ambrozie is a senior associate within the competition practice group of Popovici Nițu Stoica & Asociații. She is specialised in competition matters, including merger control, antitrust, unfair competition and trading policies. She also deals with M&A, corporate and commercial matters.

Ms Ambrozie holds a degree in law from the University of Bucharest, and is a member of the Bucharest Bar and the Romanian Bar Association.

CATARINA ANASTÁCIO
*SRS Advogados*

Catarina Anastácio is a consultant with the SRS competition department and former president of the executive editorial board of the *Concorrência & Regulação* (competition and regulation) legal review. She was a lawyer at the Portuguese Competition Authority between 2003 and 2017 (having worked in, *inter alia*, the Restrictive Practices Department, the Studies Department and the Legal Department, as well as for the Cabinet of the President). Previously she was a lawyer at the Portuguese Central Bank and the Portuguese Securities Market Commission, as well as a member of the Cabinet of the Secretary of State of Finance and Treasury.

She has lectured in civil procedural law, contract and tort law and property law at the University of Lisbon Law School.

Catarina was directly involved in the Damages Actions Directive negotiations, as well as in drafting the legislative proposal for its transposition in Portugal. She has lectured on private enforcement issues to different audiences, including postgraduate students, lawyers and judges.

GONÇALO ANASTÁCIO
*SRS Advogados*

Gonçalo Anastácio is the partner in charge of the competition department at SRS and was previously a partner at Simmons & Simmons. His practice includes antitrust, merger control, state aid, compliance programmes and EU litigation. He joined the firm in 1998 after having worked in Genoa and Lisbon, and he studied at the Coimbra, Lisbon and Sorbonne (Paris I) universities.
In 2001, he was seconded to the EU and competition department of Simmons & Simmons in London, and in 2004 he was part of the first group of lawyers to be awarded the title of specialist in European and competition law by the Portuguese law society.

Gonçalo (as well as SRS) is ranked in the top band for competition law in Portugal by the leading international legal directories, and is the author and editor of a number of reference works on competition law.

ELSA ARBRANDT
Advokatfirman Cederquist KB

Elsa Arbrandt is a partner in the dispute resolution group of Cederquist, with 20 years of experience of arbitration and litigation. In addition to her experience as senior associate and senior legal consultant at the law firms of Roschier and Ashurst, Elsa Arbrandt has also been Head of Department at the Swedish Competition Authority.

She is a focused and analytical litigator, specialised in international arbitration and commercial litigation, with an emphasis on antitrust and international law aspects. Her background is the intersection of competition and intellectual property law, having conducted both contentious and non-contentious work within those areas. She has also advised several companies in relation to competition damage claims in various jurisdictions, and most recently acted as legal expert in relation to a large follow-on damages claim in the Netherlands against the participants in the European Sodium Chlorate cartel.

Elsa Arbrandt is ranked by both Chambers and Partners Europe (since 2013) and The Legal 500 (since 2014) for EU and competition law with statements such as ‘Elsa Arbrandt is widely renowned for her strength in competition issues and is praised by clients for her pragmatism and hands-on approach’ and ‘is a knowledgeable lawyer, with a good deal of common sense’.

Her areas of expertise are arbitration, litigation, commercial contracts, competition and international law.

MICHAEL BINETTI
Affleck Greene McMurtry LLP

Michael Binetti is a litigator with a focus on competition law, commercial litigation and administrative law. A partner of Affleck Greene McMurtry LLP, he appears regularly in all levels of court in Ontario.

Michael represents clients who are targeted by the Competition Bureau and defends multinational corporations in Canadian class actions, often as part of larger, multi-jurisdictional class actions.

Michael was called to the Bar in Ontario in 2006 after articling with Affleck Greene McMurtry LLP. He graduated with a JD from the French common law section of the University of Ottawa, Canada. He obtained an honours bachelor of arts from Glendon College of York University in Toronto and was a visiting student at the Institut d’Études Politiques de Rennes in France.
TOM BRIDGES
Webb Henderson

Tom Bridges is a partner based in the Sydney office of Webb Henderson. Tom is a rising star in the Australian competition litigation and consumer law space, and has represented and advised both the Australian Competition and Consumer Commission and private clients in relation to competition and consumer law matters, including enforcement actions under Part IV of the Competition and Consumer Act (2010) (Cth) and the Australian Consumer Law.

CAROLINA DESTAILLEUR G B BUENO
Pinheiro Neto Advogados

Carolina Bueno graduated in law at São Paulo Law School of Fundação Getúlio Vargas, Brazil in 2017.

She speaks English and Portuguese.

NATALIA CALLEJAS AQUINO
Aguilar Castillo Love, SRL

Natalia Callejas Aquino is a partner in the Guatemala office of Aguilar Castillo Love and is admitted to practise in Guatemala. Natalia is a graduate of the Universidad Francisco Marroquín (lawyer and notary public, 2013) and a member of the Guatemalan Bar Association.

She has experience dealing with foreign direct investment and multinational clients, and advising clients in a variety of industries, taking part in a wide range of commercial and corporate transactions.

She is a founding member and the secretary of the board of directors of the Women in the Profession chapter in Guatemala – Transforma Abogadas en Guate – of the Vance Center. She is also the head of its pro bono committee.

FIONA CAMPBELL
Affleck Greene McMurtry LLP

Fiona Campbell is a member of the firm’s competition group and represents clients who are targeted by the Competition Bureau as well as in multi-jurisdictional class actions.

JUAN CARLOS CASTILLO CHACÓN
Aguilar Castillo Love, SRL

Juan Carlos Castillo Chacón is a managing partner at Aguilar Castillo Love. Mr Castillo Chacón graduated with honours (magna cum laude) as an attorney and notary from Universidad Francisco Marroquín and has a master’s degree in law from Harvard Law School, Cambridge, Massachusetts.

He has considerable experience in energy, financial and acquisition matters, and has participated in some of the biggest acquisitions in the history of Guatemala, such as, among many other projects, the process of disincorporation of generation assets from Empresa Eléctrica de Guatemala, SA from 1996 to 1998; the social capitalisation and sale of shares (80 per cent) from the same company in 2009; the acquisition of all the assets of Shell in...
Central America in 2009; and a percentage of the entity Royal Forest Holding (RFH) and its subsidiaries in Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica in 2010.

In 2000, he was part of the group that presented an analysis of the bill of the Banking and Financial Groups Law as an adviser to the Guatemalan Bank Association.

In 2006, he founded the law firm Aguilar Castillo Love, as a result of a merger between two acknowledged firms in Costa Rica and Guatemala.

**RICK CORNELISSEN**

*Houthoff*

Rick Cornelissen is counsel with Houthoff. He specialises in competition litigation and commercial litigation, with a particular focus on cartel damages claims, claims for access to distribution networks and disputes regarding contract terminations. Rick Cornelissen also has extensive experience in advising, negotiating and litigating on a wide variety of other matters regarding distribution, agency and e-commerce (with a focus on automotive and other high-end consumer goods). He is a lecturer of several courses and the author of several publications on the subject of competition litigation. Rick is a member of the Dutch Associations for Competition Law, European Law and Distribution Franchise and Agency Law.

**ANDONI DE LA LLOSA GALARZA**

*Redi Litigation*

Andoni de la Llosa Galarza is a founding partner of Redi Litigation. Before that, he worked in the litigation and arbitration department of other renowned law firms in Spain such as Baker & McKenzie, Garrigues, Uría and Pérez-Llorca. These firms allowed him to gain experience in all areas of civil, corporate and criminal law litigation, both before the courts and arbitration tribunals.

In addition, his expertise in damages claims arising out of antitrust infringements allows him to give lectures in different forums (e.g., the Barcelona Bar Association, the University of Deusto) and contribute to several press and specialised publications.

**MIGUEL DEL PINO**

*Marval, O'Farrell & Mairal*

Miguel del Pino joined Marval, O'Farrell & Mairal in 1998 and has been a partner since 2008. His area of specialisation is centred on competition and mergers and acquisitions. His professional work focuses on advising clients and representing them before the antitrust authorities on matters relating to pre-merger control, cartel investigations, anticompetitive investigations and general market investigations. Mr del Pino has also dealt with mergers, acquisitions and joint venture transactions, advising buyers and sellers on the transfer of shares or assets in Argentina. He has been very active in advising foreign clients on setting up businesses in Argentina and compliance with local regulations.

He has published several works related to his area of expertise, and has participated as a panellist and moderator in different conferences related to his area of expertise. He is an assistant professor of competition law on the postgraduate courses in business and economics law at the Universidad Católica. He graduated as a lawyer from the Universidad Católica.
About the Authors

de Buenos Aires in 1994, and in 1997 obtained a master’s degree in law from the University of Pennsylvania (Philadelphia).

SANTIAGO DEL RIO

Marval, O’Farrell & Mairal

Santiago del Rio is a partner of Marval, O’Farrell & Mairal. He joined the firm in 2006 and has been involved in competition issues ever since. He regularly provides advice to companies regarding merger control regulations in Argentina over a wide range of markets, and also provides counsel to companies that either undergo antitrust investigations or decide to initiate them during Antitrust Commission investigations, and regarding the challenge of decisions before the appellate courts and the Supreme Court of Justice.

Between 2010 and 2011 he was seconded to the Spanish firm Uría Menéndez, where he dealt with both European Union and Spanish competition matters in the firm’s Brussels and Madrid offices. He participated in Phase I and II merger control proceedings, anticompetitive investigations under Sections 101 and 102 of the TFEU, as well as appeals before the European Court of Justice.

He graduated with honours in 2005 from the Universidad del Salvador, and holds a postgraduate diploma in economics for competition law from King’s College London.

NAOMI DEMPSEY

Houthoff

Naomi Dempsey is counsel with Houthoff. She specialises in corporate litigation, with particular emphasis on private litigation of competition claims, employment law and litigation before the Dutch Supreme Court. Naomi was admitted to The Hague Bar in 2005 after obtaining her law degree at Leiden University in 2003 and a magister juris degree at Oxford University in 2004.

BERNT ELSNER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Bernt Elsner leads the Austrian team for EU competition law, public procurement law and public law. He is head of the global CMS practice group for public procurement, and a member of the managing team of the global CMS practice group for competition and EU. Bernt studied law at the University of Vienna and business administration at the Economic University of Vienna. He was a law clerk at the Austrian Constitutional Court and has over 20 years of experience as an attorney in Vienna and Brussels. Bernt has authored numerous books and articles. He is a well-known expert with specific experience of cross-border merger control matters, anticompetitive behaviour in tender procedures, and antitrust damage and antitrust compliance.

EYTAN EPSTEIN

M Firon & Co

Eytan Epstein is a senior partner at M Firon & Co. Mr Epstein has repeatedly been listed in The International Who’s Who of Competition Lawyers, and has also been elected by leading
research organisations, such as Chambers and Partners and The Legal 500, as one of the leading competition law practitioners in Israel.

Mr Epstein received his law degree from the Faculty of Law at Tel Aviv University (1984) and, after being admitted to the Israel Bar in 1985, he worked in DG IV (competition) in Brussels. He established the law firm in 1989. He has served as a lecturer and assistant professor at the Tel Aviv University Law School, and teaches EC competition and international trade law at the Tel Aviv Business College.

He served as a member of the government committee for the preparation of Israel towards the European Union (1992) and the foreign trade committees of the Israel Industrialists’ Association, the Israel CPA Association and the Israel Chambers of Commerce. Mr Epstein is a member of the International Bar Association (IBA) and served until recently as co-chair of the international sales committee. In 2008, he was a member of a special taskforce formed by the IBA to comment on the draft Non-Horizontal Merger Guidelines issued by the European Commission. He is the representative of the Israeli Bar to the IBA, serves as acting chair of the Israeli Bar’s antitrust committee and chairs the Israel Bar Annual Conference. Mr Epstein is also the Israeli Bar’s representative to the Knesset (the Israeli parliament) with respect to all economic and antitrust issues.

Mr Epstein practises corporate, commercial and trade law, and specialises in antitrust law. He has extensive experience dealing with competition issues before the Israeli Antitrust Authority, and represents Israeli and foreign clients engaged in the airline, telecommunications, energy, credit card, insurance, computer, pharmaceuticals, retail and other industries. He advises frequently on international M&A filings in Israel and collaborates with the leading antitrust international law firms.

Mr Epstein has published numerous articles on antitrust and the legal environment of Israel’s foreign trade. Inter alia, he is the author of the chapters on Israel in the Oceana Digest of Commercial Laws of the World (Kluwer Law, 2000) and Warranties and Disclaimers (Kluwer Law and the IBA, 2002).

H ERCÜMENT ERDEM
Erdem & Erdem Law Office

Prof Dr H Ercüment Erdem is the founder and senior partner of Erdem & Erdem. He has more than 30 years’ experience in international commercial law, competition and antitrust law, mergers and acquisitions, privatisations, corporate finance and arbitration. He serves international and national clients in a variety of industries including energy, construction, finance, retail, real estate, aerospace, healthcare and insurance.

He has collaborated for many years with the ICC, and has actively participated in several ICC task forces, drafting model contracts for international business (e.g., agency, distribution, confidentiality, mergers and acquisitions, occasional intermediaries, Incoterms). He is the co-chair of the ICC Commission on Commercial Law and Practice, a member of the ICC Incoterms Experts Group, a council member of the ICC Institute of World Business Law and a member of the ICC International Court of Arbitration.

He has acted as chair and sole or party-appointed arbitrator in many international and national arbitrations under different rules. He is a member of the ICC Turkish National Committee Arbitration, the Istanbul Arbitration Centre (ISTAC) and the Association Suisse de l’Arbitrage (ASA).

According to The Legal 500, he ‘is very experienced in cartel investigations, distribution and licensing agreements, alleged abusive conduct and state aid’.
**KAROLIEN FRANCKEN**

*Contrast*

Karolien Francken is a senior associate at Contrast. She specialises in EU and Belgian competition law and distribution law. She assists companies in proceedings before the European Union and national authorities and courts. Karolien has a particular focus on private damages in competition law and has gained practical experience in this field. She closely follows the developments in private damages both on an EU and a domestic level.

Karolien obtained a master’s degree in European and international law at the University of Antwerp and a master’s degree in competition law at the University of Toulouse Capitole I. In addition to her law degrees, Karolien holds a master’s degree in applied economic sciences, with a specialism in business administration, international management and diplomacy. During her studies, Karolien participated in summer schools and exchange programmes with the University of Paris – Sorbonne (France), the University of Oxford (UK), the University of Oujda (Morocco) and the University of Toulouse (France).

Karolien is the driving force behind Contrast’s seminars (Contrast law seminars). Contrast law seminars organise four to six legal seminars per year together with a leading Belgian publisher (Larcier). These seminars have welcomed international top speakers from the European Commission and national competition authorities.

Karolien speaks regularly at seminars on EU and Belgian competition law (including on private damages) and gives hands-on training sessions on compliance with competition law to sales teams throughout Europe.

Karolien is admitted to the Brussels Bar.

**SHANI GALANT-FRANKFURT**

*M Firon & Co*

Shani Galant-Frankfurt is an advocate at M Firon & Co and part of the antitrust and regulatory affairs department.

Ms Galant-Frankfurt advises on both civil and criminal antitrust cases. Her practice includes, among others, notifications of mergers, advising clients and providing legal opinions in respect of all aspects of competition and antitrust law.

Ms Galant-Frankfurt received her law degree (LLB) with honours from Interdisciplinary Center Hertzliya (IDC) in 2014 and her master of laws (LLM) with highest honours from IDC in 2017.

**SIBO GAO**

*King & Wood Mallesons*

Sibo Gao joined King & Wood Mallesons in 2013 and is an associate in the firm’s antitrust and competition group in Beijing. She specialises in antitrust and anti-unfair competition law. Ms Gao’s practice focuses on antitrust investigation, antitrust litigation and merger filing. She has advised clients on various antitrust-related issues, including assisting clients in coping with antitrust investigations and advising clients on seeking leniency treatment and on antitrust compliance matters. In addition, she has represented many multinational companies, as well as large domestic companies, in merger control proceedings before MOFCOM.
MARCOS PAJOLLA GARRIDO

Pinheiro Neto Advogados

Marcos Pajolla Garrido graduated in law at the Faculdade de Direito da Universidade de São Paulo, Brazil in 2007.

He specialised in competition law at the São Paulo Law School of Fundação Getúlio Vargas, Brazil in 2009.

He has an LLM degree in corporate and commercial law from the London School of Economics and Political Science, 2015.

He was a foreign associate at Bredin Prat, Brussels, in 2016.

He speaks English and Portuguese.

ILENE KNABLE GOTS

Wachtell, Lipton, Rosen & Katz

Ilene Knable Gotts is a partner in the New York City law firm of Wachtell, Lipton, Rosen & Katz, where she focuses on antitrust matters. Mrs Gotts is regularly recognised as one of the world’s top antitrust lawyers, including being recognised for over the past decade in The International Who’s Who of Business Lawyers as one of the top 15 global competition lawyers, in the first-tier ranking of Chambers USA and in the ‘leading individuals’ ranking of PLC Which Lawyer? Yearbook, being named an ‘All Star’ by BTI Consulting Group due to her level of dedication and commitment to exceptional client service, and having been selected as the ‘Antitrust Lawyer of the Year’ for 2016 by the Wall Street Journal’s ‘Best Lawyer’ survey. Mrs Gotts was a member of the American Bar Association’s Board of Governors from 2015 to 2018, having previously served as chair of the ABA’s Section of Antitrust Law as well as in a variety of leadership positions in the Section for over two decades, including as the International Officer. From 2006 to 2007, Mrs Gotts was chair of the New York State Bar Association’s Antitrust Section. She is currently a member of the American Law Institute. Mrs Gotts is a frequent guest speaker, has had over 200 articles published on antitrust-related topics and has been the editor of the ABA’s Merger Review Process handbook editions published over the past 20 years.

MIHAELA ION

Popovici Nitu Stoica & Asociatii

Mihaela Ion is a partner at Popovici Nitu Stoica & Asociatii and head of the competition practice group. Her area of expertise covers in particular antitrust litigation, unfair trade practices, consumer law, merger control proceedings and state aid. She also assists clients in structuring and implementing compliance programmes, providing regular training as external legal counsel on all relevant aspects of competition law. Chambers Europe reported Ms Ion as having ‘great expertise in antitrust investigations and wider competition law’. Ms Ion holds a degree from ‘Lucian Blaga’ University of Sibiu and is a member of the Romanian Bar Association. She also holds a master’s degree in European and international business, competition and regulatory law from Freie Universität Berlin, a master’s degree in competition from the Bucharest Academy for Economic Studies, and a master’s degree in international relations and European integration from the Romanian Diplomatic Institute.
AVAANTIKA KAKkar

Cyril Amarchand Mangaldas

Avaantika Kakkar heads the competition law practice at Cyril Amarchand Mangaldas. She advises on complex merger filings with the Competition Commission of India (CCI). She was the lead lawyer in the first Phase II merger control case in India (Sun Pharma/Ranbaxy) and also on the first few cases involving remedies and modifications (Hospira/Orchid, ZF Friedrichshafen AG/TRW Automotive). She represented Titan International, Inc in its plea for mitigation of damages for a late merger filing. Her experience in corporate and securities laws, mergers and acquisitions, private equity and structured finance equips her uniquely for strategic advice on merger control.

Besides advising on joint ventures, Avaantika represents select clients on the enforcement side before the CCI and the Office of the Director General. She provides strategic support on commercial arrangements and compliance issues and was involved with filing the first few leniency applications before the CCI.


As per The International Who’s Who of Competition Lawyers & Economists, Avaantika is among the world’s leading competition lawyers. She is a ranked lawyer in Chambers and Partners, was recognised by GCR in its list of top 100 women in antitrust, 2016, and is a leading lawyer according to Asialaw Leading Lawyers.

MERT KARAMUSTAFAOĞLU

Erdem & Erdem Law Office

Mert Karamustafaoglu, a competition and compliance expert at Erdem & Erdem, specifically focuses on competition compliance programmes, mergers and acquisitions, joint ventures, commitment implementation, privatisations, investigations within the scope of competition law and competition law practices in the energy sector.

He worked at the Turkish Competition Authority for 15 years. He was the Chief Competition Expert with the Authority. Throughout this period, he actively took part in all kinds of competition investigations conducted with regard to competition violations in privatisations of the electricity, fuel oil, natural gas, mining, pharmaceutical, cement, ceramic and cinema sectors, and in public tenders. Moreover, Mert Karamustafaoglu has frequently taken part in law-making processes and educational activities conducted within the body of the Competition Authority. He has also attended the preparation processes of the secondary legislation on competition law, in-service training and certificated internship programmes in this regard.

Mert Karamustafaoglu received his master’s degree in law from the Freie Universitaet of Berlin in 2010, and is currently pursuing his postgraduate programme on energy and...
About the Authors

ALBERT KNIGGE

Houthoff

Albert Knigge has comprehensive experience in complex, multiparty cross-border disputes. He acts as a defence counsel for corporate and financial institutions with a particular focus on class action litigation and mass claim settlements and in follow-on civil litigation. He heads a team of experienced competition litigation lawyers at Houthoff. He is admitted to the Bar as a Supreme Court litigator. He is the author of several publications, primarily on the subject of procedural law and tort law, and a board member of the Dutch Association for Procedural Law. He is recommended in Chambers Europe and Chambers Global. ‘Sources say: “He is just one of the best litigators I have ever worked with. He has an extraordinary range of capabilities, his appreciation for the nuances of litigation has been incredibly helpful and he has been a great resource for us.”’ (Chambers Europe, 2016, dispute resolution) and ‘He acts on cross-border disputes with great experience as defence counsel to a number of financial institutions and international corporates.’ (Chambers Global and Chambers Europe, 2017, dispute resolution).

OLGA LADROWSKA

Slaughter and May

Olga Ladrowska is an associate in the dispute resolution group. She has experience advising clients on a wide range of contentious commercial matters, with a particular focus on competition litigation. Olga has acted on complex multi-jurisdictional follow-on cases, including before the Court of Appeal.

FREDRIK LINDBLOM

Advokatfirman Cederquist KB

Fredrik Lindblom is a partner in Cederquist’s EU, competition and procurement group. Starting out in Brussels with two international law firms and the European Commission, Fredrik has continued during the past 18 years to work in Stockholm on competition law aspects of cross-border transactions and multinational companies’ antitrust compliance.

Over the years, Fredrik has conducted over 100 merger notifications in more than 20 jurisdictions worldwide, and he is recognised as a very business-oriented counsellor. In addition, he has advised both national and international manufacturers on their distribution setups to avoid competition law pitfalls. He has also advised several companies in relation to competition damage claims in various jurisdictions, and most recently acted as legal expert in relation to a large follow-on damages claim in the Netherlands against the participants in the European Sodium Chlorate cartel.

Fredrik Lindblom is ranked by Chambers (since 2008), The Legal 500 and GCR 100, with comments such as ‘Clients describe Fredrik Lindblom as an “excellent” lawyer. He is particularly noted for his experience with M&A, vertical restraint and anti-dumping matters’ and ‘Fredrik Lindblom is described by sources as “very skilled” and “a pleasure to deal with” both because of his personal character and because of the high quality of his work’.

competition law. Additionally, he is part of the publication board of the Energy Law Journal that is published by the Energy Law Research Institute, and he is also a member of the management board of the Institute.
MAZOR MATZKEVICH
M Firon & Co

Mazor Matzkevich is a partner at M Firon & Co, heading the competition, antitrust and regulatory affairs department.

Ms Matzkevich’s practice focuses on all aspects of antitrust including litigation in administrative and criminal cases, merger notifications and the Concentration Law and Food Law.

Ms Matzkevich joined the Israel Antitrust Authority in 1998, and between 1999 and 2002 led the Authority’s Criminal Division. Ms Matzkevich supervised the Authority’s prosecutors and represented the Authority at the district courts and the Supreme Court, leading the key criminal cases of the Authority, including the first case in which prison sentences were imposed on cartel members.

In addition, Ms Matzkevich was responsible for the Authority’s regulatory activity in sectors such as professional organisations, water and the environment.

In 2003, after being admitted to the New York State Bar, Ms Matzkevich joined the Federal Trade Commission (FTC) as a staff attorney. During her six-year tenure, Ms Matzkevich practised both antitrust and consumer protection law, and was the lead counsel or co-counsel of merger and non-merger cases involving various industries, including high-tech, retail, pharmaceuticals, agro-chemistry, energy, hospitals and food.

Ms Matzkevich was part of the FTC’s litigation team in the North Texas Specialty Physicians and Whole Foods/Wild Oats cases. She also took part in the Intel investigation.

In 2010, Ms Matzkevich joined the law firm of Epstein Chomsky, Osnat and Co as a partner, until its merger with M Firon in 2016.

Ms Matzkevich has authored several professional publications, including the Israeli chapter in Merger Control (2011, 2014 and 2017; JF Francois Bellis and P Elliot, Van Bael & Bellis).

Ms Matzkevich was elected one of the 100 leading women worldwide in competition law by the Global Competition Review in 2016, and was recognised as a ‘Competition Future Leader Partner’ by Who’s Who Legal 2017 and 2018.

NATALIA MIKOŁAJCZYK
Linklaters C Wiśniewski i Wspólnicy

Natalia Mikołajczyk is an associate at Linklaters specialising in infrastructure and energy projects, as well as international dispute resolution. Prior to joining Linklaters, she practised in a renowned claimants’ antitrust boutique law firm in London. Natalia graduated from the Faculty of Law and Administration at the University of Warsaw and obtained her LLM degree from the University of California, Berkeley, School of Law.

SUSAN NING
King & Wood Mallesons

Susan Ning joined King & Wood Mallesons in 1995. She is a senior partner and head of the commercial and regulatory group. Her practice includes merger control filings, antitrust investigations, compliance and antitrust litigation. Since 2003, she, together with her team, has undertaken hundreds of antitrust merger control filings on behalf of clients, mostly consisting of multinational corporations. Susan has also assisted a number of clients on
confidential investigations of cartel conduct, resale price maintenance and abuse of market dominance. Meanwhile, Susan has furnished legal advice to a number of clients regarding establishing and improving their antitrust and competition compliance systems and conducting internal audits.

Ms Ning was also one of the first Chinese lawyers to practise international trade and investment law. She has been widely recognised for her international trade and investment work, which covers a wide range of issues, including anti-dumping, safeguards, countervailing and WTO dispute settlements. In 2008, Ms Ning led the firm’s Olympics legal counsel team: the firm was chosen as the sole Chinese legal counsel to the Beijing Organising Committee of the Games of the XXIX Olympiad. As head of the team, Ms Ning provided a wide range of legal advice.

Susan also practises in the areas of cybersecurity and data compliance, with publications in a number of journals such as the *Journal of Cyber Affairs*. Susan’s practice areas cover, *inter alia*, self-assessment of network security, responding to network security checks initiated by authorities, data compliance training, due diligence of data transaction or exchange, and compliance of cross-border data transmission. Susan has assisted companies in sectors such as IT (including emerging blockchain technology), transportation, online payments, consumer goods, finance (including digital currency) and the internet of vehicles in dealing with network security and data compliance issues.

**CHRISTOPHER LOUIE D OCAMPO**

*Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)*

Christopher Louie D Ocampo is a senior associate in ACCRALAW’s litigation and dispute resolution department. Mr Ocampo’s practice involves, among others, criminal, commercial and antitrust litigation and advice. Currently, Mr Ocampo is part of the firm’s team representing the Philippines’ largest telecommunications entity in the first case under the Competition Act involving a 69.1 billion Philippine peso joint acquisition.

Mr Ocampo obtained his Juris Doctor from the University of the Philippines in 2012 where he received the Dean’s Medal for Academic Excellence. In 2018, he obtained his master’s degree in law and finance from the University of Oxford.

**THOMAS OSTER**

*Bird & Bird AARPI*

Thomas is a partner in Bird & Bird’s competition and EU practice, based in Paris.

His practice covers both contentious and non-contentious national and European competition law.

Thomas has substantial experience of advising on cartel investigations and assisting companies in preparing leniency applications before the European Commission and the French Competition Authority. He helps to develop and implement competition compliance programmes, and provides assistance in notifications of transactions to the European Commission under the EC Merger Regulation and to the French Competition Authority. He also assists clients in relation to antitrust damages actions.

Thomas’ experience of competition law covers different angles, having worked in practice and in house, and having done an internship at the French Competition Authority. Prior to joining Bird & Bird, he worked for 14 years in the Paris office of a major global law firm.
Thomas regularly participates in seminars and conferences, and is the author of several articles on competition law. He is a member of the association of competition law practitioners (APDC) and of the French association for the study of competition law (AFEC).

CHUL PAK
Wilson Sonsini Goodrich & Rosati

Chul Pak is a partner in Wilson Sonsini Goodrich & Rosati’s antitrust practice, where he focuses on antitrust litigation, mergers and counselling. Chul defends clients in class actions, individual lawsuits and complex multi-district antitrust litigations across the United States. His litigation matters include representing manufacturers, services companies and technology firms in monopolisation, tying, exclusive dealing, price fixing, patent misuse and conspiracy claims. Chul also counsels companies in mergers and non-merger investigations before the FTC, the DOJ and numerous state attorneys general. Prior to joining Wilson Sonsini, Chul served as the assistant director of the Mergers IV Division at the FTC. In that role, Chul supervised a 25-attorney team responsible for investigating mergers and acquisitions across a wide spectrum of industries, including consumer goods (food and beverages), retail stores (supermarkets, department stores and other retail venues), cable and related media entertainment, and hospitals. Chul has also represented the FTC in numerous high-profile trials in federal court and the FTC’s internal administrative adjudication tribunal.

KATE PENG
King & Wood Mallesons

Kate Peng joined King & Wood Mallesons in 2004 and is a partner of the antitrust team in the firm’s Beijing office. She specialises in antitrust, competition and intellectual property law. Ms Peng is one of the very few antitrust attorneys who have extensive experience in contentious antitrust matters. She has been focusing on antitrust investigations and litigation since she joined KWM’s antitrust team as a partner in early 2012. Representing various types of clients, including multinationals, state-owned companies and government agencies in dozens of antitrust investigations and litigations enables her to provide valuable insight and guidance to clients throughout proceedings. Ms Peng is also one of the very few antitrust attorneys who have a strong intellectual property background: she began practising intellectual property law, both contentious and non-contentious, in 2006. Ms Peng’s distinct specialisation in the overlap between intellectual property abuse and antitrust issues, and her unique knowledge of contentious and non-contentious matters, make her a preferred choice for clients when they encounter complicated antitrust issues and issues involving intellectual property.

ALBERT POCH TORT
Redi Litigation

Albert Poch Tort founded Redi Litigation after having worked at other renowned law firms in Spain where he became a business and antitrust litigation specialist before the civil and criminal courts of justice.

He also has extensive experience in national and international arbitrations, having intervened in arbitrations of the International Chamber of Commerce (ICC) and the Civil and Mercantile Court of Arbitration (CIMA), among others.
From 2015 to date, he has been listed by Best Lawyers for his insolvency and reorganisation law and litigation work.
His working languages are Catalan, Spanish, English, French and Italian.

WOJCIECH PODLASIN
*Linklaters C Wiśniewski i Wspólnicy*

Wojciech Podlasin is a senior associate in Linklaters’ Warsaw competition practice. He specialises in antitrust, merger control and state aid cases and gained extensive practical experience as a member of Linklaters’ Warsaw and Beijing competition teams. Wojciech has a broad sector expertise, including IT, energy, financial services and chemicals. He is the co-author of a leading commentary on the part of the Polish Competition Act concerning merger control. Wojciech read law at the University of Warsaw and the London School of Economics, and finance at the Warsaw School of Economics.

PATRICIA-ANN T PRODIGALIDAD
*Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)*

Patricia-Ann T Prodigalidad is a senior partner in ACCRALAW’s litigation and dispute resolution department. Ms Prodigalidad focuses on commercial, securities and antitrust litigation as well as arbitration. She advises clients on various matters including debt and asset recovery, corporate rehabilitation, AML and competition law. She is an accredited arbitrator and adjudicator.

Ms Prodigalidad obtained her bachelor of laws degree from the University of the Philippines, *cum laude*, graduating class salutatorian. She then topped (ranked first in) the 1996 Philippine Bar examinations. In 2004, she obtained her master’s degree in law from Harvard Law School.

CAMILLA SANGER
*Slaughter and May*

Camilla Sanger is a partner in the dispute resolution group. Camilla’s practice includes handling complex commercial disputes of a varied nature, often involving multiple jurisdictions, with particular expertise in competition litigation and regulatory investigations. Camilla has acted on a large number of high profile follow-on and standalone damages cases, including before the Court of Appeal. Camilla is recognised in *Who’s Who Legal Competition – Future Leaders* and has been named a ‘Next Generation Lawyer’ in both commercial litigation and competition litigation in *The Legal 500 UK*. She is frequently asked to speak at panel events on private enforcement issues.

MONIQUE SENGELØV
*Contrast*

Monique Sengeløv is a junior associate at Contrast. She graduated from the University of Ghent and obtained an LLM in European Union law at the University of Ghent.

Monique is admitted to the Brussels Bar.
VANDANA SHROFF
_Cyril Amarchand Mangaldas_

Vandana Shroff is a partner at Cyril Amarchand Mangaldas. She has over 28 years of wide-ranging experience in general corporate matters and specific expertise in private equity.

She has extensive experience in corporate and competition law and has been advising both domestic and international clients on all aspects of their activities, including mergers, acquisitions, restructuring, foreign investment and commercial agreements.

She has acted for several foreign and domestic private equity funds and venture capitalists, both in public and private investments, and has handled all aspects, including due diligence, regulatory filings, open offers and other compliance issues. Her clientele includes blue-chip private equity funds across a range of geographies.

PAUL SLUIJTER
_Houthoff_

Paul Sluijter is counsel in Houthoff’s corporate and commercial litigation practice group. His particular field of expertise is private international law. Paul focuses on complex cross-border disputes, including several cartel damages proceedings, class actions and shareholder liability litigation. Paul graduated and obtained his PhD in civil procedure law from Tilburg University before joining Houthoff in 2012.

JONATHAN SPEED
_Bird & Bird LLP_

Jonathan Speed is a partner in Bird & Bird’s international dispute resolution group, based in London. He has extensive experience of domestic and international commercial litigation acting for multinational companies, public sector clients and individuals. He has particular expertise in disputes in the technology and communications and automotive sectors, and is regularly involved in disputes relating to the private enforcement of competition law.

WILLIAM TURTLE
_Slaughter and May_

William Turtle is a partner in the competition group. He has extensive experience in a wide range of competition and regulatory matters, including global investigations, merger control and antitrust. On the contentious side, he has advised on a range of multi-jurisdictional standalone and follow-on damages actions as well as on appeals before the European courts. William is recognised as a leading competition lawyer by _Who’s Who Legal: Competition_.

CANDICE UPFOLD
_Norton Rose Fullbright South Africa Inc_

Candice Upfold is a senior associate in the antitrust and competition team in Johannesburg, South Africa. She has extensive experience providing competition law opinions and obtaining merger clearances from the competition authorities within South Africa, other sub-Saharan African jurisdictions and COMESA. She has assisted with several large mergers in the industrial and manufacturing, insurance and mining sectors.
Candice also has experience in cartel investigations, including applications for corporate leniency, dawn raids and settlement negotiations. Candice also advises clients in proceedings before sectoral regulators such as the National Energy Regulator of South Africa (NERSA) and the International Trade Administration Commission (ITAC).

Candice has provided a comparative analysis of the European Merger Regulation in an exclusive chapter in the 2014 *International Economic Law and African Development* guide. The chapter deals with the jurisdiction of the COMESA Competition Commission for merger transactions.

She also presented a paper at the Seventh Annual Conference on Competition Law, Economics & Policy comparing the approach taken by COMESA and the European Union to jurisdiction over mergers and thresholds, and is a contributor of articles on competition law and related issues to legal journals, including the *Competition Policy International Antitrust Chronicle*, the *Global Antitrust Compliance Handbook* and *The Merger Control Review*.

Candice joined the practice as a candidate attorney in January 2010, and holds both an LLB and LLM degree in business law from the University of KwaZulu-Natal. She also holds an LLM degree in international law with a focus on international trade law from the University of the Witwatersrand, Johannesburg.

**DAVID VAILLANCOURT**
*Affleck Greene McMurtry LLP*

David Vaillancourt is a partner of Affleck Greene McMurtry LLP and a member of the firm’s competition group. David represents clients who are targeted by the Competition Bureau as well as in multi-jurisdictional class actions. He has acted as trial and appellate counsel before all levels of provincial court, the Competition Tribunal and the Federal Court of Appeal.

**WEYER VERLOREN VAN THEMAAT**
*Houthoff*

Weyer VerLoren van Themaat has been assisting international clients for over 25 years in complex cases relating to merger control and cartel defence litigation, and leads Houthoff’s competition practice group. He was resident partner at Houthoff’s Brussels office from 1997 to 2005, after which he returned to Amsterdam. Weyer was chair of Lex Mundi’s antitrust competition and trade group from 2014 to 2016, and is a non-governmental adviser to the ICN on behalf of the Dutch Authority for Consumers and Markets (ACM). He publishes and speaks regularly on competition law-related subjects. Weyer is (highly) recommended in, *inter alia*, *Chambers Europe*, *The Legal 500*, *Who’s Who Legal* and *Best Lawyers*. He is ‘praised by his clients for his expertise in cartel cases and excellent litigation skills’.

**MAAIKE VISSER**
*Contrast*

Maaike Visser is counsel at Contrast. She specialises in (EU and Belgian) competition law, in particular cartel investigations and private damages in competition law cases.

Maaike graduated from the University of Ghent and obtained a master’s degree in European law from Queen Mary, University of London. She was an intern at DG Competition of the European Commission.

Maaike speaks regularly at seminars on EU and Belgian competition law.
Maaike is admitted to the Brussels Bar.

**DANIEL P WEICK**
*Wilson Sonsini Goodrich & Rosati*

Daniel P Weick is an associate in the New York office of Wilson Sonsini Goodrich & Rosati and a member of the firm’s antitrust practice. Dan has extensive experience in civil antitrust litigation, having represented plaintiffs and defendants in all phases of the litigation process, from pre-complaint investigations and negotiations through trial, appeal and judgment enforcement proceedings. He also has represented clients before multiple government agencies, including the US DOJ, the US State Department, the FTC, various state attorneys general, and the US Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, among other agencies. Dan is a graduate of the New York University School of Law, where he won the Betty Bock Prize in Competition Policy. During law school, he served as a student advocate in the NYU Supreme Court Litigation Clinic, where he contributed to multiple briefs before the US Supreme Court. Dan currently serves as vice-chair of the American Bar Association Section of Antitrust Law’s Economics Committee.

**FRANK WIJCKMANS**
*Contrast*

Frank Wijckmans is a partner at Contrast. He is active in the fields of EU and competition law and Belgian business law. Frank is an experienced negotiator, litigator and arbitrator (ICC, CEPINA, *ad hoc* arbitration). He is a regular speaker at conferences.

Frank graduated from the University of Antwerp and obtained a master’s degree at the University of Virginia (USA).

Frank Wijckmans is a professor at the Brussels School of Competition, where he teaches the law of economics of vertical restraints course.

Frank Wijckmans has an extensive publication record in the fields of EU competition law and EU and Belgian distribution law. His most recent publications (in 2018) are a monograph published by Oxford University Press: *Vertical Agreements in EU Competition Law*, including motor vehicle distribution (third edition), and a monograph published by Larcier: *Distribution Agreements – EU – Belgium – Netherlands*. These publications are part of a pan-European publication project steered and coordinated by Frank. He edited and co-authored also a monograph published by Oxford University Press on *Horizontal Agreements and Cartels in EU Competition Law*. In addition, Frank has contributed articles to a wide range of international and national law reviews.

Frank is a member of the Brussels Bar.
PETER WILLIS

*Bird & Bird LLP*

Peter Willis is a partner in Bird & Bird’s competition and EU law practice group, based in the firm’s London office. He provides no-nonsense advice on the application of EU and national competition and regulatory rules.

He has particular expertise in the area of competition litigation, and in particular follow-on damages claims. He also provides feasibility and defensive advice on follow-on litigation to potential claimants and defendants. Recent experience includes what is thought to have been the first follow-on damages claim in the Scottish courts; advising UK Power Networks on its follow-on damages claim against members of the *Gas Insulated Switchgear* cartel; advising Polar Air Cargo LLC, a contribution defendant, in the *Emerald v. BA* damages proceedings in the High Court following the *Air Cargo* cartel decision of the European Commission; advising TomTom on its claim against Samsung for damages resulting from losses caused by the global *LCD* cartel; and advising Beko and Arçelik in their damages claim against members of the *CRT* cartel.

MANDA WILSON

*Contrast*

Manda Wilson is a junior associate at Contrast. She graduated from the University of Leuven. Manda is admitted to the Brussels Bar.

MARLENE WIMMER-NISTELBERGER

*CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH*

Marlene Wimmer-Nistelberger has been an associate at CMS Reich-Rohrwig Hainz in Vienna since 2014. Her main areas of expertise include EU state aid law, competition law as well as public law. She holds a master’s degree in law from the University of Vienna. Furthermore, she is a Master of Laws in international business law with distinction of Queen Mary Law Faculty of the University of London, where she was marked best in her specialism. She passed the Austrian Bar exam with distinction in 2018.

DIETER ZANDLER

*CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH*

Dieter Zandler is a partner at CMS Reich-Rohrwig Hainz in Vienna. He specialises in European and Austrian antitrust law, representing international and Austrian clients especially in cartel (fine), antitrust damage, antitrust compliance, merger control and abuse of dominance proceedings before national competition authorities and courts and the European Commission and EU courts. He has over 10 years of experience as a lawyer, holds a doctorate from the University of Salzburg and is a Master of Laws, Central European University in Budapest. Prior to joining CMS, he clerked at the Austrian cartel court, and he has been an intern with two well-known international law firms in Vienna. In 2011, he was seconded to the CMS EU law office in Brussels.
CRISTIANNE SACCAB ZARZUR
Pinheiro Neto Advogados

Cristianne Saccab Zarzur graduated in law from the Universidade Presbiteriana Mackenzie, Brazil in 1995.

She specialised in law and the fundamentals of the economy for lawyers at the Fundação Getúlio Vargas – Escola de Administração de Empresas de São Paulo, Brazil in 2002.

She was a foreign associate at Howrey Simon Arnold and White LLP from 2000 to 2001.

She is a permanent board member of the Brazilian Institute of Competition and Consumer Relations, having previously been its president (from 2014 to 2015), vice president (from 2012 to 2013), director of legal affairs (from 2010 to 2011) and a counsellor (from 2006 to 2009).

She speaks English, Italian and Portuguese.
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

ADVOKATFIRMAN CEDERQUIST
KB
Hovslagargatan 3
PO Box 1670
111 96 Stockholm
Sweden
Tel: +46 8 522 065 00
Fax +46 8 522 067 00
elsa.arbrandt@cederquist.se
fredrik.lindblom@cederquist.se
www.cederquist.se

AFFLECK GREENE MCMURTRY LLP
365 Bay Street, Suite 200
Toronto
Ontario M5H 2V1
Canada
Tel: +1 416 360 2800
Fax: +1 416 360 5960
dvaillancourt@agmlawyers.com
mbinetti@agmlawyers.com
fcampbell@agmlawyers.com
www.agmlawyers.com

AGUILAR CASTILLO LOVE, SRL
7a Avenida 5-10, Zona 4
Centro Financiero
Torre II, Nivel 11, Oficina No. 1
Guatemala
Tel: +502 2495 7272
jcc@aguilarcastillolove.com
nca@aguilarcastillolove.com
www.aguilarcastillolove.com

ANGARA ABELLO CONCEPCION
REGALA & CRUZ LAW OFFICES
(ACCRALAW)
22nd to 26th Floors, ACCRALAW Tower
Second Avenue corner 30th Street
Crescent Park West, Bonifacio Global City
Taguig City 1635
Metro Manila
Philippines
Tel: +632 830 8000
Fax: +632 403 7007/7009
ptprodigalidad@accralaw.com
cdocampo@accralaw.com
www.accralaw.com
BIRD & BIRD
Bird & Bird AARPI
Centre d’Affaires Edouard VII
3 square Edouard VII
Paris 750009
France
Tel: +33 1 42 68 6741
Fax: +33 1 42 68 6011
thomas.oster@twobirds.com

Bird & Bird LLP
12 New Fetter Lane
London EC4A 1JP
United Kingdom
Tel: +44 20 7415 6000
Fax: +44 20 7415 6111
peter.willis@twobirds.com
jonathan.speed@twobirds.com

www.twobirds.com

CONTRAST
Minervastraat 5
1930 Zaventem
Belgium
Tel: +32 2 275 00 75
Fax: +32 2 275 00 70
frank.wijckmans@contrast-law.be
maaike.visser@contrast-law.be
karolien.franchin@contrast-law.be
monique.sengelov@contrast-law.be
manda.wilson@contrast-law.be
www.contrast-law.be

CYRIL AMARCHAND MANGALDAS
5th Floor, Peninsula Chambers
Peninsula Corporate Park
Lower Parel
Mumbai 400 013
India

ERDEM & ERDEM LAW OFFICE
Valikonağı Caddesi, Başaran Apt No. 21/1
34367 Nişantaşı
Istanbul
Turkey
Tel: +90 212 291 73 83
Fax: +90 212 291 73 82
ercument@erdem-erdem.av.tr
mertkaramustafaoglu@erdem-erdem.av.tr
www.erdem-erdem.av.tr

CMS REICH-ROHRWIG HAINZ RECHTSANWÄLTE GMBH
Gauermanngasse 2
1010 Vienna
Austria
Tel: +43 1 40443 0
Fax: +43 1 40443 90000
bernt.elsner@cms-rrh.com
dieter.zandler@cms-rrh.com
marlene.wimmer-nistelberger@cms-rrh.com
www.cms.law
HOUTHOFF
Gustav Mahlerplein 50
1082 MA Amsterdam
The Netherlands
Tel: +31 20 605 60 00
Fax: +31 20 605 67 00
a.knigge@houthoff.com
w.verloren@houthoff.com
r.cornelissen@houthoff.com
n.dempsey@houthoff.com
p.sluijter@houthoff.com
www.houthoff.com

M FIRON & CO
Adgar 360 Tower
2 Hashlosha St
Tel Aviv 6706054
Israel
Tel: +972 3 754 0800
Fax: +972 3 754 0011
epstein@firon.co.il
mazorm@firon.co.il
shanig@firon.co.il
www.firon.co.il

KING & WOOD MALLESONS
18th Floor, East Tower
World Financial Center
1 Dongsanhuan Zhonglu
Chaoyang District
Beijing 100020
China
Tel: +86 10 5878 5010
Fax: +86 10 5878 5599
susan.ning@cn.kwm.com
pengheyue@cn.kwm.com
gaosibo@cn.kwm.com
www.kwm.com

MARVAL, O’FARRELL & MAIRAL
Av Leandro N Alem 882
C1001AAQ Buenos Aires
Argentina
Tel: +54 11 4310 0100
Fax: +54 11 4310 0200
mp@marval.com
sdr@marval.com
www.marval.com

LINKLATERS C WIŚNIEWSKI
I WSPÓŁNICY
32nd Floor
Building Q22
Aleja Jana Pawła II 22
Warsaw 00-133
Poland
Tel: +48 22 526 50 00
Fax: +48 22 526 50 60
natalia.mikołajczyk@linklaters.com
wojciech.podlasin@linklaters.com
www.linklaters.com

NORTON ROSE FULBRIGHT
SOUTH AFRICA INC
15 Alice Lane
Sandton
Gauteng
Johannesburg 2196
South Africa
Tel: +27 11 685 8870
Fax: +27 11 301 3503
candice.upfold@nortonrosefulbright.com
www.nortonrosefulbright.com

PINHEIRO NETO ADVOGADOS
Rua Hungria, 1100
São Paulo 01455-906
Brazil
Tel: +55 11 3247 8400
Fax: +55 11 3247 8600
czarzut@pn.com.br
cbueno@pn.com.br
mgarrido@pn.com.br
www.pinheironeto.com.br

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POPOVICI NIȚU STOICA & ASOCIAȚII
239 Calea Dorobanți, 6th Floor
1st District
010567 Bucharest
Romania
Tel: +40 21 317 7919
Fax: +40 21 317 8500
office@pnsa.ro
www.pnsa.ro

REDI LITIGATION
Calle Urgell, 264, Entresuelo 3ª
08036 Barcelona
Spain
Tel: +34 650 474 935/+34 626 607 407
albert@rediabogados.com
andoni@rediabogados.com
www.rediabogados.com

SLAUGHTER AND MAY
One Bunhill Row
London EC1Y 8YY
United Kingdom
Tel: +44 20 7600 1200
Fax: +44 20 7090 5000
william.turtle@slaughterandmay.com
camilla.sanger@slaughterandmay.com
olga.ladrowska@slaughterandmay.com
www.slaughterandmay.com

SRS ADVOGADOS
Rua Dom Francisco Manuel de Melo, 21
1070-085 Lisbon
Portugal
Tel: +351 213 132 080
Fax: +351 213 132 001
goncalo.anastacio@srsllegal.pt
www.srslegal.pt

WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
United States
Tel: +1 212 403 1247
Fax: +1 212 403 2247
www.wlrk.com

WEBB HENDERSON
Level 18, 420 George Street
Sydney NSW 2000
Australia
Tel: +61 2 8214 3500
tom.bridges@webbhenderson.com
www.webbhenderson.com

WILSON SONSINI GOODRICH & ROSATI
1301 Avenue of the Americas, 40th Floor
New York, NY 10019
United States
Tel: +1 212 999 5800
Fax: +1 212 999 5899
650 Page Mill Road
Palo Alto, CA 94304
United States
Tel: +1 650 493 9300
Fax: +1 650 493 6811
www.wsgr.com
For more information, please contact info@thelawreviews.co.uk

THE ACQUISITION AND LEVERAGED FINANCE REVIEW
Marc Hanrahan
Milbank Tweed Hadley & McCloy LLP

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW
Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP

THE ASSET MANAGEMENT REVIEW
Paul Dickson
Slaughter and May

THE ASSET TRACING AND RECOVERY REVIEW
Robert Hunter
Edmonds Marshall McMahon Ltd

THE AVIATION LAW REVIEW
Sean Gates
Gates Aviation LLP

THE BANKING LITIGATION LAW REVIEW
Christa Band
Linklaters LLP

THE BANKING REGULATION REVIEW
Jan Putnis
Slaughter and May

THE CARTELS AND LENIENCY REVIEW
John Buretta and John Terzaken
Cravath Swaine & Moore LLP and Simpson Thacher & Bartlett LLP

THE CLASS ACTIONS LAW REVIEW
Richard Swallow
Slaughter and May

THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW
Steven M Bierman
Sidley Austin LLP