The Private Competition Enforcement Review

Ninth Edition

Editor
Ilene Knable Gotts

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EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, 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 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 has 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: Brazil 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 last 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. Also, 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 is undertaking a comprehensive review and is now considering the implementation of significant changes to its private enforcement law. The most significant developments, though, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be 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 are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculation. Even without this 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 adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is 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 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 also taken steps to facilitate collective action or class-action legislation. 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 (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) 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.

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, for example, Germany and Sweden). Some jurisdictions, such as Hungary, 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 jurisdictions 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, Hungary, 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 the 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 have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 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, Hungary, 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; limited recognition of privilege in Germany; 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 of the privilege being preserved for otherwise 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 to 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
February 2016

Chapter 1

EU OVERVIEW

Stephen Wisking, Kim Dietzel and Molly Herron[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

i Background – the EU Damages Directive

Although EU law provides a right to 'full compensation' for those who have suffered harm as a result of breaches of EU competition law,[2] private antitrust claims are brought in the national courts of the EU Member States and are governed by the national law of those Member States.

Until very recently there has been no EU regulation of the procedural rules applicable to competition claims, which currently differ significantly between Member States. The questions of jurisdiction and applicable law are subject to EU harmonising legislation (which applies to competition claims and more widely),[3] but in relation to all other aspects only the general EU law principles of effectiveness and equivalence have applied, meaning that Member States are obliged to have in place procedural rules which: (1) do not render it practically impossible or excessively difficult for claimants

1 Stephen Wisking and Kim Dietzel are partners and Molly Herron is a senior associate at Herbert Smith Freehills LLP.

2 As established by the Court of Justice of the European Union (CJEU) in Case C-453/99 *Courage v. Crehan* and Joined Cases C-295/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-296/04 *Antonio Cannito v. Fondiaria Sai Assicurazioni SpA*, C-297/04 *Nicolò Tricarico v. Assitalia Assicurazioni SpA* and C-298/04 *Pasqualina Murgolo v. Assitalia Assicurazioni SpA* (*Manfredi*).

3 See below.

to exercise the right to compensation; and (2) are not less favourable than the rules governing similar domestic actions. However, this all changed when the EU Damages Directive[4] was finally formally adopted on 26 November 2014.

The Directive's stated aims are to: enhance the ability of those who have suffered harm as a result of anti-competitive behaviour to effectively exercise their right to compensation; reduce the differences between the national rules of Member States governing private antitrust actions thus creating a 'more level playing field'; and regulate the relationship between public and private enforcement of the competition rules in order to maximise the effectiveness of both.[5] It requires Member States to ensure that their national regimes meet, as a minimum, a series of requirements designed to achieve these aims. The Directive's provisions apply to claims based on infringements of EU competition law as well as to infringements of national competition law where applied in parallel with EU law.

ii Recent activity

EU Directive

The deadline for implementation of the Directive by Member States is 27 December 2016.

During 2015 a number of Member States began to take steps towards implementation. For example, in the Netherlands the government published a proposal for implementing the Directive in October 2015, while Finland consulted on implementation of the Directive's provisions in June 2015. In the UK, on the other hand, the government's proposals for implementation are still awaited at the time of writing, and the same is the case in Germany.

The proposed approach of Member States to implementation also differs markedly, with some Member States (e.g., the Netherlands) proposing to apply the procedural changes required by the Directive only to competition cases with an EU dimension, while others intend to go beyond what the Directive strictly requires and apply these to all private competition claims (thus creating a consistent regime for all private antitrust enforcement). Spain is reportedly considering whether to go further, by taking the opportunity to extend the Directive's provisions on document disclosure to civil litigation more generally.

It is therefore too early to determine the extent to which different approaches will be taken to implementation, and therefore how likely it is that the European Commission's aim of reducing the divergences between the rules in different Member States will be met. However, it appears likely that significant differences will remain, given that Member States can go further than the provisions of the Directive, the ambiguities as to what the Directive requires on some issues, and the fact that some key aspects of private antitrust enforcement are outside the scope of the Directive, including funding and costs, non-monetary relief, and the question of collective redress.

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4 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States of the European Union (the Directive).

5 See Article 1 and Recitals 1-11 of the Directive.

At Commission level, in August 2015 (following an earlier public consultation) the Commission adopted a number of changes to its antitrust 'Implementing Regulation'[6] and a number of its Notices[7] to reflect the Directive's provisions on access to documents, in particular the bar on the disclosure of leniency statements and settlement submissions (see Section V, *infra*).

Judicial developments

Judicial developments at EU level during 2015 have been relatively limited. However, the CJEU has issued an important judgment on the applicability of the EU jurisdictional rules to cartel damages claims in the *CDC Hydrogen Peroxide* case,[8] discussed in Section II, *infra*.

There have also been a number of judgments of the EU General Court on issues at the intersection of public and private enforcement.

The first set of judgments related to the extent to which the Commission can disclose information about a cartel within the public non-confidential version of the Commission's decision. Potential damages claimants have pushed for the publication of the widest category of information possible, to assist identifying and bringing claims, in particular given that many European national systems do not currently provide for wide-ranging *inter partes* disclosure. Addressees of the Commission's decision have generally resisted such disclosure by the Commission, in part on the basis that it would make them more vulnerable to damages actions.

In these cases[9] the General Court has allowed the Commission a wide discretion to choose to disclose more information than in its previous practice, and has not accepted

6 Regulation No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union). The changes were made by Regulation No. 2015/1348 of 3 August 2015 amending Regulation (EC) No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

7 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004; Commission Notice on Immunity from fines and reduction of fines in cartel cases; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases; and Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 of the EC Treaty.

8 Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and others*.

9 Firstly Case T-462/12 *Pilkington Group Ltd v. European Commission* and Case T-465/12 *AGC Glass Europe SA and others v. European Commission*, concerning the *Car Glass* cartel decision, and secondly Case T-341/12 *Evonik Degussa GmbH v. European Commission* and Case

arguments that to do so would undermine leniency incentives or that leniency recipients had legitimate expectations that such information would not be included in the public version of the decision.[10]

The second category of case concerns access to the Commission's file under the Transparency Regulation,[11] which has been much litigated in recent years, largely by claimants or potential claimants seeking information to bolster damages claims. In the General Court's most recent decision[12] it has followed the approach adopted by the CJEU in its 2014 *EnBW*[13] judgment and granted the Commission considerable leeway to refuse to disclose wide categories of document within its file, despite assertions by the applicant that these were necessary to bring its damages action.

These cases demonstrate the likelihood of significant satellite litigation at EU level motivated by either the threat of, or the desire to bring, follow-on private enforcement actions at Member State level, as well as the balance which the Commission and the EU courts are seeking to tread between facilitating private damages actions and preserving leniency incentives.

National

In the meantime, private antitrust enforcement has continued to develop apace in some Member States, with 2015 seeing important case law developments and legislative

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T-345/12 *Akzo Nobel NV and others v. European Commission*, concerning the *Bleaching Chemicals* cartel decision. AGC and Evonik Degussa have both brought appeals against the General Court's decisions.

10 The General Court also largely rejected arguments based on business secrets or commercial confidentiality given the age of the information in question.

11 Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents.

12 See Case T-677/13 *Axa Versicherung AG v. European Commission* (again concerning the *Car Glass* case).

13 Case C-365/12 P *European Commission v. EnBW Energie Baden-Württemberg*. The CJEU held (contrary to the previous approach of the General Court) that the Commission is entitled to presume that disclosure of documents within its cartel investigation file would undermine the protection of the commercial interests of the undertakings involved and the protection of the purpose of the Commission's investigations (such as to justify refusal of access under the Transparency Regulation), without the need to consider each of the documents in the file individually. It ruled that this general presumption can be rebutted by demonstrating that it does not cover a specific requested document or that there is an overriding public interest in disclosure of the document. The mere fact that the document is to be used to bring a private damages action is not sufficient for this purpose; the applicant must specifically demonstrate that access is necessary for pursuing its right to compensation so that the Commission can weigh up on the facts the respective interests in favour of disclosure of such documents and in favour of the protection of those documents.

change at national level (not least in the UK, where a very significant overhaul of the system of private enforcement in the Competition Appeal Tribunal (CAT), including the introduction of a collective redress regime, came into force on 1 October 2015).

It is worth noting that the parties to current private antitrust litigation at national level have already sought to rely on the provisions of the Directive prior to implementation in order to bolster their case.

In some instances this has been met with success. For example in the *Cargest* case[14] the Italian Supreme Court cited the provisions of the (unimplemented) Directive in a judgment requiring the national courts to apply the current Italian procedural rules so as to guarantee the effective enforcement of the competition rules, including exercising a power to order the production of documents and request information.

In contrast, in the *VISA* case the English Court of Appeal rejected the claimants' attempt to rely on the Directive's provisions on limitation (see Section II, *infra*) to argue that part of their claim was not time barred,[15] on the basis that the relevant provisions were not yet transposed into English law and were patently new law rather than a codification of the existing position (as evidenced by the fact that Article 22 of the Directive provides that national measures adopted to comply with the substantive provisions of the Directive do not have retroactive effect).

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Overview

As discussed in Section I, once the Directive is implemented in December 2016 there will for the first time be an EU law framework for private competition enforcement. The Directive obliges Member States to 'ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and obtain full compensation for that harm', and sets out a series of more detailed minimum requirements which Member States must meet in order to enable such claims to be brought, including as to disclosure of evidence, limitation, joint and several liability and contribution, passing-on and the impact of consensual dispute resolution.

The Directive does not, however, deal with every aspect of competition damages actions. Notably it does not require Member States to introduce collective redress mechanisms (the omission of this essentially allowed political agreement to adopt the Directive to be reached). However, at the same time as proposing the Directive the Commission published a 'Recommendation' inviting Member States to adopt collective redress regimes in respect of EU law rights complying with specified principles (see Section VII, *infra*).

The Directive does not deal with the question of jurisdiction (which in relation to defendants domiciled in EU Member States is regulated by the Recast Brussels

14 Supreme Court, *Comi and Others v. Cargest*, 4 June 2015, No. 11564.

15 *Arcadia Group Brands Ltd & Ors v. Visa Inc & Ors* [2015] EWCA Civ 883.

Regulation,[16] which applies to civil and commercial proceedings more generally), nor does it address applicable substantive law (which again is regulated by wider EU legislation[17]).

Moreover, it does not deal with some key issues which are of great practical importance to the viability of private antitrust actions, namely costs and funding.

Finally, the Directive applies only to actions for damages. It does not deal with actions for injunctive relief, which in many stand-alone competition cases, in particular in relation to abuse of dominance, may be crucial, as the claimant's main aim will be to prevent or stop the allegedly anti-competitive behaviour.

It is also worth noting that even within the Directive's sphere of application, on some issues much of the detail is left to national law to regulate, as discussed further below.

ii Limitation

Currently the limitation rules vary greatly between Member States (and within a Member State in the case of the UK). In some jurisdictions the position is relatively claimant friendly, with lengthy limitation periods or provisions that suspend the period due to concealment (particularly relevant in cartel cases) or an ongoing competition authority investigation. In other Member States, prescription periods are relatively short, or can start to run even before a claimant was aware of its potential claim. As a result, limitation is a key factor for claimants when choosing a forum. Moreover, in some cases defendants have sought to argue that the applicable law is different to that of the forum in order to argue that a more beneficial limitation period applies.

This will change significantly as a result of the Directive. The Directive requires[18] Member States to ensure that the limitation period for relevant competition claims:

a is at least five years;

b does not begin to run until the infringement has ceased and the claimant knows or can reasonably be expected to know of: (1) the behaviour and the fact that it constitutes an infringement; (2) the fact the infringement caused harm to it; and (3) the identity of the infringer; and

c is suspended or interrupted if a competition authority (i.e., the Commission or an EU national competition authority (NCA)) takes action in relation to the investigation in respect of the infringement to which the damages action relates. In this case the suspension must end at the earliest one year after the infringement decision becomes final (i.e., when a decision can no longer be appealed[19]) or the proceedings are otherwise terminated.

16 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

17 On applicable law the EU has adopted the Rome I Regulation on the law applicable to contractual obligations ((EC) 593/2008), and the Rome II Regulation on the law applicable to non-contractual obligations ((EC) 864/2007).

18 Article 10.

19 Article 2(12).

The Directive also provides[20] that the limitation period must be suspended for the duration of any 'consensual dispute resolution process' in respect of those parties involved in that process.

The provisions as to when the limitation period starts to run and as to suspension will significantly lengthen the limitation period in many Member States,[21] exposing businesses to potential damages claims many years after an infringement has ceased.[22]

Moreover, there are a number of elements which are ambiguous, which may lead to divergent approaches between Member States, and which may be challenged by defendants in national courts or give rise to a preliminary reference to the CJEU, which will give rise to inevitable delay in the cases in which these are being tested. These include what type of alternative dispute resolution or settlement discussions will be sufficient to trigger a suspension of the limitation period, and what appeals mean the infringement decision is not final. This latter question has led to much litigation in the UK in relation to a similar provision applicable in the CAT, for example as to whether an appeal on penalty alone suspends the limitation period, and whether an appeal by one addressee of a Commission decision suspends the limitation period for all addressees or only for the appellant.[23] These issues may now be replicated in other Member States and at EU level.

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20 Article 18.

21 It should be noted that Recital 36 to the Directive 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 periods does not render it practically impossible or excessively difficult for claimants to exercise their right to full compensation. On this basis a Member State could in theory have in place an ultimate 'long stop date' (as many Member States currently do) of, for example, 15 years from when the harm was suffered. However, given the substantive provisions of the Directive do not contain this derogation, and uncertainty as to what length period would meet the effectiveness test, it is not clear how many Member States will seek to introduce such periods or whether existing periods will survive challenge under the Directive.

22 For example, if a cartelist applied for leniency in respect of conduct between 2010 and 2015 and the Commission started an investigation in 2016, the Commission may not issue a decision until 2020, and appeals of that decision may not be resolved until at least 2025. This would mean that the limitation period (of at least five years) would not start to run again until 2026 (and may be further suspended during any relevant consensual dispute resolution negotiations), and therefore would expire in 2031 at the earliest.

23 On the first point the English appellate courts have held that an appeal concerning penalty only does not extend the limitation period (which will therefore run from the date on which the deadline to lodge an appeal expired). See *BCL Old Co Limited v. BASF plc* [2009] EWCA Civ 434 and *BCL Old Co Limited v. BASF plc* [2012] UKSC 45. On the second, the Supreme Court (supported by *amicus curiae* observations of the Commission) has held that a Commission decision constitutes a series of individual decisions and therefore the limitation period must be determined in relation to each defendant individually; accordingly, an appeal by one party does not lead to a suspension for non-appellants. See *Deutsche Bahn AG v. Morgan Advanced Materials plc* [2014] UKSC 24.

iii Jurisdiction

The question of jurisdiction is regulated, where the defendant is domiciled in a Member State,[24] by the Recast Brussels Regulation[25] (which replaced the previous, but similar, Brussels Regulation[26] for cases commenced on or after 10 January 2015).

The default rule under the Regulation is that 'persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state' (Article 4(1)). However, there are important exceptions, the most relevant of which for present purposes are Article 7(2) and Article 8(1).

Article 8(1) provides, in relation to claims against multiple defendants, that claimants can bring a claim in the courts of the place where any one of the defendants is domiciled, 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'. This enables a number of defendants from different Member States to be sued together in one Member State provided one of them (the 'anchor defendant') is domiciled there. This is often used in cartel cases, where a claimant can find one anchor defendant domiciled in a favourable jurisdiction (e.g., the UK or the Netherlands)[27] and use this provision to bring in the other cartelists, even where they have no connection with that jurisdiction, as there is joint and several liability between them.

In the *CDC Hydrogen Peroxide* case,[28] the CJEU essentially endorsed this approach, at least where the defendants had been found to have participated in a 'single and continuous' cartel infringement. In this case only one of the addressees of the Commission's decision was based in Germany; it was used as an anchor defendant to bring in the other cartelists. When a settlement was reached with the original German anchor defendant, leading to the claim against it being withdrawn, the other defendants challenged the jurisdiction of the German court to hear the actions. Following a preliminary reference the CJEU held that the settlement with the anchor defendant did not alter this conclusion, unless it could be demonstrated that the out-of-court settlement had been deliberately delayed until proceedings had been brought for the sole purpose of establishing jurisdiction in Germany.

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24 For non-EU defendants the position is regulated by national law (apart from defendants domiciled in Norway, Switzerland and Iceland, which are subject to the provisions of the Lugano Convention, which is very similar in its terms to the Recast Brussels Regulation).

25 Op cit.

26 Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

27 It is worth noting that defendants can also engage in forum shopping to some extent. The Regulation provides that once a court has been 'seised' of the action, all other courts must stay or dismiss cases brought subsequently. A potential defendant may therefore choose to begin proceedings for a negative declaration that a cartel caused no damage in its chosen jurisdiction (for example the 'Italian Torpedo' brought in connection with the *Synthetic Rubber* cartel; see *Cooper Tire & Rubber Company Europe Ltd & Ors v. Dow Deutschland Inc & Ors* [2010] EWCA Civ 864).

28 Op cit.

Article 7(2) provides that in matters relating to tort, delict or quasi-delict (which are the usual causes of action for competition claims) a person may be sued in the courts of the place where the harmful event occurred. EU case law has interpreted this to give the claimant a choice between the place where the event giving rise to the damage took place, and the place where the damage was suffered. In *CDC Hydrogen Peroxide* the CJEU held that the place of the causal event is the place of the conclusion of the cartel, but that in this case it was not possible to identify a single place as the cartel consisted of a number of collusive agreements made during various meetings or discussions across the EU. It therefore looked at the place where the damage occurred (i.e., where the alleged damage – the payment of the overcharge – actually manifested itself). The CJEU held that this is generally located at the relevant victim's registered office.[29]

III EXTRATERRITORIALITY

The EU competition law rules apply to any conduct (including conduct that occurs outside the EU and including conduct by foreign parties) that may restrict competition in the EU and may affect trade between EU Member States.

IV STANDING

EU case law[30] (now codified in the Directive[31]) provides that any person (natural or legal) may claim compensation for harm suffered provided there is a causal relationship between that harm and the infringement of competition law. This includes both direct purchasers and indirect purchasers.[32] The CJEU has also held that claimants with no direct or indirect contractual links with the infringers may also claim for so-called 'umbrella damages', where they have purchased products from third parties at prices inflated due to the general distortive effects of the cartel on the market.[33]

V THE PROCESS OF DISCOVERY

Disclosure is one of the key focuses of the Directive. The aim of the Directive in this area is twofold.

First, it aims to assist claimants by correcting the 'information asymmetry' (between the allegedly damaged party and the perpetrators of the competition law breach) which exists in many competition disputes, requiring Member States to introduce a level

29 The CJEU also considered in this case arguments as to whether contractual jurisdiction clauses could override the normal position (as per Article 25). It noted that such a clause could only be effective if it covers disputes in connection with a breach of competition law, not where it abstractly refers to all disputes arising from the contractual relationship.

30 *Manfredi*, op cit.

31 Article 3(1).

32 See Article 12(1).

33 Case C-557/12 *Kone AG and others v. ÖBB-Infrastruktur AG* (*Kone*).

of disclosure into national law. The lack of extensive *inter partes* disclosure rules in many EU jurisdictions is regarded as a key obstacle to successful private enforcement (albeit that Germany and the Netherlands remain key jurisdictions despite the relatively limited availability of disclosure). While the changes will not have a material impact in Member States where disclosure requirements already exceed those set out in the Directive (notably the UK, where the disclosure regime is a real benefit to claimants), it will have a major impact in many Member States with civil law systems where extensive disclosure is not currently a feature of civil litigation. This will therefore require significant cultural change.

Secondly, in what was one of the key driving forces behind the passing of the Directive, it aims to protect certain categories of document from disclosure in whole or in part, in particular putting in place an EU-wide regime in respect of 'leniency documents', replacing the 'balancing exercise' (i.e., an obligation on national courts to weigh up the interest in promoting damages claims versus the interest in protecting the public enforcement regime) which had been required by the CJEU in relation to such documents in the *Pfleiderer* case.[34]

Article 5 of the Directive therefore requires Member States to ensure that in damages proceedings national courts can (as a minimum[35]) order the defendant (or a third party) to disclose relevant evidence in its control in response to a 'reasoned justification' by a claimant.[36] The same right must also be afforded to the defendant in respect of evidence from the claimant (or a third party), for example in relation to passing-on. The Directive contains provisions to limit concerns of excessive disclosure and 'fishing expeditions'. The claimant must present reasonably available facts and evidence to support the plausibility of its claim and specify evidence, or categories of evidence, as precisely and narrowly as possible.[37] The national court must limit the disclosure of evidence to that which is proportionate,[38] have the power to protect confidential information,[39] and ensure applicable legal professional privilege rules are respected. The national court must

34 Case C360/09 *Pfleiderer AG v. Bundeskartellamt*.

35 Article 5(8) expressly provides that Member States can maintain or introduce rules that would lead to a wider disclosure of evidence.

36 Article 5(1).

37 Article 5(1)-(2).

38 Article 5(3). The proportionality assessment should take into account in particular: the extent to which the claim or defence is supported by available facts and evidence justifying the disclosure request; the scope and cost of disclosure; and confidentiality. In relation to documents within the file of a competition authority the national court should also take into account the specificity of a disclosure request (in terms of the nature, subject matter or contents of documents), or whether this a just a non-specific application concerning documents submitted to a competition authority (Article 6(4)(a)).

39 Article 5(4). For example by redacting sensitive passages in documents, conducting hearings in camera, restricting the circle of persons entitled to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form (Recital 14).

also have the power to impose penalties in relation to the refusal to comply with the disclosure order or confidentiality requirements, the destruction of evidence, and breach of requirements as to the use of evidence.[40]

Article 6 of the Directive sets out a 'black list' and a 'grey list' of evidence included in the file of a competition authority containing limits on disclosure (disclosure of any other evidence within the file of a competition authority may be ordered at any time, subject to the Directive's general provisions on disclosure).[41]

In the black list[42] are:

a 'leniency statements', defined[43] as oral or written presentations voluntarily provided to a competition authority (or a record thereof)[44] describing the provider's knowledge of a cartel and its role therein, drawn up specifically for submission as part of a leniency or immunity application, and not including pre-existing information (i.e., that which exists independently of the proceedings of a competition authority (for example contemporaneous documents)), which national courts must be free to order disclosure of at any time;[45] and

b 'settlement submissions', defined[46] as voluntary presentations acknowledging the infringement drawn up specifically to enable the competition authority to apply a simplified or expedited procedure.

National courts cannot order disclosure of these categories of evidence at any time[47] (and any such evidence acquired through access to the file is to be inadmissible).[48] According to Recital 26 to the Directive the black list should extend to 'verbatim quotations' from leniency statements or settlement submissions included in other documents, and should

40 Article 8.

41 Article 6(9). National courts must only order disclosure from the competition authority itself where no party or third party is reasonably able to provide the evidence (Article 6(10)).

42 Article 6(6).

43 Article 2(16).

44 To the extent that there are documents within the hands of the defendant which would in any event be disclosable, and not, for example, protected by legal professional privilege rules (the practice of allowing oral submissions having been developed by the Commission for this very purpose, originally to protect leniency statements from disclosure in US litigation). The privilege rules vary, however, considerably from Member State to Member State.

45 Recital 28.

46 Article 2(18).

47 This absolute bar is at odds with the CJEU ruling in Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG and others* in relation to an Austrian rule containing an equivalent prohibition. The CJEU held that a blanket ban on the disclosure of such documents without the possibility for a *Pfleiderer* balancing exercise to be undertaken was incompatible with the principle of effectiveness. However, this conclusion was reached on the basis of the absence of any EU legislation in this area.

48 Article 7(3).

be limited to 'voluntary and self-incriminating' leniency statements and settlement submissions. National courts must have the power to review evidence to determine whether it does in fact fall within the black-listed categories.[49]

The grey list[50] contains:

a information prepared specifically for the proceedings of a competition authority;

b information drawn up by the competition authority and sent to the parties in the course of its proceedings; and

c settlement submissions that have been withdrawn.

National courts can only order disclosure of grey-listed evidence once a competition authority has closed its proceedings. After the competition authority has closed its proceedings national courts should (as part of the proportionality assessment) still consider the need to safeguard the effectiveness of public enforcement.[51] This arguably imports the need to carry out a *Pfleiderer* balancing exercise in relation to this category of information.

Although the Commission's aim was to provide clear and consistent rules in relation to the previously vexed question of the disclosure of leniency documents, potential ambiguities still remain. This includes how extracts within other documents (such as responses to information requests and to the statement of objections, the statement of objections itself and the confidential version of the decision) substantially replicating leniency submissions, but not amounting to 'verbatim quotes', should be dealt with.

Moreover, outside the black-listed categories, the requirement for a proportionality assessment before disclosure is ordered gives rise to the prospect of national courts in different Member States coming to different conclusions on similar disclosure requests (in particular given the varied legal traditions in this area). This fact – together with the ability of Member States to have wider disclosure rules in place – means that an uneven playing field is likely to remain in this area.

VI USE OF EXPERTS

The prevalence or otherwise of using experts and economists and the role of experts in court proceedings (e.g., whether experts are appointed by the parties, or as neutral advisers to the court), varies from Member State to Member State, but is generally established practice. The parties to damages proceedings (or threatened proceedings) routinely utilise economists to assess potential damages.

This is reflected in the Commission's Communication on quantifying harm in antitrust damages actions[52] and its Staff Working Document 'A practical guide on

49 Article 6(7) and Recital 27.

50 Article 6(5).

51 Article 6(4)(c) and Recital 26.

52 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 167/07).

quantifying harm',[53] adopted at the same as the Directive was proposed, which discuss the main methods and techniques for assessing damages in different types of case, and which presuppose the involvement of economic experts in doing so.

VII CLASS ACTIONS

Although the Commission had previously proposed competition law specific collective proceedings in its 2008 White Paper,[54] reaching agreement on this point was politically difficult (amid fears of a creating a 'litigation culture', and concerns about the varying legal traditions in the different Member States) and therefore provision for collective redress was not included within the Directive.

However, at the same time as proposing the draft Directive, the Commission published a Recommendation on collective redress mechanisms, designed to improve access to justice for citizens and companies in respect of their EU law rights.[55] The Recommendation (and accompanying Communication[56]) invites Member States to adopt collective redress systems at national level that follow the same basic principles. The Recommendation takes the form of a 'horizontal' framework; in addition to competition, it applies in other fields where EU law rights exist, for example consumer protection, environmental protection, financial services legislation and protection of personal data. Unlike the Directive, it addresses both compensatory and injunctive collective redress.

There is no binding obligation on the Member States to implement the Recommendation, but they were recommended to do so by 26 July 2015. The Commission is now obliged to assess the implementation of the Recommendation,[57] by 26 July 2017, and whether further measures are needed.

The key principles or elements for collective redress systems outlined in the Recommendation are as follows:

a An opt-in model for collective redress for both stand-alone and follow-on claims, to be brought by representative entities or class members. However, the Recommendation provides that exceptions to the opt-in model should be possible if 'duly justified by reasons of sound administration of justice'.

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53 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).

54 White Paper on damages actions for breaches of the EC antitrust rules (SEC (2008) 404) (COM/2005/0165 final).

55 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 (2013/396/EU). This followed a 2011 public consultation carried out by the Commission's consumer affairs directorate.

56 'Towards a European Horizontal Framework for Collective Redress' COM(2013) 401 final.

57 In particular evaluating its impact on access to justice, the right to obtain compensation, the need to prevent abusive litigation, and the functioning of the single market, SMEs, competitiveness and consumer trust.

b Rules on standing for entities that are authorised to bring representative collective actions, which provide that claims can be brought by entities that have been officially designated in advance based on stipulated requirements, or entities that have been certified on an *ad hoc* basis by a national court or authority for a particular representative action.

c Safeguards for minimising risks of abusive litigation, including: verification by the courts that a collective action is an appropriate form of redress; judicial control to ensure that manifestly unfounded cases are not continued; the 'loser pays' principle to apply in respect of reimbursement of legal costs; the availability of contingency fees only exceptionally and with appropriate regulation; limitations on third-party funding; and no punitive damages.

d Encouragement of collective alternative dispute resolution and judicially approved collective settlement before and throughout the litigation.

Some Member States have implemented new or revised collective redress regimes since the Recommendation was adopted, although in the main these do not appear to have been prompted by the Recommendation. A key example is the UK competition-specific collective action and settlement regime, which has diverged from the Recommendation on the key issue of opt-in versus opt-out proceedings. Other examples are France and Belgium, both of which have recently adopted collective proceedings regimes which extend beyond the competition law sphere.

It remains to be seen whether the Commission will seek to take further action in this area, but any attempt to make the introduction of collective redress mandatory (whether in relation to antitrust or more generally) is likely to be very controversial.

VIII CALCULATING DAMAGES

Apart from the limited number of requirements set out in the Directive discussed below, causation and the quantification of damages are a matter for national law (subject to the requirements of effectiveness and equivalence).

The Directive provides (in addition to its provisions on passing on, discussed in Section IX, *infra*) that:

a Member States must ensure 'full compensation' for those who have suffered harm caused by an infringement of competition law, which 'shall place a person who has suffered harm in the position in which that person would have been had the infringement not been committed'. This must include (as established in case law) compensation for actual loss and loss of profit and interest.[58]

b There should be no 'overcompensation', and therefore punitive or multiple damages are prohibited.[59] This contrasts with the pre-Directive position in some Member States where punitive damages are possible in some circumstances, for

58 Article 3. The level of interest, which may be a very substantial part of a claim, in particular where the many years have passed since the infringement, is a matter for national law.

59 Article 3(3).

example in the UK where it is possible for the courts to award exemplary damages where there has been no fine imposed by a competition authority (removing double jeopardy concerns).[60]

c Member States must be empowered to estimate the amount of harm (where it has been established that the claimant suffered harm, but it is practically impossible or excessively difficult to precisely quantify this),[61] as is already the case in some Member States (e.g., Germany).

d It shall be presumed that cartel infringements cause harm, although this can be rebutted.[62] There is, however, no presumption as to the level of overcharge, which is to be welcomed (this can be contrasted with the position in Hungary, where a 10 per cent cartel overcharge is presumed). It is therefore unclear whether this provision will have any effect in practice, as claimants will adduce evidence as to the existence and level of overcharge, and defendants as to the absence or low level of overcharge.

e Member States must ensure that the NCA can 'assist the court' in respect of quantification where it wishes to do so.[63] Whether it is appropriate or useful for an NCA to do so is not clear, and NCAs' appetite for doing so remains to be seen.

In addition, as noted above, as a matter of EU law Member States must allow so-called 'umbrella damages' to be claimed. The CJEU has held[64] that a claimant may obtain compensation for the loss caused by a cartel, even if it did not purchase from the cartelists, where it is established that:

a the cartel was, in the circumstances of the case and the relevant market, liable to have the effect of umbrella pricing being applied by third parties (not party to the cartel) acting independently; and

b those circumstances could not be ignored by the members of that cartel.

In practice quantification is a crucial and complex issue, requiring significant data, and both claimants and defendants routinely utilise economic experts in order to estimate damage. As noted above, the Commission has published a Communication on quantifying harm in antitrust damages actions, together with the more detailed Staff Working Document 'A practical guide on quantifying harm',[65] which discuss the main methods and techniques for assessing damages (e.g., comparator models based on various

60 Exemplary damages were awarded by the CAT in *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited* ([2012] CAT 1), in circumstances where the defendant had not been fined by the UK NCA.

61 Article 17(1).

62 Article 17(2).

63 Article 17(3).

64 *Kone*, op cit.

65 Op cit.

temporal and geographic comparators, and simulation models) in different types of case (cartels and exclusionary practices). These are designed to offer assistance to parties and to national courts when quantifying damages, but are not binding.

IX PASS-ON DEFENCES

As noted above, indirect purchasers have standing within the EU. As codified within the Directive, any person (natural or legal) may claim compensation for harm suffered provided there is a causal relationship between that harm and the infringement of competition law.[66]

The Directive also provides that Member States must ensure (as was already the case in a number of Member States) that the passing-on 'defence' can be raised by the defendant[67] (without prejudice to the right of a claimant to claim compensation for loss of profits due to the volume effect resulting from passing on of an overcharge[68]). The Directive provides that the burden of proving passing-on lies on the defendant.

In relation to indirect purchaser claims, the Directive seeks to assist these, introducing some considerable complexity. Although the Directive states that an indirect purchaser claimant bears the burden of proving that an overcharge has been passed on to it (and to what degree),[69] it provides a rebuttable presumption that this burden is satisfied where the indirect purchaser has shown that:

a the defendant has committed an infringement of competition law;
b this infringement result in the direct purchaser paying an overcharge; and
c the indirect purchaser has purchased the relevant goods or services (or goods or services derived from or containing them).[70]

Given that, in particular in relation to EU-wide cartel infringements, claims are often brought by purchasers at different levels of the supply chain in different proceedings and in different Member States, the Directive attempts to deal with the risk of overcompensation (including as a result of the presumption discussed above) by providing that national courts must be able to take into account claims in relation to the same infringement but brought by claimants at different levels of the supply chain (and judgments thereon).[71] Whereas this may be possible within the same Member State (e.g., by jointly hearing claims), quite how national courts are expected to do so in practice where claims are brought in different Member States (or even in different courts in the same Member State) is unclear.

The Directive provides that national courts must have the power to estimate the share of any overcharge which is passed on,[72] and that the Commission will issue

66 Articles 3 and 12 of the Directive.
67 Article 13.
68 Article 12(3).
69 Article 14(1).
70 Article 14(2).
71 Article 15.
72 Article 12(5).

guidelines for national courts on how to do so.[73] This guidance is awaited. In connection with this the Commission issued a tender for a 'Study on the passing-on of overcharges' in April 2015.

X FOLLOW-ON LITIGATION

There is no bar on claimants bringing actions against defendants who have been subject to public enforcement action, or have received immunity or leniency from the Commission or an NCA in respect of fines.[74]

As discussed above, however, under the Directive limitation periods must be suspended or interrupted where the competition authority is investigating. EU case law has also established that a national court cannot take a decision that is inconsistent with a decision taken by the Commission, and therefore where a Commission investigation is on-foot or where an appeal to the EU courts is pending, the national court proceedings must be stayed prior to judgment (a '*Masterfoods* stay'), in order to prevent the risk of conflicting decisions.[75]

In addition, the Directive contains provisions ameliorating the normal joint and several liability rules in relation to immunity recipients. This forms part of its aim to ensure that increased private enforcement does not undermine effective public enforcement, and in particular the leniency regime, given, *inter alia*, that leniency recipients who are less likely to appeal a decision are often the first target of damages claims.

As a starting point the Directive requires Member States to ensure that joint infringers (e.g., co-cartelists) are jointly and severally liable for the full harm caused by the joint infringement and therefore that the claimant has the right to require full compensation from any of the infringers.[76]

By way of derogation,[77] Member States must ensure that an immunity recipient is only jointly and severally liable to:

a its own direct or indirect purchasers (or suppliers); and

b other injured parties only where full compensation cannot be obtained by the other infringers.

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73 Article 16.

74 In addition, Article 9 provides that an infringement of competition law found by a final decision of an NCA or review court is irrefutably established for the purposes of an action for damages brought within the same Member State. Where the final decision is taken in another Member State the decision must constitute 'at least *prima facie* evidence' that an infringement of competition law has occurred for the purposes of a damages action. Commission infringement decisions, when final, are binding on all Member State courts as a matter of EU law.

75 C-344/98 *Masterfoods Ltd v. HB Icecream Limited*.

76 Article 11(1).

77 Article 11(4). Article 11(2) also contains a derogation from joint and several liability for small or medium-sized enterprises (SMEs) (as defined in Commission Recommendation 2003/361/EC concerning the definition or micro, small and medium-sized enterprises),which meet certain conditions.

In relation to contribution, the Directive requires Member States to ensure that an infringer can recover a contribution from its co-infringers, determined in accordance with the 'relative responsibility for the harm' borne by each of the co-infringers. Again the Directive provides that the amount of contribution payable by an immunity recipient to its co-infringers shall not exceed the amount of harm caused to its own direct or indirect purchasers (or providers).[78]

The extent to which these provisions provide comfort to would-be immunity applicants, and therefore whether they will increase leniency incentives, is questionable.

First, as the immunity recipient remains a debtor of last resort, and it is not clear when or how it will be determined whether full compensation may be obtained from co-infringers, an immunity recipient may be subject to an uncertain risk of greater liability for many years. This is compounded by the requirement within Article 11(4) that any limitation period applicable to such claims against immunity recipients is 'reasonable and sufficient to allow injured parties to bring such actions', which implies that such periods may be even lengthier than those required under the general limitation provisions discussed above. Secondly, there is no express limitation on the liability of an immunity recipient to its direct or indirect purchasers to its sales to or the harm it caused to those purchasers, which means that in a multi-sourcing scenario it would appear to still be liable for its co-infringers' sales to the same purchasers. Thirdly, the provisions apply only to immunity recipients, not those undertakings who have received partial reduction of fines as part of the leniency programme.

XI PRIVILEGES

The Directive provides that national courts must give full effect to applicable legal professional privilege when ordering the disclosure of evidence.[79] However, what privilege rules apply is a question of national law; the Directive does not provide that EU law privilege applies in damages proceedings. National privilege rules vary considerably, with relatively extensive protection for legal advice and litigation privilege under English law, and a much less developed doctrine in many civil law jurisdictions.[80]

XII SETTLEMENT PROCEDURES

The Directive does not mandate any alternative dispute resolution mechanisms or regulate settlement procedures generally (including as to the possibility of collective settlement).

78 Article 11(5). In relation to any harm caused to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of the immunity recipient's contribution to the co-infringers shall be determined in the light of its relative responsibility for the harm (Article 11(6)) (i.e., on the basis of the normal rules).

79 Article 5(6).

80 In circumstances where disclosure was limited this was of less concern, but following implementation of the Directive's provisions on discovery the question of privilege may assume greater importance in such jurisdictions.

As noted above, however, it does provide that limitation periods be suspended for the duration of any 'consensual dispute resolution process',[81] as is already the case under the rules of some Member States. It also provides that national courts seized of damages actions may suspend their proceedings for up to two years while the parties are involved in consensual dispute resolution.[82] It further provides that a competition authority may consider compensation payable under a settlement to be a mitigating factor when imposing a fine (it remains to be seen how often an undertaking will offer such compensation prior to an infringement decision having been issued,[83] and whether competition authorities will offer such a discount).

Most importantly, the Directive deals with the impact of settlement on joint and several liability and contribution, which to date have been key concerns for defendants seeking to settle cartel damages claims against them (with attempts to achieve finality through contractual mechanisms). These provisions are likely to assist in incentivising settlements in cartel cases.

Member States are required to ensure that, following a consensual settlement, the claimant's claim is reduced by the settling co-infringer's share of harm (not, notably, the amount it has actually paid[84])[85] and that it can only pursue its remaining claim against the non-settling co-infringers.[86] Crucially, non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.[87] In addition, when assessing contribution, national courts shall take 'due account' of any damages paid pursuant to a consensual settlement.[88]

XIII ARBITRATION

See Section XII, *supra*; arbitration is not treated differently from other consensual dispute resolution mechanisms.

81 Article 18(1).

82 Article 18(2).

83 This may occur, however, in cases where the undertaking is settling with the relevant competition authority.

84 Recital 51 provides that this reduction is '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'. This, combined with the prohibition on contribution being sought from settling infringers, provides significant incentives for defendants to offer an early settlement.

85 Article 19(1).

86 Article 19(2). There is a derogation to this within Article 19(3) whereby if the non-settling co-infringers cannot pay the remaining damages due to the claimant, it may pursue the settling co-infringers. However, this can be expressly excluded under the terms of the settlement agreement, which it can be expected defendants will routinely seek to do.

87 Article 19(2).

88 Article 19(4).

The Directive does not preclude the inclusion of arbitration clauses within sales agreements that specifically deal with competition claims arising out of the relevant supply or purchase relationship.

XIV INDEMNIFICATION AND CONTRIBUTION

See Section X and XII, *supra*, for a description of the Directive's provisions on joint and several liability and contribution (and the impact of the receipt of immunity, and of settlement of claims, on these mechanisms).

In relation to contribution it is important to note that while the Directive provides that contribution is to be determined in light of the co-infringers' 'relative responsibility' for harm,[89] the question of how relative responsibility is to be allocated is left to national law, subject to the principles of effectiveness and equivalence (see Recital 37).

There is limited precedent on this point in most Member States, and some jurisdictions suggest that the starting point is equal apportionment among the number of cartelists. In practice, parties often proceed for the purpose of settlement discussions on the basis that contribution would likely be apportioned on the basis of relative sales to the claimant in question (although this does not, of course, provide a solution in the case of umbrella damages). Recital 37 mentions turnover, market share, and the role in the cartel as examples of relevant criteria for determination of responsibility. There therefore remains uncertainty on this point, and the potential for divergence across Member States.

Finally, the Directive does not specify what limitation periods should apply in relation to actions for contribution, which will therefore be a matter for national law. The limitation period for such claims in some Member States currently starts to run at the same time (or even earlier) than the limitation period for the primary claim.

XV FUTURE DEVELOPMENTS AND OUTLOOK

As discussed above, the key forthcoming development is implementation of the Directive in the EU Member States prior to the December 2016 deadline.

It remains to be seen whether the Directive, when fully implemented, will lead to an increase in the level of effective private enforcement across the EU. In relation to those Member States in which private enforcement is already firmly established and where the applicable procedural rules on many topics already meet the requirements of the Directive, it is unlikely that the Directive will have a significant impact (other than to give rise to the prospect of procedural litigation as to the interpretation of some of its provisions).

However, in other jurisdictions, where private enforcement is currently practically difficult to achieve, implementation of the Directive must be expected to lead to a greater number of damages actions (or out of court settlements), in particular as a result of its requirement for a greater level of document disclosure than currently exists in many Member States.

89 Article 11(5).

As the Directive introduces minimum requirements only, and Member States are entitled to retain or adopt measures which are more claimant friendly, the scope for forum shopping will remain, and therefore the Commission's desire for an even playing field seems unlikely. The current favoured jurisdictions for follow-on cartel damages claims (the UK, Germany and the Netherlands) also have the added advantage of a more experienced judiciary and an established claimant bar, offering a variety of funding options, and can therefore be expected to remain the jurisdictions of choice for some time.

The Commission is obliged to review the Directive and report on its impact to the European Parliament by December 2020. It remains to be seen whether this review – and that of the impact of the Recommendation on collective redress due in 2017 – will lead to further EU legislative action in this area.

Chapter 2

ESTIMATING CARTEL DAMAGES IN THE EUROPEAN UNION

Enrique Andreu, Jorge Padilla, Nadine Watson and Elena Zoido[1]

I INTRODUCTION

Consider a typical cartel in an intermediate goods market, say the market for widgets. Widgets are sold to manufacturers of blodgets, which then sell them to end-consumers. The goal of the widget cartel was to raise prices. So, if successful, the cartel would have caused widget prices, and most likely blodget prices, to increase, hurting blodget manufacturers (i.e., the direct customers of widgets) and end-consumers of blodgets (i.e., the indirect customers of the widget cartelists). Both the direct and indirect customers of a cartelised product can claim compensation for damages in the European Union.

In this chapter, we discuss the methods commonly used to estimate damages in the Member States of the European Union. We first explain the effects of a cartel on the profits of direct customers as well as on the surplus of end-consumers. We then discuss the different economic methods used to estimate those effects. We conclude with a few practical considerations.

II CARTEL EFFECTS

The damages caused by the widget cartel to a blodget manufacturer will equal the loss of profits suffered by that direct customer as a result of the cartel. A cartel may have three effects on the profits of a direct customer: (1) the price paid by the customer may increase (the 'price overcharge'); (2) the retail price which the direct customer charges to the final consumers of blodgets may also increase (the 'pass-on effect'); and (3) sales volumes may

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fall (the 'output effect'). The widget cartel will hurt the end-consumers of blodgets only if the pass-on effect is positive (i.e., only if the retail price of the blodgets increases in response to the higher widget price set out by the cartelists).

The magnitude of the damage inflicted on both direct and indirect customers can be computed as follows.

Absent the cartel, a blodget manufacturer pays a price c to the widget supplier and sells q units at a retail price p to the consumers of blodgets. The blodget manufacturer thus earns a profit equal to (p - c) x q. In the cartel scenario, the blodget manufacturer pays an input price c' to the widget supplier and sells q' units at a retail price p'. The profits under the cartel equal (p' - c') x q'. The change in profits for the blodget manufacturer caused by the cartel can be decomposed in three terms. First, $\alpha = (c' - c) \times q'$ is the reduction in profits stemming from the increase in the price of widgets caused by the cartel. Second, $\beta = p \times (q' - q)$ is the reduction in profits resulting from the loss of volume caused by the increase in the retail blodget price. Third, $\gamma = (p' - p) \times q'$ represents the additional profits accruing to the blodget manufacturer as a result of the higher retail blodget price.[2] Therefore, the loss in profit to the blodget manufacturer resulting from the widgets cartel equals the loss of profits $\alpha + \beta$ minus the additional profits γ.

Quantifying the damages suffered by a blodget manufacturer thus requires comparing widget prices with and without the cartel (c and c', respectively), blodget prices with and without the cartel (p and p', respectively), and blodget sales with and without the cartel (q and q', respectively). We can observe widget prices, blodget prices and volumes during the cartel, but can only estimate these magnitudes in the absence of the cartel. The main challenge in the quantification of cartel damages is indeed determining the likely evolution of the market absent the infringement (i.e., absent the cartel). This hypothetical scenario, commonly known as the counterfactual or but-for scenario, is not observable and, therefore, must be approximated, possibly using econometric tools. This is, needless to say, a complex task, since it requires simulating an economic scenario that did not occur.

III ESTIMATION METHODS FOR THE PRICE OVERCHARGE

The European Commission recently published a Practical Guide offering assistance to courts and parties involved in actions for damages on how to quantify the harm caused by antitrust infringements, including price-setting cartels.[3] The Commission's Practical Guide sets out a number of methods and techniques to estimating the value of the economic variable or variables of interest in the non-infringement or counterfactual scenario. In a price-setting cartel the main economic variable of interest is the price that would have been paid by the cartelists' customers absent the cartel: the widget price. Estimating this price for the counterfactual scenario and comparing the counterfactual price to the observe price provides an estimate of the price overcharge.

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2 This is a simplified analysis which ignores other costs the retailer might have incurred.

3 European Commission (2013), 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, 11 June 2013, SWD (2013) 205.

i Comparator methods

The discussion in the Commission's Practical Guide focuses in particular on the methods most widely used by parties and courts in EU antitrust damages cases: the so-called comparator methods, which in a cartel case estimate the (widget) prices that would have been observed in the market absent the infringement by reference to (1) the (widget) prices observed at time periods before or after the infringement, (2) the prices observed in other geographic (widget) markets that were unaffected by the infringement, or (3) the prices of other product (non-widget) markets that bear a relationship with the (widget) markets affected by the cartel but that were effectively competitive.

Comparisons over time

This method requires data to be available both during the cartel period and outside the cartel period. It also requires information about the beginning and end of the cartel period. As the Commission's Practical Guide notes:

> *An advantage of all methods comparing, over time, data from the same geographic and product market is that market characteristics such as the degree of competition, market structure, costs and demand characteristics may be more comparable than in a comparison with different product or geographic markets.*[4]

However, this should not be interpreted as saying that a simple comparison of the prices of widgets before, during and after the cartel will provide an accurate estimate of the price effect of the cartel: c' – c. If important market factors, such as the level of demand or costs, change over time, a simple time comparison may be misleading and should be treated with caution.[5] Suppose, for example, that the cost of producing widgets was higher during the cartel period than before or after the cartel period. In that case, we should expect widget prices to be higher during the cartel period even in the absence of the cartel and, therefore, a simple comparison of widget prices over time would produce a biased estimate of the cartel overcharge.

Unless all factors that may have influenced prices during the cartel period other than the cartel itself (the so-called 'confounding factors') are appropriately taken into account, the use of time comparison methods could overestimate or underestimate the price effect of the cartel. Econometric techniques, such as regression analysis, are typically used to account of those confounding factors, such as costs and demand drivers, when conducting these comparisons.

Comparisons across different geographic markets

A second common approach to estimate the price overcharge is to use data from a different geographic market for the same product (e.g., widgets) during the period of the infringement to compare the (widget) prices observed during the infringement period in the relevant geographic market with the corresponding prices during the same period

4 Commission's Practical Guide, para. 41.

5 Commission's Practical Guide, para. 42.

but in the comparator market.[6] The (widget) prices in the comparator market provide an estimate of the counterfactual prices (i.e., the (widget) prices that would have obtained absent the cartel).

For this approach to be valid, the comparator market would need to be one where the infringement had no effect. The Commission's Practical Guide states that:[7]

> *The more a geographic market is similar (except for the infringement effects) to the market affected by the infringement, the more it is likely to be suitable as a comparator market.*

This approach is not used very often because it is generally difficult to find a comparator market that is (1) sufficiently similar to the market affected by the infringement and (2) not affected, directly or indirectly, by the infringement. In addition, even if a comparator market can be found, the comparison needs to take into account possible differences across markets that may explain a price differential.

Comparisons across different product markets

A third approach to estimate the price overcharge is to compare the (widget) price during the cartel period with the price of a different, yet related, product market that is not affected by the infringement.[8] In this approach, the price for the comparator product is used to estimate the counterfactual price. The main challenge in using this approach is to identify a product market that is sufficiently similar to the market in which the infringement took place but was not itself affected by it. As the Commission's Practical Guide states:[9]

> *the comparator product should be carefully chosen with a view to the nature of the products compared, the way they are traded and the characteristics of the market e.g. in terms of number of competitors, their cost structure and the buying power of customers.*

ii Other methods

Other methods discussed in the Practical Guide are simulation models and cost-based models. Simulation models draw on economic theory to simulate market outcomes with and without the infringement, while the cost-based models use accounting information on production costs and a reasonable estimate of the profit margin to estimate the prices in the hypothetical non-infringement scenario.[10] As the Commission's Practical Guide explains, no single approach is always better than the others so the choice of approach must vary from case to case.

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6 Commission's Practical Guide, para. 49.

7 Commission's Practical Guide, para. 50.

8 Commission's Practical Guide, para. 54.

9 Commission's Practical Guide, para. 55.

10 Commission's Practical Guide, para. 28.

Simulation models

Economic models can be constructed that simulate prices, output, costs and profits under alternative market scenarios.[11] For example, in a cartel case they can be used to simulate market outcomes in a counterfactual scenario where competitors set prices non-cooperatively.

Such models are adjusted (or 'calibrated') so that they produce the price levels actually observed during the cartel period. Having calibrated the model in this way, one can then change the relevant behavioural assumptions and assume that there was no cartel to simulate the prices that would have prevailed absent the cartel.

One difficulty with this approach is ensuring that the model accurately reflects the real world, so that it can be trusted to provide a reliable estimate of the counterfactual prices. This is extremely complex and may prove practically impossible. As the Commission's Practical Guide explains:[12]

> *the development of complex simulation models can be technically demanding and may require significant amounts of data that may not always be accessible to the party concerned or possible to be estimated with sufficient reliability.*

Simulation models may be used when the data is insufficient to implement a comparator approach (e.g., because there is no reliable data outside the infringement period). Other than that they are less preferred to the simple comparator models described above. In fact, we are not aware of any cartel damages case in the EU where simulation models have been used.

Cost-based assessments

The cost-based approach relies on the assumption that under competitive conditions (i.e., absent the cartel) prices would have equalled costs plus a reasonable mark-up.[13] Under this assumption, counterfactual (widget) prices could be estimated by applying an appropriate mark-up to the costs of producing widgets.

Implementing this approach requires information on production costs plus an estimate of the 'mark-up' that allows for a reasonable profit in the absence of the infringement. The relevant cost measures depend on the industry and the time horizon under consideration. The cost of production is combined with assumptions on counterfactual margins to obtain a counterfactual price.

This approach raises a number of potentially insurmountable challenges. For example, identifying the relevant cost when the infringement relates to one product of a multi-product firm is a difficult task. Estimating the profit margin in the counterfactual is even more complex. Both these tasks may require making assumptions, which are not always easy to test and verify. For example, one needs to make assumptions regarding the level of competition in the absence of the infringement, and hence on the degree

11 Commission's Practical Guide, para. 97.

12 Commission's Practical Guide, para. 104.

13 Commission's Practical Guide, para. 107.

of product differentiation, the existence of capacity constraints and the cost structure of producers absent the infringement. This may explain why these methods are less commonly used than the comparator methods described above.

IV ESTIMATING THE PASS-ON EFFECT

As we explained above, direct customers of the cartelists paying an overcharge for the products they use as input in their own production of other goods or services may decide to raise the prices for their own goods or services, thereby passing on some or the entire initial overcharge to their own customers.

The decision to pass on all or part of an input cost increase normally entails a negative volume effect. In other words, an increase in the retail blodget price will reduce blodget sales. The reduction in the volume of sales will cause a loss of profit. The pass-on and volume effects are, therefore, two sides of the same coin. Not surprisingly, their magnitudes are determined by the same factors: most importantly, the elasticity of end-consumer demand.[14]

Pass-on rates can vary between zero and 100 per cent and, in some cases, can even exceed 100 per cent. As the Commission's Practical Guide points out:[15]

> *It is not possible to establish a typical pass-on rate that would apply in most situations. Rather, careful examination of all the characteristics of the market in question will be necessary to assess pass-on rates. In a specific case, the existence and degree of pass-on is determined by a range of different criteria and can therefore only be assessed having regard to the conditions of the market in question.*

The extent to which the direct customers of a cartel can pass on the price overcharge to their own consumers depends on a series of factors which include: (1) the size of the affected market; (2) the intensity of competition in the downstream market where they compete for the demand of the end consumers; (3) the sensitivity of final demand to prices; (4) the variation of marginal cost with output changes; (5) the importance of the cartelised input in their total costs; and (6) the duration of the infringement and the frequency of business exchanges.[16]

Customers of cartelised products will not be able to fully pass on a cartel price overcharge to their customers if most of their competitors in the downstream market purchase their inputs outside of the cartel. On the contrary, if all competitors in the downstream market purchase their inputs from the cartel and are therefore similarly exposed to the overcharge, then the pass-on rate is likely to be high.

The intensity of competition in the downstream market also affects the pass-on rate. If the downstream market is perfectly competitive and the cartel affected most players in the market, the pass-on rate will tend to be equal to 100 per cent. If the downstream

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14 The elasticity of end-consumer demand which determines the profit maximising response (i.e., the price and corresponding sales volume) of the direct purchaser to an input cost increase.

15 Commission's Practical Guide, para. 168.

16 Commission's Practical Guide, para. 169–171.

market is less than perfectly competitive, then it is likely that the direct customers of the cartelised product will pass on at least part of the overcharge, though often significantly less than 100 per cent. The sensitivity of end-consumers to price changes (i.e., the price elasticity of end-consumer demand) will also influence the pass-on rate. The pass-on rate will generally be higher when end-consumers are not very price sensitive, that is, if demand is inelastic.

A substantial pass-on is less likely if marginal costs significantly decrease following a reduction in output, because the lower output would become less costly to produce (e.g., in the presence of capacity constraints). Conversely, a substantial pass-on is more likely if marginal costs do not significantly decrease following a reduction in output (e.g., due to the absence of capacity constraints). When the cartelised inputs are essential and are a large part of the total cost of the product, the pass-on rate is likely to be higher because failure to pass on input price increases would have a marked impact on profitability. In addition, if the cartel has an impact on variable costs, then pass-on is more likely than if the impact is on fixed costs.

Finally, where infringements last for a long time, it is more likely that pass-on will occur because companies will be unable to sustain the negative impact on profitability indefinitely. The same applies to sectors where business exchanges and price adjustments are frequent.

V PRACTICAL CONSIDERATIONS

For the reasons explained above, given the data typically available in cartel cases, the price overcharge is commonly estimated by comparing prices during the infringement period with prices before and/or after the infringement period, taking into account that other relevant factors that may have influenced prices during these periods. In our professional experience, there seems to be a wide consensus among plaintiffs' and defendants' economists in the European Union about the superiority of comparator methods to estimate the price overcharge. While we have witnessed many disagreements about the precise implementation of those methods in actual cases, we have not been involved in any case where one of the experts advocated in favour of a simulation model and/or a cost-based approach.

There is also no controversy regarding the right analytical approach for the estimation of the pass-on and volume effects. And yet, in practice, the assessment of these effects is typically conducted using theoretical arguments and/or relying on anecdotal evidence or back-of-the-envelope calculations. The reason is that plaintiffs rarely conduct these studies, relying on the presumption of zero pass-on that is common in the European Union, and defendants usually find themselves unable to obtain the data needed to perform these estimations themselves in order to rebut that presumption.

Chapter 3

ARGENTINA

Miguel del Pino and Santiago del Rio[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Although antitrust legislation has been in place for over a century in Argentina, private litigation for the compensation of damages in competition matters is still nascent. Since the enactment of the latest Antitrust Law No. 25,156 (the Antitrust Law) in 1999 there have been no significant cases in which compensation has been pursued against perpetrators of an illegal anti-competitive act. Although there have been certain judicial precedents that could be considered as an indicator that these types of actions are beginning to have traction in Argentina, it remains to be seen whether these will develop greater interest in private antitrust litigation in the country.

Private antitrust litigation may also generate further traction due to the new Civil and Commercial Code becoming effective on 1 August 2015. The Code has incorporated into its Section 11 the notion of abuse of dominant position and, even though 'dominant position' is not expressly defined in the Code (it is defined in the Antitrust Law), this express inclusion could encourage judges to grant indemnification for the damages caused by this particular type of abuse. According to Section 10 of the Civil and Commercial Code, the judge must order what is necessary to prevent the effects of the abuse and, if appropriate, set the appropriate reparations.

One factor attributing to the lack of judicial procedures is the ever-growing state and governmental controls that had been set up in Argentina over the past few years. A recent example occured in 2014, when the Argentine government established a price freeze programme (*Programa de Precios Cuidados*, Controlled Prices Programme). The

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Controlled Prices Programme was implemented through voluntary agreements entered into between the Argentine government (represented by the Secretary of Trade) and the relevant companies. In furtherance of this Controlled Prices Programme, the Secretary of Trade created a Price Reporting Regime with Resolution No. 29/2014. Pursuant to this Resolution companies manufacturing inputs and final goods that meet specific requirements are required to report on a monthly basis to the Secretary of Trade the current prices of all their products.

As a complementary measure to these two actions, the Argentine Antitrust Commission (the Antitrust Commission) initiated four market investigations in 2014 and has continued with its analysis in 2015. As part of these investigations, the Antitrust Commission issued several requests for information to over 250 companies in a wide range of markets in order to determine the costs and margins of companies and their influence in the vertical structural pricing of such markets.

As of the end of 2015 a new Administration has taken office in Argentina and is currently analysing pricing increases generated by a devaluation of the Argentine peso, which may change the regulatory landscape and increase interest in private antitrust litigation.

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 Civil and Commercial Code in combination with the specific competition law provisions set out by the Antitrust Law.

Pursuant to Section 1 of the 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, 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.

Section 2 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 Antitrust Law. The list provided under Section 2 of the Antitrust Law includes the following practices:

a price fixing;

b practices that restrict or control technical development or the production of goods and services;

c practices that establish minimum quantities or the horizontal allocation of zones, markets, customers or sources of supply;

d agreement or coordination of bids in public biddings;

e exclusion or obstruction of one or more competitors from entering a market;

f 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;

g 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;

h unwarranted refusal to fulfil purchase or sale orders of goods or services submitted in existing market conditions;

i imposition of discriminatory conditions for the purchase or sale of goods or services not based upon existing commercial practices;

j suspension of the provision of a dominant monopolistic service in the market to a provider of public services or services which are of public interest; and

k predatory pricing.

Pursuant to Section 51 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 the violation of the duty of not causing damage to another person gives rise to the compensation for such damages. 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 whomever causes damage intentionally or due to negligence is liable to the damaged party.

In relation to the applicable statute of limitations, there is no clarity regarding the legislation to be used. Arguably, the general term of five years set out in the Antitrust Law applies rather than the three-year term for civil reparations in the Civil and Commercial Code. There are no specific precedents in this regard. Furthermore, the triggering event for the calculation of the statute of limitations remains unclear; it could be deemed to commence with (1) the generation of the harm itself, (2) the resolution issued by the Antitrust Commission, or (3) the ratification of the resolution by the courts.

III EXTRATERRITORIALITY

Pursuant to Section 3 of the Antitrust Law, all of its provisions are applicable to (1) all individuals and entities that carry out business activities within Argentina, and (2) those that carry out business activities abroad to the extent that their acts, activities or agreements may affect the Argentine market (known as '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 of the 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[2] based on (1) the market participation of the products imported by the parties of the foreign-to-foreign transaction and (2) 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 anti-competitive practices, those acts carried out in 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 damages arising from anti-competitive 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 anti-competitive 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 anti-competitive 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 re-tracing the investigation.

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

V THE PROCESS OF DISCOVERY

In the current Argentina procedure, there is no preliminary stage. Thus, the claimant cannot request from the 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 on. It is 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 Civil and Commercial Procedural Code provide that in certain cases, those who are or will be part of a discovery process, 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:

a witness testimonies of an old or sick person, or a person who is going to be absent from the country;

2 Advisory Opinion No. 52 dated 10 July 2000, 'Thompson CDF and Racal Electronics PLC re. Request for an Advisory Opinion'; Advisory Opinion No. 68 dated 8 October 2000, 'Alcan Aluminum and Alusuisse Lozna Group AG re. Request for an Advisory Opinion'.

b an expert report to register the existence of documents, the state, quality or condition of goods or places;
c reports from public entities or private individuals or companies; or
d 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 the 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 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 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 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.

VI USE OF EXPERTS

The use of experts' reports is among the types of admissible evidence regulated by the 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; the court reviews these questions and then 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 Argentine 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 Supreme Court,[3] on a leading case in this matter, held that there are three categories of rights: (1) individual rights, (2) rights with a collective impact that concern collective assets, and (3) 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 damages resulting from conduct that damages the environment or the competition, or the rights of users and consumers and those of discriminated persons, consisting of a single or continuous act that causes harm to all the members of the group.

The Supreme Court further identified the requirements that must be met in order to bring a collective action:

a the existence of a common factual cause that causes injury to a significant number of individual rights;

b the claim must be focused on the collective effects of such cause and not in what each individual might seek; and

c the 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,[4] in which six major cement producing companies were accused of agreeing to allocate 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.[5] 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.[6]

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3 Case 'Halabi, Ernesto c/ PEN - Ley 25.873 - Dto. 1563/04 s/ Amparo Ley 16.986'.

4 Resolution SCI No. 124 dated 25 July 2005 'Loma Negra Cia. S.A.; Cemento San Martín S.A., Juan Minetti S.A., Corcemar S.A., Cementos Avellaneda S.A., Cementos del Gigante S.A. y Petroquímica Comodoro Rivadavia S.A. re. Infraction to Law No. 25,156 (C. 506)', CNDC Opinion No. 513 dated 25 July 2005.

5 Id.

6 Id.

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.[7] The fine imposed on 25 July 2005 by the Antitrust Commission and the Secretary of Trade totalled 309,729,289 pesos and was confirmed by the Supreme Court in August 2013.

Based on this anti-competitive conduct, a consumer association (the Consumer Protection Association of Mercosur) filed a class action against the cement companies for the damages caused by the cartel. The consumer 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 which 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.[8]

The Supreme Court considered the initiators of a collective process must provide an objective, certain and easily verifiable definition of the class they want 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 Supreme Court considered these requirements not fulfilled by the consumer association and the suit was dismissed.

VIII CALCULATING DAMAGES

The affected parties of an 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 a 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 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. The 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,

7 Id.

8 Supreme Court of Jutice, 'Asociación Protección Consumidores del Mercado Común del Sur e/ Loma Negra Cía. Industrial Argentina S.A. y otros' dated 10 February 2015.

a variety of circumstances should be considered such as the nature of the business, the quantity and importance of the injured party's clients, its prestige and experience in the market, the volume of gross sales, etc.

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.

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 the *Autogas/ YPF* case (analysed in depth in Section X, *infra*), 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.

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 *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 anti-competitive behaviour previously investigated and punished by the Antitrust Commission. Such was the situation in the *YPF/Autogas* case.[9] 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-import of LPG to 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 of re-importing LPG. Additionally, it imposed on YPF a fine of 109,644,000 pesos. The decision was upheld by the Supreme Court.

Based on this case, a private company claimed that it had been affected by YPF's anti-competitive 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 record that it would not analyse YPF's anti-competitive conduct, since that had already been analysed and sanctioned by the Antitrust Commission and ratified

9 Commercial Court No. 14 on 16 September 2009, 'Auto Gas S.A. c/ YPF S.A. y otro s/ ordinario'.

by the Supreme Court. Thus, it considered 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 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 damages, such as those that stemmed from the breach of contract or those that originated from the alleged supply cut performed by YPF to Auto Gas.

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

XI PRIVILEGES

Regulatory Decree No. 89/2001 provides in its Section 12 that the parties may request the confidentiality of the information submitted in the proceeding, when its disclosure may cause damage to the party's interest. Although this provision is primarily applicable to the merger review process, it could be understood that those provisions would be analogous applied to claims or investigations carried out by the Antitrust Commission in order 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. 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 attorney–client privilege, unless otherwise authorised by the interested party (i.e., the client). Likewise, Section 7 provides as a right of lawyers to keep confidential information protected under attorney–client privilege. Furthermore, Section 444 of the 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 said 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 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, the parties are able to settle the matters in dispute at any time of the procedure. That settlement must be homologated by the judge.

XIII ARBITRATION

Argentina does not have an arbitration law. Arbitration is only recognised as a specific procedure within certain provincial procedural codes on civil and commercial matters. According to the Civil and Commercial Procedural Code all disputes may be resolved by means of arbitration except those that cannot be subject to a party settlement. For example, the following disputes may not be resolved through arbitration:

a criminal actions;
b family law issues;
c inheritance matters;
d disputes over assets or rights that cannot be traded; and
e where the dispute touches upon a matter of public policy.

Despite the fact that the Civil and Commercial Procedural Code rules the arbitration procedure, parties generally agree to apply institutional or *ad hoc* arbitration rules, which are also accepted by local law. Both legal and amiable composition arbitrations are admitted in Argentina; however, arbitration is not a common method of dispute resolution in private antitrust litigation in Argentina.

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 anti-competitive practice. The link between the damage and the anti-competitive 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,[10] 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.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Over the last decade the Antitrust Commission has been mostly focused towards the controlling of inflation and the enactment of measures and investigations trying to control dominance structures in certain price-sensitive markets. However, there has not been a great amount of private litigation carried out by independent parties nor advocated by the Antitrust Commission.

The recent change in administration may change this landscape, since the new authorities have claimed an interest in the pursuing of cartels and in the setting up of a leniency programme which may boost collusion investigations and, in turn, generate more private claims by affected parties.

It will also be important for the new administration of the Antitrust Commission to ensure that dominance cases continue to be strongly prosecuted, in what could also be an import source for private claims. In that regard, the entry in force of the new Civil and Commercial Code and its inclusion of the concept of abuse of dominant position could also encourage courts to start investigating antitrust cases on their own without having to wait for the sometimes slower pace of the Antitrust Commission.

10 Section 827 et seq. and Section 1751 of the Civil and Commercial Code.

Chapter 4

AUSTRALIA

Andrew Christopher and Jennifer Hambleton[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The legislative framework supporting private antitrust enforcement rights was subject to a 'root and branch' review (the Harper Review) at the end of 2014 and early 2015 and the final report was released on 31 March 2015. The Harper Review noted that private enforcement action for anticompetitive conduct was an important right for individuals and that the current legislative framework did not go far enough to remove unnecessary impediments to private enforcement. The Harper Review recommended that Section 83 of the Competition and Consumer Act 2010 (Cth) (CCA), which provides that a finding of any fact by a court made in an earlier proceeding can be used as *prima facie* evidence in subsequent proceedings, be extended to admissions made by a party in the earlier proceeding to assist private litigants in follow-on litigation.

The Australian government published its response to the Harper Review on 23 November 2015. The government stated that it supports the Harper Review's recommendation regarding amendment of Section 83 of the CCA and will develop draft legislation for public consultation to give effect to this recommendation.

The government expressed support (in full, in principle or in part) for 44 of the Harper Review's 56 recommendations regarding competition policy and law in Australia. To the extent that these recommendations are converted into legislation, they have the potential to significantly reshape both public and private competition law enforcement in Australia.

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II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The CCA together with the Federal Court of Australia Act 1976 (Cth) (the Federal Court Act) provide the legislative framework for private antitrust litigation in Australia. Part IV of the CCA prohibits a broad range of anticompetitive conduct such as cartel conduct, third line forcing, resale price maintenance, 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. 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. 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 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 (the Federal Court Rules).

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, *infra*) such private enforcement actions are not common in Australia. This is likely due to the difficulties in assessing damages suffered as a result of anticompetitive conduct.

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 currently extends the application of the prohibitions in Part IV of the CCA to conduct engaged in outside Australia by bodies corporate incorporated or carrying on business in Australia, 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 recently examined in *Norcast S.ár.L v. Bradken Limited (No 2)* [2013] FCA 235 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.

At present, Section 5 of the CCA requires private parties to seek ministerial consent before relying on extraterritorial conduct in private competition law actions. In its final report, the Harper Review recommended that the government remove this requirement. Prior to publishing its response to the Harper Review (in which the government supported this change), the government introduced the Competition and Consumer Amendment (Deregulatory and other Measures) Bill 2015 into Parliament. If passed, this Bill will remove the written consent requirement.

The Harper Review also recommended Section 5 of the CCA be amended to remove the requirement that a contravening firm have a connection with Australia in the nature of residence, incorporation or business presence. The government has not given its support to this recommendation, but stated that 'it will consider how best to effectively capture conduct that harms competition in an Australian market, taking account of international law and policy considerations'.

IV STANDING

The CCA permits a person (including a corporation) to seek damages, declarations that all or part of a contract is void, divestiture and other remedies if they have suffered loss or damage, or are likely to suffer loss or damage as the 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 (otherwise 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 their 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 or not to commence proceedings against a prospective defendant. In order 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 or not to commence proceedings if it is satisfied that the person reasonably believes that they may have the right to obtain relief from a prospective defendant, that the person has made reasonable inquiries but does not have sufficient information to decide whether to commence proceedings and 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 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 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.[2] 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 national competition regulator, the Australian Competition and Consumer Commission (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 information).[3] 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 on any 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, however in both cases the expert is required to prepare a report outlining the his or her opinion on the particular questions that the expert 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

2 Federal Court Rules, Rule 20.11.

3 Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008, Explanatory Memorandum, 87, [7.1], available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4027_ems_b454fd30-9e3f-4f16-a964-79f671a6a9fa/upload_pdf/321465.pdf;fileType=application%2Fpdf.

retained them.[4] 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 involves calling all of the experts to give evidence at the trial at the same time. Each expert presents his or her opinion and then each other expert is given an opportunity to respond.

VII CLASS ACTIONS

In Australia, representative proceedings (or class actions) are governed by Part IVA of the Federal Court Act. In order to commence a representative proceeding in Australia, the following requirements must be met: (1) there must be at least seven persons who have claims against the same person or persons; (2) the claims of all these persons must arise out of the same, similar or related circumstances; and (3) 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 cost 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.

Once a representative proceeding has been commenced, it is subject to strict supervision of 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 processes and can hinder settlement efforts. Further information on the settlement processes for representative proceedings is set out in Section XII, *infra*.

VIII CALCULATING DAMAGES

Damages are assessed on compensatory principles and punitive and exemplary damages are not available as remedies for private enforcement actions in Australia. 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

4 Federal Court of Australia, Practice Note CM7.

contravention of the CCA. This is in keeping with the general Australian approach of using damages and other forms of monetary compensation to restore a litigant to the position they would have enjoyed had the contravening conduct or breach not occurred. Therefore in private antitrust enforcement actions, the courts do not consider any fines that may have been imposed on the respondent as part of public enforcement action taken by the ACCC, when assessing damages.

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 that interest is payable on actions to recover money, the value of goods or damages claims at such rates as the court considers fit under Section 51A of the Federal Court Act.

IX PASS-ON DEFENCES

There is no specific passing-on defence in Australia. The current relevance of passing-on in Australia is that any order for damages under Section 82 of the CCA is intended to compensate for actual loss or damage suffered and 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 which 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.

Under Section 83 of the CCA, findings of fact made in earlier proceedings including proceedings brought for contraventions of cartel conduct prohibitions, are *prima facie* evidence of those facts in later proceedings for damages or compensation orders. As outlined earlier in this chapter, the government has stated that it will draft legislation for public consultation to give effect to the Harper Review's recommendation that section 83 be extended 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.

There have been some limited follow-on proceedings in Australia in respect of cartel conduct, in particular in relation to the cartels in *Australian Competition and Consumer Commission v. Visy Industries Holdings Pty Ltd*, *Cadbury Schweppes Pty Ltd v. Amcor Ltd,* an air cargo surcharge cartel and *De Brett Seafood Pty Ltd v. Qantas Airways Ltd (formerly Auskay International Manufacturing & Trade Pty Ltd v. Qantas Airways Ltd)*. Each of these proceedings settled.

XI PRIVILEGES

Australian courts recognise legal professional privilege and 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 their 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, that was made, or 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 alternative dispute resolution (ADR) including mediation, as soon as reasonably practicable. Prior to commencing proceedings in the Federal Court, the parties must file a 'genuine steps statement' where parties outline what steps have been taken to resolve the dispute and if no steps have been taken, why this is the case.

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 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 example of where an order for indemnity costs may be made includes a situation 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 the case of 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 in accordance with Section 33V of the Federal Court Act.

The Federal Court has developed its own criteria for approving class action settlements.[5] The parties will usually need to persuade the court that:

a the proposed settlement is fair and reasonable, having regard to the claims made on behalf of group members bound by settlement; and

5 Federal Court of Australia, Practice Note CM17.

b 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, *supra*, 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 the proceedings be stayed. If the court orders that the parties proceed to arbitration, then either party may apply to the court to have the court appoint an arbitrator, 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 the 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 their 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.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Following an announcement by the Prime Minister and the Minister for Small Business on 4 December 2013 of a review of Australia's competition policy, the Harper Review Panel's Final Report was released on 31 March 2015 – the first comprehensive review of Australia's competition framework since 2003. Comprising over 500 pages and containing 56 targeted recommendations, the Harper Review's comprehensive set of recommendations proposed an ambitious reform agenda to competition law, enforcement institutions and competition policy in Australia. Some of the recommendations included dividing the ACCC into two regulators, one dedicated to pricing of regulated infrastructure, as well as recommendations for changing some of Australia's competition laws.

As discussed above, the government has formally expressed its support (in full, in principle or in part) for 44 out of 56 of the Harper Review's recommendations. In particular, the government has stated its support for the recommendation of simplifying the competition law provisions in Part IV of the CCA, including the provisions relating to the prohibition on cartel conduct which are currently characterised by undue prolixity

and complexity. However, the government has delayed until February 2016 a decision regarding the controversial recommendation to amend the prohibition on misuse of market power included in Section 46 of the CCA. Section 46 has proved difficult to enforce in practice and there has been a significant push from small business lobby groups in particular to amend the section.

There are a number of other recommendations from the Harper Review, which if implemented will open up sectors of the economy to increased competition and are likely to have substantial and longer-term impacts.

Chapter 5

AUSTRIA

Bernt Elsner, Dieter Zandler and Molly Kos[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private antitrust litigation in Austria has substantially increased in recent years.[2] 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[3] 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

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2 Apart from private antitrust damages claims, private antitrust litigation in 2015 in Austria also led to Supreme Court decisions in various fields involving cases where private claimants were seeking (1) access to newspaper takeaway in Vienna's subway stations (OGH 11 June 2015, 16 Ok 8/14h), (2) admission to selective distribution networks in the automotive services industry (OGH 8 October 2015, 16 Ok 1/15f), (3) to challenge non-compete and radius clauses in lease agreements for tenants in shopping centres (OGH 8 October 2015, 16 Ok 6/15s), or (4) to contest predatory pricing and cross-subsidising in the waste collection sector (OGH 8 October 2015, 16 Ok 9/15g).

3 OGH 8 October 2008, 16 Ok 5/08.

parties[4] as well as for indirectly damaged parties,[5] which now also includes cases where damages were allegedly caused by cartel outsiders raising their prices in the wake of a cartel (umbrella pricing).[6]

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 *Kone* case[7] regarding antitrust damages claims based on umbrella pricing as well as the *Donau Chemie* case[8] concerning access to file by possible private damages claimants. Although private antitrust litigation nowadays plays a pivotal role in Austrian antitrust practice and Austrian courts are actively shaping the law even 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.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

In Austria, Section 37a of the Cartel Act (KartG) is the cornerstone of private antitrust damages claims (PADCs).[9] The competent courts for PADCs are the ordinary civil courts.

Pursuant to Section 37a(1) KartG first sentence, claimants may seek damages from parties culpably violating the substantive provisions of Austrian or European antitrust law. Section 37a(3) KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities (NCAs) of other EU Member States[10] 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 damages incurred and a causal link between the infringement and such damages. Section 37a(4) KartG stipulates that the statute of limitations for PADCs is suspended for the period during which infringement proceedings are pending before the cartel court, the European Commission or before the NCAs of other EU Member States. The suspension ends six months after the decision has become legally binding or the

4 OGH 26 May 2014, 8 Ob 81/13i.

5 OGH 2 August 2012, 4 Ob 46/12m.

6 OGH 29 October 2014, 7 Ob 121/14s.

7 Judgment *Kone and Others v. ÖBB Infrastruktur AG*, C-557/12, ECLI:EU:C:2014:1317.

8 Judgment *Bundeswettbewerbsbehörde v. Donau Chemie and Others*, C-536/11, ECLI:EU:C:2013:366.

9 Other provisions that can be used as a basis for a claim for private antitrust law enforcement not (directly) aimed at seeking damages – such as Section 36(4) Nr 4 KartG (actions for seeking a prohibition decision pursuant to Section 26 or establishing infringements in the past pursuant to Section 28 KartG) – as well as cases where the nullity of an agreement violating competition law is sought are not covered in this chapter.

10 According to the prevailing opinion, the Austrian official parties are not covered by this provision although they also qualify as national competition authorities under Regulation 1/2003: see Reidlinger/Hartung, *Das Österreichische Kartellrecht*, 3rd edition (2014), p. 246.

proceedings have ended otherwise. According to Sec 37a(2) KartG, PADC proceedings can be suspended for the duration of parallel proceedings with the cartel court, the European Commission or an NCA of another EU Member State.

Section 37a KartG was introduced in the Cartel and Competition Amendment Act 2012 and entered into force on 1 March 2013. The provision was mainly inspired by Section 33 of the German Act against Restraints of Competition (GWB).[11] For all PADCs resulting from violations from Austrian and European antitrust law that have occurred until 28 February 2013, the general tort law rules apply.[12] While it is also established case law that antitrust laws are so-called protective provisions under general tort law that – in case of an infringement – may form the basis of PADCs if the damages have been caused culpably,[13] the reliefs offered by Section 37a KartG are not applicable to PADCs based on antitrust violations that occurred prior to 1 March 2013.

The general limitation period for PADCs is three years, commencing from the knowledge of the circumstances giving rise to the claim and the identity of the injuring party. The maximum period for PADCs is 30 years if the claimant has no knowledge of the damage and the identity of the tortfeaser (Section 1489 ABGB).

The above-mentioned provisions may be subject to considerable change following the implementation of the EU Damages Directive (the Directive) in Austria (see Section XV, *infra*).

III EXTRATERRITORIALITY

The application of the specific rules on PADCs in the KartG requires a domestic effect in Austria ('effects doctrine').[14] 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:

a against a defendant domiciled outside Austria if the harmful event caused by the cartel occurred or is expected to occur in Austria;[15]

b against a defendant that is domiciled in Austria (with the potential to include the other cartel members as additional defendants in the same lawsuit[16]); and

11 Gruber, *Österreichisches Kartellrecht*, 2nd edition Vienna 2013, Section 37a KartG 2005, p. 498.

12 Section 86(4) KartG last sentence.

13 OGH 14 February 2012, 5 Ob 39/11p; OGH 4 Ob 46/12m.

14 Section 24(2) KartG; cf OGH 27 February 2006, 16 Ok 49/05; OGH 23 June 1997, 16 Ok 12/97.

15 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012, L 351/1, p. 1, Article 7(2); see also Judgment *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and others*, C-352/13, ECLI:EU:C:2015:335.

16 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'.

c against defendants that are not domiciled in one of the Member States of the EEA if they hold assets in Austria.[17]

IV STANDING

Based on the decisions of the CJEU in *Courage v. Crehan*[18] and *Manfredi*,[19] anyone who has suffered damages from an infringement of Article 101 TFEU is entitled to recoup his or her losses from the cartelists. This case law also had a significant effect on PADCs solely based on an infringement of Austrian competition law. So far, only in cases of umbrella claims has the OGH held that under Austrian law (if EU law is not applicable), a claimant would not have standing against the cartelists due to lack of an adequate causal link between the cartelists' infringement and the losses alleged by the claimant.[20] Following the CJEU's decision in the *Kone* case,[21] 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

Austrian law currently 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).

In order to obtain such evidence, a potential claimant contemplating a PADC may request access to files of the cartel court pursuant to the provisions set out in Section 219(2) of the Code of Civil Procedural (ZPO).[22] Based on this provision a third party may be granted access to the file if it can credibly show a legitimate interest (which typically can be established by a possible PADC). If such legitimate interest can be shown, the cartel court has to decide whether to grant access to the file by balancing the conflicting interests of the party seeking access and the interests of the parties of the cartel court proceeding, in particular business secrets. Such balancing of interests has to be made for every single document for which access is requested.[23]

Based on the CJEU's decision in the *Donau Chemie* case (which was based on a request to the Austrian cartel court for access to the file concerning an infringement

17 Section 99 Law on Court Jurisdiction (JN).

18 Judgment *Courage Ltd v. Bernard Crehan* and *Bernard Crehan v. Courage Ltd and Others*, C-453/99, ECLI:EU:C:2001:465.

19 Judgment *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v. Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) *v. Assitalia SpA*, C-295/04, ECLI:EU:C:2006:461.

20 OGH 17 October 2012, 7 Ob 48/12b (ruling).

21 The OGH in this decision asked the trial court to establish the necessary facts with regard to umbrella pricing: OGH 7 Ob 121/14s.

22 Gitschthaler in Gitschthaler/Höllwerth, *AußStrG* Section 22 paragraph 28 et seq.

23 Ibid. paragraphs 43, 47, 48.

proceeding relating to printing chemicals), Section 39(2) KartG, which made such access to the file conditional upon the approval of all the parties to the cartel court proceedings (and thereby making access to the file virtually impossible for potential claimants) is no longer applicable if the potential claim for which access to the file is requested is based on an infringement of Article 101 TFEU. In a more recent ruling, the OGH declared that Section 39(2) KartG also will no longer be applicable in cases where the potential PADC for which access to the file is requested is based on an infringement of national antitrust law without any EU law implications.[24] According to this judgment, the courts should give parties that deny access to the file the opportunity to present their reasons for such denial in order to decide on the balancing of interests.[25]

The FCA – which often will be in possession of additional evidence (as not all evidence will necessarily be submitted to the cartel court proceedings by the FCA) – currently does not allow (third) parties access to its file.[26]

Furthermore, in PADC proceedings before civil courts, parties can claim that the opposing party is in possession of documents that are of significant importance for substantiating its claims and parties can request the court to order the opposing party to disclose such documents (Section 303 ZPO). Disclosure may not be denied only when (1) the opposing party has itself relied on the document, (2) the opposing party is obliged to disclose the document due to applicable law, or (3) the document is a joint document of the parties.[27] Owing to these limitations, the existing disclosure obligation currently does not play an important role in Austrian procedural practice.

Note that the imposition of Article 5-7 of the Directive[28] may drastically change the legal setting for potential discovery of evidence in Austria. Although no draft of the implementation statute has yet been published,[29] it is expected that Article 5 et seq. of the Directive will be implemented closely to the original wording of the Directive.

VI USE OF EXPERTS

According to Section 351(1) ZPO, courts can appoint experts to collect evidence. Such court-appointed experts can have an important role in private antitrust damage

24 OGH 28 November 2014, 16 Ok 10/14b and 16 Ok 9/14f; Ablasser-Neuhuber, *Zur Einsicht in Akten des Kartellverfahrens*, ÖBl 2015/37; Zandler, *Akteneinsicht in Kartellgerichtsakten*, 9 February 2015: http://blog.cms-rrh.com/post/2015/02/09/akteneinsicht-in-kartellgerichtsakten/ (last accessed on 9 December 2015).

25 See Gitschthaler, *AußStrG* Section 22 paragraph 43.

26 Polster/Zellhofer, *Aktenzugang im Kartellverfahren im Spannungsfeld zwischen Geheimnisschutz und Private Enforcement*, OZK 2008/3, p. 103.

27 According to Section 304(2) ZPO, if it was put up in the interest or entails a mutual legal transaction of the parties involved.

28 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349 p. 1.

29 As of the cut-off date for this publication.

proceedings in particular as regards establishing whether an alleged loss has occurred and as regards the calculation of the quantum of damages (see Section VIII, *infra*, for more detail). Although Section 37a(1) KartG[30] also gives courts the capacity to estimate the quantum of damages (see Section VIII) themselves, courts often are not willing to make such estimates but rather prefer to appoint court experts, such as economists, to calculate the quantum of damages suffered.

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 appoint private experts and use their findings as evidence in the proceeding. In addition, parties may also try to call their private expert as an expert witness to the proceeding. Note, however, that private experts appointed by the parties do not substitute court-appointed experts and that 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 full evidential value compared to reports of court-appointed experts (Section 292 ZPO).

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).[31] Recently, Austrian-style 'class actions' have been brought before courts mainly by the association for consumer protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding.[32] However, as the ZPO does not contain any specific provisions for class actions, courts have differed in their treatment, by either treating them as separate single proceedings, by joinder of claimants, or by having one 'test proceeding' (while staying the other proceedings), which then serves similar to a 'precedent' for the other claims.[33]

Despite the growing number of such Austrian-style 'class actions', courts remain reluctant to accept the pooling of claimant actions for damages and instead try them in a single court proceeding; Austrian civil procedural rules are rather based on an individual examination of each claim brought before the court.

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

30 By way of reference to Section 273 ZPO.

31 Kodek in Neumayer, *Beschleunigung von Zivil- und Strafverfahren*, 2014, p. 5.

32 Kodek, Haftung bei Kartellverstößen in WiR – Studiengesellschaft für Wirtschaft und Recht (eds), *Haftung im Wirtschaftsrecht* (2013), p. 63, 77.

33 Kodek in Neumayer, p. 9.

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.[34]

VIII CALCULATING DAMAGES

Under Austrian law, antitrust damages are limited to the actual loss suffered plus statutory default interest[35] calculated from the date when the loss 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. If a PADC is based on an infringement of Article 101 TFEU, such actual losses also include lost profits based on the CJEU's *Manfredi* judgment. For PADCs that are only based on an infringement of national antitrust laws, lost profits may be awarded in cases where the commitment of the infringement was grossly negligent or intentional[36] or if the claim is based on a contractual relationship between businesses[37] (these strict requirements will likely need to be amended with the implementation of Article 3(2) of the Directive).

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.[38] Often, injured parties have difficulty establishing the counterfactual hypothetical scenario that establishes proof of their damages.[39]

Section 37a(1) KartG, therefore, also 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 damages due to an antitrust infringement (i.e., the injured party has to prove the 'first euro' of its damages).[40] In one example, the allegedly injured party was not able to establish that it had suffered damages in follow-on litigation

34 See Ginner, *Erstes österreichisches Urteil zum Private Enforcement – Fahrschulkartell Graz*, ÖZK 2008, p. 110 et seq.

35 The applicable statutory default interest is 4 per cent (Section 1000(1) ABGB), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code (UGB)).

36 Section 1331 ABGB; see Csoklich, *Schadenersatz nach Kartellverstoß*, VbR 2014/112, p. 185.

37 Section 349 UGB; see Kramer/Rauter in Straube/Ratka/Rauter (eds), UGB I, 4th edition (2011), Section 349 paragraph 8.

38 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.

39 For possible calculation methods see Csoklich, ibid; Abele/Kodek/Schäfer, *Zur Ermittlung der Schadenshöhe bei Kartellverstößen – Eine Integration juristischer und ökonomischer Überlegungen*, ÖZK 2008, p. 216; Kodek, *Haftung im Wirtschaftsrecht* (2013), p. 63, 74.

40 OGH 8 Ob 81/13i; see Kodek, ibid.

from the *Escalator* cartel when the claimant (due to lack of contractual documentation) was only able to provide estimates of the prices paid to the cartel members rather than expressly to determine the prices paid.[41]

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 attorney's 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 above a double digit million euro amount) often exceed the actual attorneys' fees incurred. The award of costs also includes court fees, including a party's expenses for court-appointed experts.

IX PASS-ON DEFENCES

Section 37a(1) second sentence KartG clarifies that the passing on of excess fees in products or services as such is not sufficient grounds to preclude PADC of the initial buyer based on increased prices. An indirectly damaged party is also allowed to claim damages from the members of a cartel when the damages are 'automatically' passed on from the contractual counterparty of the cartelists to the claimant by means of a contractual obligation.[42] In its decision, the OGH adopted the position expressed by the German Federal Court in 2011[43] that the passing-on defence is to be recognised under the legal concept of 'benefit sharing' to reduce the damages suffered by the direct purchaser. However, as the decision involved a situation where the damage was 'automatically' passed on by means of a contractual obligation, it was not necessary for the OGH to deal generally with the question of an admissibility of the passing-on defence in cases where the direct purchaser was able to pass on some or all of its cartel losses to the next market level by way of a price increase.[44] In another decision, the OGH held a claim from an indirect purchaser of escalators admissible based on the contention that the loss was economically passed on to the indirect purchaser by the direct purchaser.[45] Therefore, if a party can establish that it has suffered damages that were caused by an antitrust infringement, there is generally no limitation for claims from indirect purchasers.

As regards the claims of the direct purchaser, based on the above precedents and although no case law exists on the question whether the passing-on defence is admissible where losses are passed on to the next market level by way of a price increase, Austrian legal literature predominantly takes the view that the concept of 'benefit sharing' should

41 OGH 3 Ob 1/12m.

42 OGH 4 Ob 46/12m.

43 BGH 28 June 2011, KZR 75/10.

44 Polster/Steiner, *Zur Passing-on defense im österreichischen Kartellschadenersatzrecht*, ÖZK 2014, p. 43, 46.

45 OGH 7 Ob 48/12b (judgment), p. 19.

be applied (which would generally make the passing-on defence permissible unless there is no causal link between the infringement and the benefit (i.e., passing on) and the defence would cause an unfair relief to the infringing party);[46] the burden of proof for the passing-on defence generally rests on the cartelists.

X FOLLOW-ON LITIGATION

Due to the binding effect of final decisions of the cartel court establishing an antitrust law infringement (see Section II, *supra*) 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) often are commenced on stand-alone claims.

XI PRIVILEGES

The professional secrecy obligation of attorneys (obligation) 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 information confidential which (1) is entrusted to them by the client or (2) 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 documents, image-, sound- or data carriers). 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.

In PADC proceedings, an attorney may refuse to provide documents if the disclosure violates such confidentiality obligation (Section 305 number 4 ZPO). Additionally, an attorney may also refuse to give evidence as a witness if it violates confidentiality (Section 321(1) number 3 ZPO). However, clients have the right to release their attorneys from the obligation.

In FCA investigations, in particular as regards the seizure of documents during a dawn raid, attorney–client communications are not privileged if they are not in the hands of the attorney.[47] However, 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.[48]

46 Polster/Steiner, ibid.

47 Metzler, 'The Tension Between Document Disclosure and Legal Privilege in International Commercial Arbitration – An Austrian Perspective' in Klausegger et al (eds), *Austrian Yearbook on International Arbitration 2015*, 231, 254.

48 Metzler, ibid, 254 et seq. with further references.

XII SETTLEMENT PROCEDURES

Austrian law permits parties to settle private antitrust damages litigation both prior to starting legal proceedings as well as 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 PADC occur (although there are a number of prominent cases where it is publicly known that they 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.

In addition to private cartel settlements, settlements of governmental antitrust proceedings[49] currently play a very important role in Austria, which makes it more difficult for private claimants to pursue PADCs against cartelists 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 Article 37 KartG.[50]

XIII ARBITRATION

As PADCs are claims generally falling under the jurisdiction of the civil courts, they may alternatively be adjudicated in arbitration proceedings,[51] 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, *ad hoc* rules or administered under commonly used arbitration rules such as those of the ICC or the Vienna International Arbitral Centre (VIAC). As Austrian law requires an arbitration agreement in writing, arbitration is rarely used for the typical follow-on PADC, but is rather confined to private antitrust disputes where the contract between the parties of the proceedings already 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 already is subject to arbitration proceedings is subsequently initiated before civil courts such claim in general will also be rejected (Section 584(3) ZPO).

Article 18 of the Directive on the suspension and other effects of consensual dispute resolution may provide new incentives for the Austrian legislator to establish specific rules for arbitration proceedings on PADC.

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49 For details see the FCA's Guidelines of Settlements: www.bwb.gv.at/Documents/BWB%20Standpunkt%20zu%20Settlements%20September%202014.pdf (last accessed on 16 December 2015).

50 This aspect has been criticised in legal writing, see Kodek, *Absprachen im Kartellverfahren*, ÖJZ 2014, 443, 450.

51 For further details see Wilheim, *Die Vorteile der Abhandlung von Follow-on Ansprüchen in kollektiven Schiedsverfahren*, ÖZK 2014, p. 49.

XIV INDEMNIFICATION AND CONTRIBUTION

Under Austrian law, cartel members are jointly and severally liable co-debtors for the losses of injured parties[52] if the infringement was committed intentionally or if the individual portion of the damages sustained cannot be determined. In such case, an injured party may claim from one cartel member the loss caused to it by the entire cartel; such joint and several liability is based on general tort law (Section 1302 ABGB).[53] For such joint and several liability, an individual cartel member's intent must not necessarily cover the losses caused by the entire cartel.[54]

Where a cartel member is held liable as a co-debtor, it may seek redress for the damage payments from the other co-debtors.[55] Austrian law does not provide for any specific rules on how to determine the respective contribution of each cartel member for private antitrust damages and we are not aware of any specific case law in Austria on this issue.

Currently, there are no specific provisions that provide for special protection from joint and several liability as co-debtors applicable to immunity recipients or SMEs. However, this should change following the implementation of Article 11 of the Directive.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Although the specific Austrian provisions on the enforcement of PADCs only came into force approximately three years ago, the implementation of the Directive will again lead to a substantial transformation of the legal framework for cartel damages claims in Austria.[56]

The most important legislative change from the Directive's implementation will be caused by Articles 5 and 6 of the Directive introducing extensive rules on disclosure of evidence and access to file.

Furthermore, the limitation period's extension from three to five years under the suspension provisions of the Directive once a competition authority initiates investigations or proceedings (Article 10) will push the legislator to clarify issues that have been at the top of its agenda for some time.[57]

Therefore, it is expected that the implementation of the Directive will further stimulate private antitrust damage litigation in Austria.

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52 OGH 5 Ob 39/11p; Wilhelm, *Kartellverstoß macht alle Kartellanten schadenersatzpflichtig*, ecolex 2012/170.

53 OGH 4 Ob 46/12m; OGH 5 Ob 39/11p.

54 Ibid.

55 Section 1302 ABGB.

56 For further details see, Krauskopf/Schicho, *Die Umsetzung der Schadenersatzrichtlinie – eine Herausforderung für alle Beteiligten*, VbR 2015/121.

57 See Arbeitsprogramm der österreichischen Bundesregierung 2013–2018, 9: 'Verjährungsbestimmungen anpassen: Verstöße sollen nicht während laufender Ermittlungshandlungen verjähren', www.bka.gv.at/DocView.axd?CobId=53264 (accessed on 9 December 2015).

Chapter 6

BELGIUM

Damien Gerard[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The year was marked by three major developments in the field of private antitrust litigation in Belgium: (1) the second judgment dismissing follow-on damages claims in the *Elevators/Escalators* case; (2) the first largely publicised settlement in a follow-on damage action; and (3) the entry into force of the 2014 Act on Collective Recovery Actions.

In April 2015, the Brussels Commercial Court dismissed a follow-on damages claim brought by the Belgian government against companies found guilty of having participated in collusive arrangements affecting tenders for the supply and maintenance of elevators and escalators in various EU jurisdictions, including Belgium.[2] While recalling the compensatory character of damages actions under Belgian law and the fact that they ought to be brought under the general torts statute (Article 1382 of the Belgian Civil Code), the Court found that it was bound by the infringement decision of the European Commission as a matter of primacy of EU law and then held that a breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU) – as of any regulatory provision – qualifies as a fault under Belgian tort law. The Court subsequently focused on the proof of the alleged harm and of the causal link between the fault and the alleged harm. In that respect, it restated that a harm must be certain (i.e., not

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2 Commercial Court of Brussels, Flemish Community, Flemish Region and Belgian State/Kone, Otis, Schindler, ThyssenKrupp (Joined Cases A/12/02291 and A/12/02293), 24 April 2015 (under appeal). The judgment follows a similar ruling issued on 24 November 2014 by the same court in a case brought by the European Union against Kone, Otis, Schindler, ThyssenKrupp (Case A/08/06816, under appeal).

hypothetical) and quantifiable, and that Belgian law does not allow for a presumption of harm deriving from a prior administrative decision, at this point. Hence, it adopted a rather sceptical approach pointing to the fact that 'prices are rarely determined by only one cause', that 'it is impossible to determine with certainty how a market would have developed in the absence of a breach of Article 101 TFEU' and that 'prices, sales volumes and margins depend on a variety of complex factors and often strategic interactions between market participants, which are not easy to evaluate.' Eventually, the Court dismissed the claim for failure to establish harm up to the requisite standard of certainty. The Brussels Commercial Court judgment is currently under appeal before the Brussels Court of Appeal.

According to public statements released on 21 October 2015, telecommunications incumbent Proximus agreed to pay €120 million to competitors Base (€66 million) and Mobistar (€54 million) to settle a follow-on damages action based on a 2009 decision of the Belgian Competition Authority (BCA) finding Proximus guilty of abusive price squeeze on the market for mobile telephony services in 2004 and 2005, and imposing on Proximus (then Belgacom) a €66 million fine. This is the first time that a sizeable antitrust settlement has been publicised in Belgium. Previously, court-appointed experts had estimated Proximus' exposure up to €1.8 billion and the case was generally considered likely to result in the first judgment upholding a follow-on damages claim in Belgium.

The 2014 Collective Recovery Actions Act entered into force on 1 September 2014.[3] The Act provides that consumer and other organisations satisfying certain statutory criteria, as well as the Federal Ombudsman for Consumers, are entitled to file a claim on behalf of a group for collective recovery, and that they may do so exclusively before the Brussels courts. Depending on the circumstances of the case, it is up to the court to decide whether to apply an opt-in or opt-out system. The system also requires the parties to first explore the possibility of negotiating a settlement. It is only in case of failure to settle that the court may hear and decide on the merits of the damages claim. At present, there is no precedent involving the use of that collective redress mechanism, in the competition law area or otherwise, because such actions can only be brought for causes occurring after the entry into force of the Act.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

At the outset, private antitrust enforcement in Belgium can be generally divided between cease-and-desist actions, on the one hand, and recovery (or damages) actions, on the other hand. In addition, competition law defences are occasionally raised in contractual disputes. Whereas there is a developed body of precedents in relation to cease-and-desist

3 Act of 28 March 2014 introducing a Title 2 'Of collective recovery actions' in Book XVII 'Special judicial procedures' of the Code of Economic Law, *M.B.*, 29 April 2014, p. 35201 (see Articles XVII.35–XVII.69 of the Code of Economic Law).

actions, this is not the case yet with respect to recovery actions, which remain exceptional even though guidance can be derived from general tort law principles and related case law.

Cease-and-desist actions are typically based on Article XVII.10 of the Code of Economic Law (CEL), which provides for a special and particularly effective procedure to obtain a cease-and-desist order at relatively short notice from the President of the competent commercial court in unfair trade practices matters.[4] In that connection, it is settled case law that claimants alleging breaches of competition principles can also bring a cease-and-desist action pursuant to the CEL's unfair trade practices provisions.[5] That procedure constitutes a credible alternative to proceedings before the BCA in those cases where plaintiffs have sufficient elements at their disposal to discharge the applicable burden of proof (or can readily identify the relevant pieces of evidence and request their production in court).

With respect to recovery actions, there is no specific provision governing damages proceedings resulting from a breach of competition law. As a result, general tort law is applicable to such proceedings and, in particular, Article 1382 of the Belgian Civil Code (BCC).[6] Generally, tort law provides for compensatory damages to be awarded where a plaintiff is able to demonstrate the existence of: (1) a fault imputable to the defendant; (2) a harm suffered by the plaintiff, which must be concrete and certain; and (3) a causal link between the fault and the harm. Under Belgian tort law, damages are awarded according to the *restitutio in integrum* principle according to which the victim must be compensated for the entire harm suffered (i.e., restored to the *status quo ante*) but only the actual harm suffered. Hence, Belgian law allows for the recovery of any direct losses and profits forgone (including losses of business opportunities) but does not provide for treble or punitive damages. Likewise, in spite of the lack of precedent in the antitrust field, it is commonly admitted that the passing-on defence can be invoked by defendants. Upon request, damage awards can also include (simple, not compound)

4 Article XVII.1 et seq. CEL. That procedure is dealt with according to the rules applicable to interim proceedings but is not subject to the requirement of urgency and gives rise to a judgment on the merits.

5 Technically, infringements of chapter IV CEL are considered to fall within the scope of the notion of 'unfair trade practice' pursuant to Article VI.104 CEL. However, according to a judicial construct known as the 'reflex effect' of competition law on the law of unfair trade practices (now included in Book XVII of the CEL), a commercial practice considered permissible under competition law principles (Articles IV.1 and IV.2 CEL or Articles 101 and 102 TFEU) cannot be considered as an unfair trade practice insofar as the essence of the plaintiff's claim is one of impediment to the functioning of the free market (see Cass., 7 January 2000, *Multipharma/Louis Widmer*, RCJB, 2001, p. 255). As a result, the law on unfair trade practice is not supposed to catch coordinated or unilateral practices that are compliant with Articles IV.1 and IV.2 CEL or Articles 101 and 102 TFEU.

6 In theory, contractual liability can also be invoked to obtain damages or even the nullity of the contract, depending on the terms of the contract in question and the circumstances of the case.

interests from the date of notice and be complemented by a fixed indemnity of procedure intended to cover attorneys' fees and other costs and disbursements.[7] Although success fees are allowed, pure contingency fees are prohibited under Article 446-ter of the Code of Civil Procedure (CCP) and the rules of professional responsibility of the Belgian bars.

Under general tort law, the applicable statute of limitation is: five years as from the day on which the injured party became aware of the harm suffered; or, in any event, 20 years from the occurrence of the facts that caused the harm (Article 2262-bis of the Belgian Civil Code). While there is no precedent governing the question, and absent specific circumstances, a Belgian court would probably take the decision of the competent competition authority as the starting point of the 'awareness' requirement in follow-on damages cases. In relation to cease-and-desist actions, the statute of limitations is one year after the termination of the cause of action (Article XVII.5 CEL).

Finally, infringements of competition law are not criminally sanctioned in Belgium, with the exception of 'bid-rigging' practices. If convicted, companies engaged in bid rigging could be sentenced to the payment of a fine (in tens of thousands of euros) and individuals can face imprisonment up to six months and/or the payment of fines (in thousands of euros). However, bid-rigging practices have rarely been criminally prosecuted over the past decade in Belgium.

III EXTRATERRITORIALITY

The application of antitrust laws in Belgium is governed by the effects doctrine, as interpreted by the EU courts, as substantive Belgian competition law is meant to transplant EU principles. No specific statutory or common-law exemptions apply in private antitrust litigation. Generally, the jurisdiction of Belgian courts to hear and decide private antitrust disputes is to be established according to EU Regulation 1215/2012.[8] Pursuant to Article 6 of EU Regulation 864/2007, the law applicable to a tort claim arising out of a restriction of free competition is the law 'of the country where the market is, or is likely to be, affected'.[9]

IV STANDING

Generally, under Belgian law, plaintiffs need to establish an 'interest' that is actual, personal and legitimate for their action to be admissible (an indirect interest may be sufficient). As a result, subject to the exceptions listed in Section VII, *infra*, there is no possibility to bring actions on behalf of persons or entities that are not party to the

7 In its judgment of 24 April 2015 in the *Elevators/Escalators* matter (see footnote 2, *supra*), the Brussels Commercial Court awarded each defendant the maximum amount of €33,000 in indemnity of procedure.

8 Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] O.J. L 351/1.

9 Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] O.J. L 199/40.

proceedings or in pursuance of the general interest. Nonetheless, individual plaintiffs having suffered personal harm can group themselves and bring their claims in a single summons; if successful, damages would then be awarded to each plaintiff separately. Various individual plaintiffs can also be represented by a single lawyer, mandate a single representative or even assign their claims to a single person.

V THE PROCESS OF DISCOVERY

Private antitrust litigations typically start with the service of summons on the defendant laying down the claim in summary fashion and calling for appearance at an introductory hearing before the competent court at short notice. That introductory hearing is normally procedural in essence and serves to agree on a calendar for the exchange of briefs. In complex litigations, two rounds of written briefs are customary. Once ready, the case is then called back before the court for one or various oral hearings. In the meantime, any party can petition the court to order the production of documents, the hearing of witnesses or to appoint an expert in view of assessing the scope of the alleged harm and the size of damages. Overall, the duration of judicial proceedings depends on the complexity of the case, the diligence of parties and the workload of the courts. While cease-and-desist orders can be obtained within months, damages actions can last for years.

At present, the Belgian Code of Civil Procedure (CCP) does not contain discovery rules comparable to those available in, for example, the United States. Notably, Belgium has not yet transposed the rules on the disclosure of evidence provided for in EU Directive 2014/104.[10] Still, judges are entitled to order any party to produce evidence in its possession (Article 871 CCP). In addition, judges are entitled to require the production of documents, including from third parties, subject to four conditions (Articles 877-882 CCP): (1) the production must pertain to identifiable documents; (2) the documents must constitute evidence of a relevant fact; (3) there must be serious, specific and concurring reasons to believe that a party or a third party holds the documents in question; and (4) the documents must actually be in possession of the party or third party subject to the production order, knowing that failure to comply with such an order is sanctioned by a fine. While the production of documents can be ordered either at the request of a party or *ex officio* by the court, existing precedents testify to a reluctance on the part of courts to issue such orders, notably when requests to that effect are formulated at a relatively late stage in the procedure.[11]

Some commentators take the view that the BCA could be subject to a third-party document production order pursuant to Article 878 CCP. Clearly, though, the Belgian

10 EU Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ([2014] O.J. L 349/1) is due to be transposed under Belgian law by 27 December 2016.

11 See, e.g., the case brought by the European Union against Kone, Otis, Schindler and ThyssenKrupp, as referred to in footnote 2, *supra*.

Competition Act does not provide for a statutory basis for granting access to its case files to plaintiffs in private damages actions. On the contrary, as a general rule, even complainants before the BCA have no right of access to the case file (Article IV.45(2) CEL) and, in the past, courts have denied plaintiffs the right to access the BCA case file to support the redress of subjective rights (versus challenges to the legality of BCA decisions).[12] In any event, the Belgian Competition Act precludes access to leniency statements and accompanying evidence 'by any means' (Article IV.46(3) CEL). It is equally unclear whether foreign competition authorities, including the European Commission, could qualify as third parties for the purpose of the CCP rules on document production. Belgian courts may still make use of Article 15(1) of EU Regulation 1/2003 to request information from the European Commission and parties can also petition the Commission directly on the basis of the EU transparency regulation.[13] EU Regulation 1206/2001 also governs inter-jurisdictional cooperation in relation to the cross-border gathering of evidence in civil matters.[14]

Finally, courts may also allow a party to produce witnesses or order *ex officio* that certain witnesses be heard (Article 915 et seq. CCP). They may equally receive affidavits and hear the authors thereof (Article 961 CCP). However, the cross-examination of witnesses by the parties is not allowed.

VI USE OF EXPERTS

It is common for the parties and the courts to appoint experts in complex litigations, including for the quantification of damages in tort cases. Parties can produce their own expert reports or, alternatively, courts can appoint an expert either with the consent of the parties or *ex officio* (Article 962 et seq. CCP). Courts can equally refuse the appointment of an expert and that decision cannot be appealed on its own (Article 963 CCP); however, the Supreme Court has found that judges cannot refuse to appoint an expert when presented with elements 'rendering plausible the facts put forward in support of the request' for the appointment of one.[15] The mission of the court-appointed expert is typically laid down in an interlocutory order and, while not legally binding, the report then produced by the expert carries significant evidentiary value. The cost of the expertise is borne by the parties, which are equally supposed to cooperate with the expert under threat of adverse inference.

12 See, by extension, Brussels Court of Appeal, *bpost/BCA*, 30 April 2015, *TBM-RCB*, pp. 231–232.

13 See, respectively: Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty [2003] O.J. L 1/1; and Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] O.J. L 145/43.

14 Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] O.J. L 174/1.

15 Cass., 15 June 2012, *J.L.M.B.*, 2013, p. 342.

Battles of experts or disputes over the methodology and outcome of an expert report are not uncommon. This was the case, for example, in the *Proximus/Base/Mobistar* matter that was settled in 2015 (see Section I, *supra*), after experts quantified the harm suffered by Base and Mobistar up to €1.8 billion. In the *Elevators/Escalators* cases (see also Section I, *supra*), the Brussels Commercial Court refused to appoint an expert and rather found that both the European Commission and the Belgian authorities had failed to establish their respective harm with sufficient certainty to justify ordering a costly and time-consuming expertise.

VII CLASS ACTIONS

There are three types of representative actions available under Belgian law: (1) cease-and-desist actions brought by trade associations or consumer organisations in defence of the collective interests for which they have been instituted (Article XVII.7 CEL); (2) injunctions for the cross-border protection of consumer interests brought by consumer associations qualified by the European Commission or by the national competent authorities of EU Member States (Article XVII.26 et seq. CEL); and (3) collective recovery actions (Article XVII.36 CEL).

Since 1 September 2014, consumer organisations and other associations authorised by decree may indeed introduce collective recovery actions on behalf of a group for causes occurring as from that date. The admissibility of such actions is conditioned upon the fulfilment of the following criteria throughout the whole duration of the proceedings: (1) the cause of action must arise from a breach of contractual or statutory obligations, including a breach of Belgian competition rules; (2) the plaintiff must be a consumer organisation or an association duly authorised by ministerial decree, which is found suitable to act as representative in the case at hand;[16] and (3) recourse to a collective recovery action must be deemed more efficient than an ordinary action.

The collective recovery procedure starts with a preliminary phase aimed to assess the admissibility of the action, including the suitability of the representative plaintiff, and to decide on the opt-in or opt-out character of the procedure. The admissibility decision therefore defines the modalities for joining the action and also sets a deadline within which the parties are invited to negotiate a settlement. This negotiation phase is mandatory so that a court would only hear and decide the case upon expiry of the period in question and in the absence of a settlement agreement. If approved by the court, the settlement agreement is endowed with *res judicata* but does not entail an acknowledgment of guilt or liability by the defendant. At the end of the procedure, an official liquidator is appointed by the court with the mission to allocate the proceeds to the victims of the practices in question, knowing that only the court is entitled to decide on the allocation of any remaining sum, including the reimbursement thereof to the defendant, if appropriate.

16 The Ministry of Justice is known to be currently assessing the appropriateness of broadening the scope of those legal persons entitled to bring a collective recovery action.

VIII CALCULATING DAMAGES

Under Belgian tort law, damages are purely compensatory in nature. As a result, there is no possibility for courts to award multiple or punitive damages. However, damages must restore the *status quo ante*, which means that the entire harm suffered by the victim needs to be compensated, including net losses but also lost profits (including for the future if they are sufficiently certain), and there is no maximum limit to the amount of damages that may be awarded. Upon request, damage awards can also include (simple, not compound) interests.

In terms of burden of proof, plaintiffs are free to rely on any method to establish the appropriate amount of damages, and so are the courts in deciding upon the adequate compensation. Although not binding, expert reports are heavily relied upon by courts in tort cases. Ultimately, if courts are unable to determine accurately the size of appropriate damages, they may award compensation *ex aequo et bono* (i.e., in a discretionary manner based on a good faith assessment).

IX PASS-ON DEFENCES

Although there is no known precedent on this issue, Belgian tort law appears to allow for a passing-on defence because: (1) the strictly compensatory nature of damages implies that damages should restore the plaintiff to the situation in which it would have been absent the fault; (2) as a result, a plaintiff can be compensated for the whole of but not more than the harm actually suffered; and (3) if it can be demonstrated that the overcharge allegedly supported by the plaintiff was effectively passed on along the supply chain, the compensation to which that plaintiff would be entitled would need to be discounted by the 'passed on' amount.

In the extreme case where the overcharge could be demonstrated to have been fully passed on, a court might conclude that no personal harm remains and then dismiss the action. In contrast, the plaintiff would need to demonstrate that at least some harm could not be passed on (e.g., lost profits). The defendant bears the burden of putting forward convincing evidence that the alleged overcharge (i.e., harm) was effectively passed on to the plaintiff's customers, at least in part. Ultimately, as noted, if courts are unable to assess accurately the amount of damages a plaintiff could be entitled to on the basis of any specific method, they are allowed to award compensation *ex aequo et bono* (i.e., in a discretionary manner, taking into account all arguments put forward by the parties with respect to the scope of the harm suffered).

X FOLLOW-ON LITIGATION

At this point, Belgian law does not provide for specific limitations on or immunities from private antitrust litigation following a finding of infringement by the BCA or any other national competition authority or the European Commission. Generally, though, there is no contemporary precedent of successful follow-on damages actions in Belgium, leaving aside settlement agreements that are rarely publicised.

XI PRIVILEGES

The protection of outside counsel privilege is widely recognised in Belgium and generally extends to attorney–client correspondence, attorney work product and joint work product defence, even outside the framework of judicial proceedings. Belgian law does not provide for a specific statutory basis for legal privilege, which is generally founded on Articles 6 and 8 of the European Convention of Human Rights (and, in the past, on Article 458 of the Belgian Criminal Code prohibiting the disclosure of 'secrets' by, for example, counsel).

Legal advice (including preparatory materials and associated correspondence) issued by in-house counsel who are members of the Belgian Institute for Company Lawyers (IJE-IBJ) also benefit from a protection equivalent to legal privilege (known as 'confidentiality') and therefore cannot be accepted as admissible evidence in private litigation or public enforcement procedures.[17]

Legal privilege is considered a matter of public policy in Belgium so that, in principle, the production of information or documents to public authorities in the framework of public enforcement procedures does not entail a loss of privilege. Nonetheless, parties are entitled to relinquish legal privilege for the benefit of their own defence in private litigations.

XII SETTLEMENT PROCEDURES

Parties can settle civil claims at any time either outside of any judicial proceedings or in the course of private antitrust litigations. Settlements are generally governed by Articles 2044 to 2058 of the Belgian Civil Code, which expressly provide that settlements: (1) can terminate existing disputes and/or prevent future claims; (2) must be made in writing; (3) can entail renunciations to rights or claims but only in relation to the dispute that they aim to terminate (including, as the case may be, all disputes between the parties); and (4) are *res judicata* between the signatories thereof and may only be rescinded for deceit or duress, or in case the cause thereof is or becomes void.

As noted, collective recovery actions (as discussed in Section VII, *supra*) also provide for a mandatory period during which parties must attempt to reach a settlement, which is then homologated by the court while not entailing any acknowledgment of guilt or liability. This is in stark contrast with settlements in administrative proceedings before the BCA, which require a recognition of infringement (of Articles 101 or 102 TFEU and/or their domestic equivalent) and liability.

As noted in Section I, *supra*, 2015 was marked by the first largely publicised settlement in a prominent follow-on damages case brought by Base and Mobistar against telecommunications incumbent Proximus. Settlements are known to occur very regularly, although most of the time they are confidential and aim to avoid going to

17 See Article 5 of the 2001 In-house Counsel Act, as confirmed by the Brussels Court of Appeal, 5 March 2013, case 2011/MR/3, *Belgacom* and upheld by the Belgian Supreme Court in Cass., *Auditorate/Belgacom-HG*, 22 January 2015 (Case C.13.0532.F).

court. Over the past five years, it has become commonplace for parties found guilty of participation in a cartel, in particular, to face more or less articulated damages claims (or threats thereof).

XIII ARBITRATION

Any patrimonial interests (i.e., monetary claims) may be submitted to arbitration either as a result of a pre-existing contractual arrangement or at the initiative of the parties. The public policy character of competition law does not prevent disputes involving a breach thereof to be submitted to arbitration but may entail the nullity of an arbitration award that would have misapplied it. While governed by Articles 1676 to 1723 CCP, arbitration procedures are conventional in nature and the modalities thereof must be determined at the outset in an arbitration agreement. Once engaged, the arbitration procedure renders inadmissible any subsequent litigation for the same cause. Likewise, the arbitration award is binding and *res judicata* between the parties, though its forced execution is subject to prior judicial homologation.

In principle, private antitrust claims may also be submitted to judicial or voluntary third-party mediation, the outcome of which is then homologated by a court and judicially enforceable (see Articles 1724 to 1737 CCP). Similarly, prior to the filing of summons, parties may request a court to enter into conciliation proceedings (see Articles 731 to 733 CCP). If successful, the outcome of such proceedings is then recorded in minutes that constitute an enforceable authentic (but non-judicial) act.

XIV INDEMNIFICATION AND CONTRIBUTION

Plaintiffs in private antitrust litigations may request that multiple defendants be held jointly and severally liable for a breach of competition law and the ensuing payment of damages. Likewise, Belgian law provides for a mechanism of 'forced intervention' whereby plaintiffs or defendants can force third parties to take part in the proceedings so that the final judgment is binding upon them and they may be held jointly and severally liable for the payment of the damages awarded. In any event, joint and several liability cannot be presumed but must be expressly stipulated (Article 1202 BCC).

As is typically the case, joint and several liability under Belgian law entails that a creditor may pursue payment of its claim against any of the jointly and severally liable debtors, with the effect of freeing all debtors of claims by the creditor while enabling the paying debtor to claim contribution from the others for their share of liability, including interests (see, generally, Articles 1200 to 1216 BCC). At this point, Belgian law does not provide for any limitations on seeking indemnification or contribution from third parties, co-defendants and cross-defendants. Generally, though, if one jointly and severally liable debtor becomes insolvent, the resulting loss is shared by all other debtors, including the one that was called upon to pay the creditor in the first place (Article 1214 BCC).

XV FUTURE DEVELOPMENTS AND OUTLOOK

The rules governing private antitrust litigations in Belgium will be significantly altered by the transposition of EU Directive 2014/104, due in principle by 27 December 2016. The transposition process raises various challenges because some of the provisions of Directive 2014/104 depart from established tort law principles. This is notably the case for the (rebuttable) presumption that cartel infringements cause harm (Article 17(2)), which was expressly excluded in the *Elevators/Escalators* judgments at first instance (see Section I, *supra*). Though probably less problematic, limitations put to the joint and several liability of small and mid-sized enterprises and of immunity recipients in the framework of administrative proceedings (Article 11) will also entail a departure from established principles. The rules governing the disclosure of evidence will equally need to be adapted, in particular for the disclosure of evidence included in the BCA case files.

A reform of the Belgian Competition Act (Title IV CEL) is also contemplated in the course of 2016, though no significant impact on private antitrust litigations is expected but for a possible modification of the modalities governing the judicial review of the use of evidence obtained during BCA inspections. A broadening of the scope *ratione personae* of collective recovery actions is said to be considered by the Minister of Justice but no announcement has been made and it is likely that any such initiative will be deferred until the first assessment of the system planned for 2017. Finally, the appeals pending in the *Elevators/Escalators* case should provide further interesting guidance in relation to follow-on damages actions, though it is possible that no judgment will be issued before 2017 either.

Chapter 7

BRAZIL

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

From the classic judicial controversy over the validity and extension of a non-compete clause at the beginning of the twentieth century to the ground-breaking decisions on monopoly rights and market closure upheld by the Supreme Court in the 1950s, the Brazilian Judiciary Branch has always been extraordinarily active in antitrust litigation. Competition violations may take many forms and the Brazilian courts have dealt with practically every type thereof as they became progressively more complex. Claims involving non-compete clauses and refusals to deal, exclusivity agreements, abusive conduct and predatory practices are routinely found in courts – even more so after the enactment of the Brazilian Consumer Code (Federal Law 8,078/90) and, more recently, Brazil's new Competition Law (Federal Law 12,529/2011).

In more recent years, as the Brazilian Antitrust Authority (CADE) has gained visibility – and its significant investment in competition advocacy has started to mature – Brazil has also experienced a surge of class actions aimed at redressing collective damages arising out of antitrust violations to the market as a whole, most of them filed by the state and federal branches of the Prosecution Office. Although Brazil does not have the same powerful tools and incentives for collective dispute as other countries,[2] CADE has been searching for new and more effective ways to encourage victims to claim damages as a group, in order to amplify the deterrent effect of the Agency's decisions. For example, in its *Industrial Gas* cartel decision, CADE openly encouraged associations and other

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2 For instance, Brazil does not have a 'triple damages rule' for antitrust private litigation.

injured parties to file collective claims against the defendants.[3] CADE has also decided to take a more active role in individual disputes, joining private lawsuits as *amicus curiae*, to ensure its view of the Competition Law will prevail also in the courts.

It is clear that CADE plays a prominent role in the defence of competition – such that Federal Law 12529/11 even refers to the Brazilian Antitrust Authority – CADE and the Economic Supervision Office of the Ministry of Finance (SEAE) as the sole components of the Brazilian competition system. However, CADE's preventive and repressive functions are geared towards the protection of collective (trans-individual) rights.[4] CADE is not interested in conducts with private repercussions only – CADE aims to protect competition, not competitors.[5] Similarly, since the administrative activity takes into consideration the potential effects of market conduct, CADE is also not concerned with the measurement and quantification of any actual damages that may have been caused by the offender.[6] In fact, administrative sanctions have the immediate goal of punishing offenders – and that is it. Compensation for private damages for specific companies or consumers must be addressed through private actions, whether class or individual actions.

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3 For example, in Administrative Proceeding No. 08012.009888/2003-70, after rendering judgment against the companies involved in the gas cartel, CADE determined that a copy of the judgment should be delivered to several trade confederations, federations and associations for any interested parties to be notified of the possibility of filing claims for damages.

4 CADE prevents anticompetitive behaviour by analysing mergers and assessing their impact on the market. On the other hand, CADE represses anticompetitive behaviour by monitoring, investigating and punishing cartels or abuse of market power.

5 Administrative Proceeding No. 08000.000146/96-55, Reporting Commissioner Ruy Santacruz. See also: Administrative Proceeding No. 08000.015370/97-13, Reporting Commissioner Arthur Barrionuevo Filho; Administrative Proceeding No. 08012.001192/98-95, Reporting Commissioner Marcelo Calliari; Administrative Proceeding No. 08000.000826/97-41, Reporting Commissioner João Bosco Leopoldino da Fonseca; Administrative Proceeding No. 139/1993, Reporting Commissioner Mércio Felsky; Administrative Proceeding No. 0142/1993, Reporting Commissioner Mércio Felsky; Administrative Proceeding No. 08000.004544/1997-31, Reporting Commissioner Thompson Andrade; Administrative Proceeding No. 08012.009882/98-47, Reporting Commissioner Celso Fernandes Campilongo; Administrative Proceeding No. 08012.004363/2000-89, Reporting Commissioner Carlos Emmanuel Joppert Ragazzo; Administrative Proceeding No. 08012.002417/2008-45; Reporting Commissioner Carlos Emmanuel Joppert Ragazzo.

6 CADE only requires a 'high risk that effects will be produced, once the conduct is practiced' (CADE, Administrative Proceeding No. 08012.007042/2001-33, Rel. Cons. Luiz Fernando Schuartz). 'Antitrust Law expressly states in its art. 20, that it is not necessary to prove actual effects, but only the potential effects' (see Administrative Proceeding No. 08012.004086/2000-21, Cons. Roberto Pfeiffer).

Under Brazilian law, victims are allowed to go to court even if CADE has expressly decided that no violation has occurred[7] – given that courts are not bound by CADE's judgment and are therefore free to take a different view of the matter.[8]

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Article 5 (XXIV) of the Brazilian Federal Constitution establishes as a fundamental guarantee that any injury or threat to a right may be referred to the Judiciary Branch. This is the basic foundation for the prevention and redress of any and all damages under Brazilian law. Moreover, Federal Law 10,406/2002 – the Brazilian Civil Code (CC) – sets out the right to obtain compensation for any damages suffered due to wrongful or unlawful behaviour. This general torts rule is applicable to virtually all disputes involving competition issues. Before the enactment of the Competition Law, the CC was at the heart of practically every claim involving unfair competition, abuse of economic power and contractual restrictions in general and, to this day, the CC continues to regulate damages, causation and liability – and the breadth and versatility of its rules allows its enduring applicability to competition issues. In addition, Article 47 of Federal Law 12,529/11 establishes that any injured individuals may file suit to cease or to seek compensation for any violation of the economic order, on their own behalf or by means of their representatives or substitutes, regardless of any prior decision or authorisation from CADE – confirming, once more, the parties' right to access the courts and to obtain civil remedies when there is an unlawful act, damage and causation. The statute of limitations on these lawsuits is of three years for injured parties in general,[9] and five years if the victim is a consumer,[10] counted from the date the damage occurred.[11]

Together with the full compensation of damages, victims are allowed to file for injunctions to prevent or stop the anticompetitive behaviour. Brazilian courts, for example, may impose daily, weekly or monthly fines on the offender, in order to seek mandatory compliance therefrom. Courts structure fines according to the situation, and have broad discretion to raise their amount, if compliance is not immediate. Fines may be accompanied by any other measure required to stop the antitrust violation.[12] For example, courts have the power to suspend contractual clauses, restore unlawfully terminated agreements and impose obligations to negotiate. In extreme cases, courts may

7 As an example, the Economic Law Office – a former part of Brazilian competition system, now replaced by CADE – opened investigations questioning the legality of the radius clause on shopping centres, and CADE has considered such clauses illegal in certain situations. The Brazilian courts, however, have consistently upheld the validity of such same clauses.

8 Naturally, even if judges are not bound by CADE's opinion, its authority as the antitrust agency will lend considerable weight to its influence on the judicial decision.

9 Article 206(3)(V) of the CC.

10 Article 27 of the Brazilian Consumer Protection Code (CDC).

11 Every case of damage (i.e., multiple purchases from a cartel) is counted individually.

12 Article 497 of the Brazilian New Code of Civil Procedure (NCPC).

even intervene directly in the defendant's business.[13] In these situations, intervention must address the crisis in a proportional and appropriate fashion, such as appointment of a court official to supervise the defendant's activities or temporarily replace its managers. In any event, the judicial intervention must not exceed 180 days.

III EXTRATERRITORIALITY

Under Article 88 of the CPC, Brazilian courts have jurisdiction over any dispute[14] (1) in which the defendant, regardless of nationality, has registered office or a subsidiary in Brazil; (2) in which the obligation shall be performed in Brazil; or (3) that has arisen from a fact or act that took place in Brazil. The lawsuit may be filed in Brazil in the presence of any of the above conditions, regardless of the nationality of the parties.[15] If there is more than one defendant, as long as one is domiciled in Brazil, all the others may be jointly sued in Brazil. Foreign plaintiffs, however, must post a deposit in court for the full amount of the court and attorneys' fees in order to litigate in Brazil.[16] The Brazilian Competition Law is only applicable to acts perpetrated in Brazil or that may produce effects in Brazil.[17] Therefore, competition violations perpetrated abroad by Brazilian companies that produce no effects in Brazil may still be litigated before Brazilian courts but will be governed by foreign law. Ongoing disputes abroad do not prevent the filing of the same suit in Brazil.[18] If final judgment has been rendered in a foreign court, it may be enforced in Brazil upon prior submission to the Superior Court of Justice for homologation (*exequatur*).[19]

IV STANDING

The injured party or the successors thereof may file private antitrust lawsuits in Brazil. Collective lawsuits (class actions) however may only be filed by:

a the Prosecution Office. The role of the Prosecution Office has gained visibility, as more and more class actions are filed to seek damages arising out of anticompetitive

13 Article 102 of Federal Law 12,529/2011.

14 Article 21 of the NCPC.

15 See Federal Supreme Court (STF), SEC No. 6684/EU, Reporting Judge Justice Sepulveda Pertence, Full court, decision rendered on 19 August 2004, published in the Court Register (DJ) on 8 October 2004; CR No. 10686 AgR/EU, Reporting Judge Justice Mauricio Correa.

16 Article 83 of the CPC. The bond must be equivalent to 20 per cent of the amount in dispute (which means, as a rule, the amount requested for the award, if it is a net value).

17 Article 2 of Federal Law 12,529/11.

18 Article 24 of the NCPC sets forth that international treaties and bilateral agreements may allow courts to recognise international *lis pendens*.

19 The Superior Court of Justice (STJ) will not analyse the merits of the foreign judgment, but determine whether it does not breach any provision of public policy or social interest.

conduct. In some cases, the Prosecution Office has filed a lawsuit even before CADE has reached a final decision. More lawsuits are expected as prosecutors increase their cooperation with CADE;

b the union, states, municipalities and the federal district;

c direct and indirect government entities and agencies; or

d associations existing for at least one year that include the defence of interests and rights of their members in their purpose.[20]

However, the Supreme Court has decided that only members that have expressly authorised the filing of a class action will be able to enforce the relevant decision.[21] This Supreme Court precedent goes against the Superior Court of Justice precedents on the same matter and limited the scope of class actions for damages. Some precedents have recognised that in addition to the above-mentioned requirements, courts should also evaluate whether the association adequately provides representation for its members (i.e., such associations must demonstrate their ability to properly conduct the defence of the respective collective interest in court by revealing their technical expertise and financial capability to handle the class action, among others). Finally, certain decisions require the association to show that it is comprised of at least an appropriate (minimum) number of alleged victims.

Private companies or individuals are not authorised to file class actions on behalf of the parties injured by anticompetitive behaviour. Nevertheless, certain private actions based on competition issues may in fact indirectly result in some form of collective protection, such as when parties are not only seeking damages, but also filing for an injunction to immediately cease the antitrust violation (for instance, to cease misleading advertisement or any abusive or discriminating conduct).

It is important to point out that CADE usually does not intervene in private lawsuits and courts also generally see no reason to call for CADE's intervention.[22] Also, even when called in court as an interested third party or *amicus curiae*, CADE does not address matters that have never been or that are currently under its investigation.[23]

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20 Recently established associations may file class actions, provided they prove the addressed damage has extraordinary social interest.

21 Appeal to the Federal Supreme Court 573323, Reporting Judge Justice Ricardo Lewandowski.

22 'CADE should not intervene in lawsuits which, in fact, aim to determine the existence of damages or abuse that interfere in private contracts, lawsuits which do not aim for the correction of the market as a whole, but only damages resulting from the practice of conducts which might be forbidden under Law 12,529/11' (Court of Appeals of the State of São Paulo (TJSP), Interlocutory Appeal No. 0156468-75.2012.8.26.0000, Reporting Appellate Judge Manoel Justino Bezerra Filho)

23 See Administrative Proceeding No. 08012.005669/2002-31 in which CADE decided that it should not take stand on 'a lawsuit with the same object as an investigation pending decision […] lest we would see a situation of potential non-decisiveness'.

V THE PROCESS OF DISCOVERY

The CPC deems all legal means of evidence admissible, as well as those that are morally legitimate (i.e., evidence that does not unreasonably violate, for example, the intimacy or privacy of the parties).[24] Wiretapping is generally considered illegal, whether the recording was conducted by a third party or by one of the parties to the conversation[25] – although occasionally the courts will admit the recording as evidence, if it is necessary to prove the defendant is not guilty in a criminal trial.[26]

Under Brazilian civil procedure law, parties produce their evidence in the course of the lawsuit – the procedure does not include any phase similar to a pretrial discovery. However, the recently enacted 'new' Civil Procedure Code (Federal Law 13,105/2015) allows for a widespread use of anticipated production of evidence, in cases in which there is no risk involved, but the evidence may help the parties reach a settlement or in cases when the production of the evidence may prevent a lawsuit altogether. This new provision may turn the anticipated production of evidence into a 'Brazilian discovery phase' through which potential plaintiffs would assess the viability of their claims.

There is no legal hierarchy as to the different types of evidence, so courts are free to weigh them as they see fit.[27] The burden of proof falls on the plaintiff as a general rule.[28] If, however, owing to the peculiarities of the case, the burden of proof is deemed excessively difficult for the party the judge may shift or redistribute it;[29] parties are also allowed to agree – before the lawsuit or during the lawsuit – on the distribution of the burden of proof.[30] Litigation involving consumers may shift the burden to the defendant, if the plaintiff is deemed more vulnerable (i.e., when there is a significant asymmetry of information or economic resources between the parties). The parties must declare early on in the lawsuit the types of evidence they intend to produce or to obtain through discovery[31] – failure to comply with this rule may result in the loss of the right to produce the evidence, as judges do not usually request its production *ex officio*.[32] The

24 Article 369 of the NCPC.

25 STJ-RT 743/208; RF 342/307; RT 620/151; 789/293; 815/242; 828/250; JTJ 143/199; 916/221.

26 STF, HC No. 74.678, Reporting Judge Justice Moreira Alves.

27 Article 371 of the NCPC.

28 Article 373(I) of the NCPC.

29 Article 373, Section 1, as long as the new distribution does not result in an impossible or excessively difficult situation for the other party.

30 Article 373, Section 3, as long as there is no public interest involved (undisposable rights) and as long as the distribution does not result in an impossible or excessively difficult situation for one of the parties.

31 Plaintiffs must specify the evidence they want to produce when the defendant files the claim. Defendants must specify it in their defences.

32 Although exceptionally the judge may determine the production of evidence if deemed necessary to clarify potential doubts or if it is indispensable for the proper trial of the dispute.

most common types of evidence in Brazil, expressly regulated in the NCPC, consist of the testimony of parties and witnesses, documental evidence and expert examination (see Section VI, *infra*).

i Deposition and testimony of witnesses

The court may summon the parties at any time to question them regarding the facts of the case.[33] Each party is also entitled to motion for the other party to testify[34] (however, they cannot motion for their own deposition in court). The main goal of the deposition is to get the confession of the party – that is, the admission of facts that are detrimental to their cause.[35] Therefore, when summoned to depose, parties cannot fail to show up in court, or refuse to answer the judge's or the other party's questions: if they do, without proper and justified cause, the judge will treat such behaviour as an admission of the truth of the claims made by the other party.[36] The parties, however, are not obliged to answer questions regarding criminal or shameful facts; facts that may endanger them or their relatives; or facts that they are bound to maintain confidential.[37]

Parties also have the right to summon up to ten witnesses – limited to three for each of the facts that the party intends to prove.[38] Witnesses may be challenged for impediment (e.g., kinship) or suspicion (close friendship, or strong animosity proven through objective fact).[39] Court mediates the testimony, as parties are not allowed to directly question the witness. Witnesses are not obliged to testify on facts that may endanger them or their relatives; or on facts that they are bound to maintain confidential.[40]

ii Documents

Parties may produce any document they possess in court. According to Brazilian law, 'document' means any material representation capable of reconstituting or preserving an image, sound, situation, idea, wish, etc. Therefore, contracts, declarations, statements, business records, photographs, digital files (emails) and sound recordings are considered documents. There are several rules governing the admissibility and validity of each different type of document, but, as a general rule, parties must produce the original document in court. The law establishes, however, that courts may accept copies, if properly certified by a public notary[41] or if the lawyer assumes responsibility for the accuracy of the copy.[42] If the document is not in possession of the party, courts may be asked to reclaim such

33 Article 385 of the NCPC.
34 Article 385 of the NCPC.
35 Article 389 of the NCPC.
36 Article 386 of the NCPC.
37 Article 388 of the NCPC.
38 Article 357(6) of the NCPC.
39 Article 447 of the NCPC.
40 Article 448 of the NCPC.
41 Article 425 of the NCPC.
42 Courts may also allow regular copies, as long as the opposing party does not challenge the document.

documents from the opposing party or any third party.[43] In order to do so, however, the requesting party must describe the document as accurately as possible and inform the purpose of the evidence. The party must also demonstrate reasonable belief that the document exists and is in possession of the other party. As a result, Brazilian law does not leave much room for 'fishing expeditions'. Refusal to surrender the document may result in the penalty of confession or the search and seizure of the document.[44] Parties are nonetheless allowed to refuse to provide documents that may subject them to the risk of a criminal action[45] – a very important limitation, especially when one is dealing with cartel cases. Any document produced in the lawsuit may be challenged for its authenticity. Documents produced in previous lawsuits or administrative proceedings – for example, those provided to CADE or any other regulatory agency – are also admissible under Brazilian case law as 'borrowed evidence'. The same applies to documents produced in foreign legal or administrative proceedings.[46] It is noteworthy that administrative proceedings before CADE are sometimes confidential, meaning that third parties – including victims – may not have access to the evidence produced.[47] In the *Industrial Gas* cartel case, for example, part of the evidence used to convict some of the defendants is confidential and, therefore, would not be readily available to potential plaintiffs. Note, however, that CADE will not allow third parties to access confidential documents while an investigation is pending and will actively litigate in court to prevent such requests from being granted.

Courts may exceptionally admit witnesses' testimonies or the seizure of documents as a preliminary measure if the evidence is deemed helpful for a settlement or if the previous knowledge of the facts may justify or prevent the filing of a lawsuit.[48] Witness depositions may also be anticipated if there is a risk of the witness defaulting (e.g., leaving the country) or dying.[49]

VI USE OF EXPERTS

If the dispute requires the assessment of technical issues, the judge will summon an expert in the field to perform an examination, either *ex officio* or upon the parties'

43 Article 396 of the NCPC.

44 Articles 400 and 403 of the NCPC.

45 Article 404 of the NCPC.

46 They must, however, first be duly translated into Portuguese.

47 See Opinion No. 206/2010 from Office of the General Counsel to CADE: 'This Attorney believes that, as a rule, anyone may inquire or obtain copies of records of an administrative proceeding in progress with CADE, regardless of the demonstration of a private or collective interest to be defended. It is nevertheless worth mentioning that once confidentiality is granted to the files of an administrative proceeding, or to certain data, information, communication, objects or documents, it constitutes an insurmountable barrier for third parties to consult said documents or obtain copies thereof.'

48 Article 381 of the NCPC.

49 Article 381 of the NCPC.

motion.[50] Antitrust issues usually involve the opinion of an economist or accountant, but depending on the relevant market, product or infrastructure involved in the dispute, court may summon engineers, physicians or any other expert in the related field (expert examination may involve multiple fields[51]). The court will determine the scope of the technical opinion and parties are allowed to ask questions they want the expert to address in his or her examination. In order to perform the examination, the expert may use any means available, including questioning witnesses and requesting documents held by the parties. The expert may therefore request books, records and other economic information of the parties to calculate, for example, lost profits or illegal surcharges applied to goods or services. The parties are allowed to hire their own experts to monitor and assess the work of the court expert. Though the court is not obligated to follow the opinion of the expert, the examination does have exceptional weight. In addition to the court-ordered expert examination, the parties are allowed to introduce their own independent analyses, economic studies or legal opinions of jurists and authorities in order to advance their case. The courts tend to be open to these contributions, as long as they comply with due process of law – in other words, as long as they are not being used to surprise the other party or to hinder the progress of the lawsuit. CADE's decision regarding an antitrust violation will be treated as a document, as it was not produced by a court expert. Because of the authority and knowledge of the antitrust agency on the matter, however, it will have undeniable weight with the court.

VII CLASS ACTIONS

According to Brazilian law, class actions may only be filed by the entities or associations determined by law and cannot be brought by a single private party or a corporation.[52]

Class actions must involve collective rights; the Brazilian system identifies three types of 'collective' rights to this end:

a diffuse rights, which are considered to be indivisible, belonging to a collectivity comprised of indeterminate people (i.e., indeterminability of the subjects, there being no individuation) linked by factual circumstances;

b that belong to a group, category or class of indeterminate, but determinable, people, linked to each other, or to the adversary party, by a standard legal relationship; and

c homogeneous individual interests or rights are individual rights arising from a common origin, which is usually the case with class actions aimed to redress antitrust damages.

Courts may grant provisional remedies in class actions so long as there is *prima facie* evidence on the strength of the claim and, cumulatively, there is risk of extraordinary damages resulting from procedural delay. As sound as the lawsuit may be, courts generally

50 Article 464 of the NCPC.

51 Article 475 of the NCPC.

52 Associations are excluded, however.

understand that the mere delay of the lawsuit poses no risk to claims for monetary damages. For that reason, it is very unlikely that courts will grant an injunction for a quicker payment of damages. If the class action is successful, it will benefit the whole class. A judgment against the collective plaintiff, however, will not harm the individual rights of the members of the class – who may therefore still file their own private claims against the defendant.[53] The progress of a successful class action aimed to redress antitrust injuries is divided into two phases: first, the court establishes the competition violation and the liability of the defendant, rendering a collective order;[54] next, each injured member of the class must act individually to claim its own damages.[55] However, if the individual damages claimed are not deemed consistent with the estimated scope and seriousness of the antitrust violation the court may order a fine be paid by the defendant to the Fund for the Protection of Collective Rights.[56]

VIII CALCULATING DAMAGES

Victims may seek damages for all types of damages under Brazilian law, which may be either pecuniary losses (any type of pecuniary damages, including loss of profits and loss of business) or pain and suffering (i.e., injury to the reputation or good standing of the victim). Such damages are not to be confused with the punitive damages available in the United States, for instance, as the purpose thereof is not to penalise the offender.

Brazilian law does not provide a specific or mandatory form of calculating material antitrust damages. Therefore, disputes in Brazil will face the same challenges already found by other jurisdictions, mainly, the proper form of evaluating damages arising out of an anticompetitive behaviour and, more specifically, by a cartel. Furthermore, it seems that a solution will indeed be assessed on a case-by-case basis, according to the elements available to the court.

On the other hand, in order to be entitled to pain and suffering in an antitrust case, the victim must effectively prove an actual injury to reputation. There is no strong set of judicial precedents for pain-and-suffering in cases involving private antitrust litigation – although there are usually pecuniary losses involved, and with the exception of disparagement cases, the reputation or good standing of the victim is seldom tainted by a competition violation – but ordinarily the awards in such cases do not exceed 500 times the Brazilian minimum salary.[57]

In recent years, certain class actions – especially those filed by public prosecutors – have claimed compensation for 'social' damages caused by the offender (i.e., damage to the entire market). Though such claims generally work as disguised claims for punitive damages, they have been accepted by courts in certain circumstances, mainly in cases

53 Article 103 (I) of the CDC.

54 Article 95 of the CDC.

55 Article 97 of the CDC.

56 Article 100 of the CDC.

57 Approximately 440,000 reais.

involving labour claims or mass torts.[58] In individual actions, the award also includes the payment of attorneys' fees (to be collected by the lawyers, not the parties[59]), usually between 10 and 20 per cent of the amount under dispute. Defendants may also be subject to the payment of attorneys' fees if a private party files the class action.[60]

IX PASS-ON DEFENCES

Brazilian law allows defendants to argue pass-on defences (i.e., the claim that the plaintiff passed on its losses to third parties or to end consumers). The CC expressly sets out that indemnification must be measured according 'to the extent of the damage',[61] which means that it must not exceed what was effectively lost by the victim. Therefore, there is a strong body of case law stating that victims cannot claim damages for losses that have already been paid or covered by someone else (such as by an insurer or a third party), since this would not be compensation, but truly improper and unjustified enrichment. The burden of proof that the increased price was not passed on falls on the plaintiff, which in fact has better conditions to demonstrate this fact in court.

Furthermore, the courts are paying increased attention to the victim's duty to mitigate the damage. It is unclear how this duty would apply in antitrust disputes. In addition, it is possible that the same defendant faces multiple lawsuits related to the same alleged cartel – for example, a lawsuit filed by a downstream buyer and a different lawsuit filed by end consumers. In this case, courts must try to reach a coherent solution, so as to avoid *bis in idem* and ensure that each alleged victim will recover the exact extent of damages experienced.

X FOLLOW-ON LITIGATION

Only a small fraction of Brazilian private antitrust litigation actually depends on CADE's decisions. Each dispute is litigated directly by the parties in court, even if in some disputes there is also an underlying collective issue.[62] Companies usually do not wait

58 The 5th Regional Federal Appellate Court upheld a judgment against companies involved in a fuel cartel for damages caused to their consumers. Court ordered the companies to cease the anticompetitive behaviour and sentenced the companies to the payment of social damages of 1 million reais as compensation for the harm caused to society. See Appeal No. 5021730-87.2011.404.7100/RS, Reporting Judge Justice Fernando Quadros da Silva, decision rendered on 27 June 2012. See also Appeal to the Superior Court of Justice No. 1.057.274, Reporting Judge Justice Eliana Calmon.

59 In the event that the plaintiff is the losing party, the plaintiff must pay attorneys' fees to the defendant.

60 See Appeal to the Superior Court of Justice No. 200600937910, Reporting Judge Justice Luiz Fux.

61 Article 944.

62 See precedents: Appeal No. 70018077529 – Court of Appeals of the State of Rio Grande do Sul (TJRS); Appeal No. 990.10.279201-3 – Court of Appeals of the State of São Paulo

for CADE or even for its regulatory agencies to take action over matters affecting their businesses mainly because (1) as previously mentioned, under Brazilian law victims are not obliged to wait for an administrative decision to seek relief in court; and (2) the statute of limitations for damages is relatively short (three or five years) and may have already passed when CADE's investigation is over.[63] As a result, follow-on litigation is usually not a relevant issue for companies and entrepreneurs. As class actions for damages have caused consumers to take a more prominent role in the system,[64] however, more and more associations (and sometimes even the Prosecution Office) are turning to CADE for information and guidance regarding collective antitrust violations.

That said, there are virtually no limitations regarding follow-on litigation in Brazilian law: CADE's decision on whether to convict or acquit a defendant does not prevent private antitrust litigation. The payment of administrative fines does not release the defendant from repairing the damages arising out of the antitrust behaviour. An administrative conviction, however, may foster private antitrust ligation, since it may make it easier, faster and less costly for collective plaintiffs to demonstrate the liability

(TJSP); Ordinary Action No. 002406984815-8 – 11th Civil Chamber of Belo Horizonte; Appeal No. 1.0702.02.002684-6/001 – TJMG; Appeal No. 2.0000.00.514885-2/000 – Court of Appeals of the State of Minas Gerais (TJMG); Appeal No. 1184536-0/4 – Court of Appeals of the State of São Paulo (TJSP); Appeal No. 1057638-0/6 – Court of Appeals of the State of São Paulo (TJSP); Appeal No. 70033651423 – Court of Appeals of the State of Rio Grande do Sul (TJRS).

63 Parties may extend the statute of limitations period by formally notifying the defendant in court.

64 The State Prosecution Office of São Paulo has recently filed a lawsuit against companies and individuals allegedly involved in the subway cartel claiming 2.5 billion reais damages in compensation for pain and suffering and for the losses in contracts involving 98 trains. The State Prosecution Office of Rio Grande do Norte has also filed a lawsuit against companies that allegedly participated in a cement cartel See also the following precedents Appeal to the Superior Court of Justice No. 677.585/RS – Superior Court of Justice (Reporting Judge Justice Luiz Fux, Full court, decision rendered on 6 December 2005); Appeal to the Superior Court of Justice No. 1.181.643-RS – Superior Court of Justice (Reporting Judge Justice Herman Benjamin, Full court, decision rendered on 1 March 2011); Class Action No. 7099345-90.2009.8.13.0024 – 28 Civil Court of Belo Horizonte; Class Action No. 053/1.03.0002071-0 – Court of Appeals of the State of Rio Grande do Sul (TJRS); Class Action No. 027/1.05.0004158-2 – Court of Appeals of the State of Rio Grande do Sul (TJRS); Class Action No. 032/1.03.0005173-1 – Court of Appeals of the State of Rio Grande do Sul (TJRS); Class Action No. 0000233-25.2011.4.03.6100 – Court of Appeals of the State of São Paulo (TJSP); Class Action No. 044/1.06. 0002731-1 – Court of Appeals of the State of Rio Grande do Sul (TJRS); Class Action No. 0029912-22.2001.403.6100 – 14th Civil Court of São Paulo; Class Action No. 2008.71.07.001547-0– TRF4; Class Action No. 2001.70.01.008206-8 – TRF4; Class Action No. 2002.72.07.000694-3 – TRF4; Class Action No. 2002.61.17.000769-6 – TRF3; and Class Action No. 2003.72.05.006266-5 – TRF4.

of the defendant and the damages caused to the market in a civil court.[65] Leniency agreements or cease-and-desist agreements entered into by a defendant may involve some sort of admission regarding the antitrust behaviour or the facts underlying the investigation. Should the defendant plead guilty for the purposes of such agreements, the defendant will not be allowed to discuss his or her liability in follow-on individual or collective litigation (agreements, however, are always restrictively interpreted in Brazil).[66]

XI PRIVILEGES

Under Brazilian law, attorney–client communication is privileged.[67] This privilege covers the law firm or office, as well as the professional tools, work product, written, electronic, telephone and telematics communications.[68] There are only two exceptions: where there is evidence indicating the authorship and material perpetration of a crime by the lawyer;[69] and when the lawyer holds an element of the *corpus delicti*[70] (Brazilian law does not differentiate between outside and in-house counsel).[71] According to the Brazilian Constitution, all correspondence and data communication may not be violated and therefore cannot be used for litigation purposes.[72] There is, however, no consistent body of case law defining whether this provision also encompasses emails or other

65 Sometimes, however, according to Federal Law 12,529/11, CADE may punish the defendant's behaviour based on its potential to cause damages to the market. In these cases, CADE does not have to show that the behaviour caused actual damages. Plaintiffs in private antitrust lawsuits, however, still have the burden of proving the damages they suffered.

66 CADE has decided that 'facilitating the redress of private damages resulting from anticompetitive offenses is not one of the immediate goals of the repressive action of this authority, despite being one of its likely developments' (see Motion No. 08700.002709/2010-44, Reporting Commissioner Olavo Chinaglia). Therefore this is usually not an issue during negotiations, as CADE could frustrate interesting and valid antitrust commitments 'just because, in the remote future, it would be likely for an agent injured by the alleged offender to eventually benefit from CADE's unfavorable judgment upon seeking redress for its private damages.' (Motion No. 08700.002709/2010-44, Reporting Commissioner Olavo Chinaglia). Therefore, admission of guilt generally does not involve admission of harm to specific parties.

67 Article 133 of the Brazilian Constitution.

68 Article 7 of the Federal Law 8906/94.

69 Article 7(6) of Federal Law 8906/94.

70 Article 243(2) of the Brazilian Code of Criminal Procedure.

71 However, in practice, in-house counsel may have documents seized (for example, during a search carried out at the company's headquarters) and the court will later select the documents that may be included in the administrative or judicial proceeding.

72 Article 5 (XII) of Federal Law 8906/94.

forms of electronic communication. Several precedents have allowed the use in court of open letters and emails, under the principle that the Federal Constitution protects the transmission of data (the communication process) but not its content.[73]

On the other hand, the Brazilian Constitution allows wiretapping 'by court order, in the situations and in the manner provided by law for the purposes of criminal investigation or fact finding'.[74] Federal Law 9,296/96 sets forth very specific and restrictive conditions for such practice: first, the authority requesting the wiretap must demonstrate that all other means of investigation have been exhausted. Additionally, wiretapping must not exceed 30 days and the decision allowing the measure must be strongly grounded. Once the recording has been used in criminal court, parties may produce it (or the transcription thereof) as evidence in administrative proceedings or civil litigation.[75]

XII SETTLEMENT PROCEDURES

Parties are allowed to settle disputes on disposable rights at any time. Settlements are, in fact, encouraged by Brazilian courts and may even encompass rights or obligations that are not part of the original lawsuit. A settlement in or out of court has the same weight as *res judicata*, so that, once settled, the parties may not litigate the controversy again. Under Brazilian law, damages usually fall under the 'disposable' rights category, which means parties may freely agree on and even waive their rights. Antitrust law, however, is considered a matter of public interest. Therefore, while an agreement over damages would be enforceable, an agreement over discriminatory conduct might not be, and it would also not prevent CADE from taking further action against the perpetrator.

Class actions, in comparison, allow very limited room for settlements. If the plaintiff is the Prosecution Office, Brazilian law allows the parties to enter into a consent decree for the purpose of ceasing the relevant behaviour, often with a payment (contribution) connected thereto. The payment of a contribution in the context of a consent decree may prevent the application of further penalties by other authorities, as that would result in a possible *bis in idem*.

The payment of a contribution, however, irrespective of the amount, does not relieve the defendant of the obligation to redress individual damages, as the conduct adjustment agreement (TAC) cannot set forth the individual rights of the victims.

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73 See opinion in Writ of Mandamus No. 21729, Full court, 10 May 1995, Reporting Judge Justice Neri da Silveira – RTJ 179/225, 270). (STF – RE 418416, Reporting Judge Justice Sepulveda Pertence, Full court, decision rendered on 10 May 2006, published in the Court Register (DJ) on 19 December 2006).

74 Federal Supreme Court (STF) – Inq. 2424, Reporting Judge Justice Cezar Peluso, decision rendered on 26 November 2008, Full court, published in the Electronic Court Register (DJE) on 26 March 2010.

75 Federal Supreme Court (STF) – Inq. 2424-QO-QO, Reporting Judge Justice Cezar Peluso, decision rendered on 20 June 2007, Full court, published in the Court Register (DJ) on 24 August 2007.

XIII ARBITRATION

Under Federal Law 9,307/96 (the Arbitration Law), parties may resort to arbitration only to settle disputes on disposable property rights. Law 12,529/11 establishes that competition is a matter of public interest, narrowing the possibilities of using arbitration to deal with antitrust litigation. It is theoretically possible to refer to arbitration in Brazil to dispute the amount of damages arising out of a cartel, for example. It is very unlikely, however, for a defendant to voluntarily join an arbitration of such scope. On the other hand, agreements entered into with arbitration clauses may generate disputes involving antitrust issues – for example, contracts with exclusivity clauses. In such cases, it is possible that the arbitrators will have to face an antitrust issue as part of their brief.[76] The Arbitration Law determines, however, that court may deem an arbitration award void if the decision conflicts with public interest provisions.[77] Moreover, the arbitration clause does not prevent the injured party from seeking an administrative decision from CADE, which will not be bound to the arbitration award, in any way. This means that CADE may decide to investigate and punish behaviour or contractual clauses even if they were deemed fully lawful or enforceable by the arbitrators.

XIV INDEMNIFICATION AND CONTRIBUTION

In the event of a competition violation, Brazilian law determines that all the individuals involved in the conduct – for example, all the members of the cartel – will be jointly liable for the damages caused.[78] This means that each of the offenders may be called to answer for the full amount of damages.

However, the full implications of this rule have not been properly tested in court yet. For example, (1) liabilities may vary when considering the different effects of the cartel over a supply chain; (2) as mentioned, courts have applied the duty to mitigate damages to the victim, which, again, may result in different responsibilities along the supply chain; and (3) finally, the Civil Code provides that, 'if there is excessive disproportion between the agent's fault and the damage, the judge may equitably reduce the compensation to be paid to the victim.' Hence, it is necessary to assess the actual behaviour of each of the alleged parties. Therefore, there are many issues that can and should be further developed in future private litigation.

Furthermore, managers and sometimes employees involved in the conduct may also be liable for the damages. Brazilian law also provides for piercing of the corporate veil

76 The Brazilian system also provides for the possibility of arbitrators suspending the procedure and remanding the decision of a matter involving inalienable rights to the Judiciary Branch (Article 25).

77 Article 32 of Federal Law 9,307/96.

78 Article 942 of the CC.

in the event of fraud or property commingling[79] – so that the victim, in some cases, may seek reimbursement from other companies of the same group, even if such companies were not directly involved in the violation.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The reform of the Brazilian competition system, whereby the former three administrative entities in charge of antitrust analysis and investigation – the Economic Supervision Office (SEAE), the Economic Law Office (SDE) and CADE – fused into 'SuperCADE', has provided a significant increase in efficiency and in the rate of antitrust investigation and merger review.[80] CADE is increasing its efforts in antitrust investigations, especially cartels, and therefore an increase in leniency agreements is also expected.

Furthermore, Brazil is currently developing certain relevant legislation reforms aimed at improving its judicial civil procedure and consumer protection environment that will significantly affect private competition litigation.

The NCPC is expected to reduce the cost and duration of civil lawsuits. A Legislative Senate Commission has been assigned to work on a bill for a new Consumer Protection Code. The Commission is currently studying changes in Brazilian class actions in order to encourage their further use by consumers. At the same time, several regulatory agencies are studying changes to their procedures and regulation to create more competition in regulated sectors.

In short, private antitrust litigation is entrenched in Brazilian judicial culture and will continue to flourish in the future, as companies in Brazil tend to consider the Judiciary Branch their main source of protection against anticompetitive conduct. In addition, class actions aimed at redressing collective damages caused to consumers are also expected to experience a significant boost in the near future as a result of CADE's remarkable efforts in competition advocacy.

79 Article 50 of the CC.

80 Due to the changes in the new law, the former 182-day period to review a merger (in 2009) has been reduced to a 25-day period. Also, CADE has been able to review and decide almost twice the administrative procedures that it used to, closing many antitrust investigations. This cognisable increase of quality and efficiency has resulted in CADE getting a four-star rating by *Global Competition Review*.

Chapter 8

BULGARIA

Bogdan Drenski and Gergana Petrova[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Bulgarian Competition Act 2008 (the Competition Act) entered into force on 2 December 2008 and repealed the Competition Act 1998 to harmonise national competition legislation with Community law and to ensure efficient protection of competition rules.

The Competition Act adopts some significant provisions of the repealed Act and introduces a number of innovations, including more detailed regulations regarding private antitrust enforcement.

The Competition Act expressly entitles private parties, whether legal entities or natural persons, whether or not competitors of the defendant, and whether or not in a contractual relationship with the defendant, to file a claim for damages ensuing from infringements of competition law. Under the Competition Act anyone who has suffered damage is entitled to compensation even if the infringement was not aimed directly against him or her. Thus, even the final consumer is entitled to initiate proceedings against the infringer and claim compensation for damage suffered.

Despite the options available, in practice parties have proved reluctant to claim damages. One possible explanation is the fact that under the Competition Act it is not possible for a private claim for damages to be joined to proceedings initiated before the Commission for Protection of Competition (CPC).[2] Any claim for damages shall be filed in a separate proceeding before the competent court.

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2 The Commission for Protection of Competition is the national authority competent to establish infringements of competition law.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The CPC is the competent authority in Bulgaria to establish infringements of competition law and impose financial penalties on the infringers. Under the Competition Act, the CPC is competent to initiate proceedings against the establishment of prohibited agreements, decisions on concerted practices, abuse of a dominant position or monopoly and unfair competition.

The right to initiate such proceedings is granted by law to all natural and legal entities whose interest has been affected or endangered by the infringement or by acts performed in violation of the competition law.[3]

Parties are currently entitled to initiate the following three types of actions.

i Claim for declaratory judgment

Under the Bulgarian Code of Civil Procedure (CCP) any party shall be entitled to file a claim to ascertain the existence or non-existence of a legal relationship or right, provided that the latter party has legal interest to do so.

A party to a contract may bring a claim for declaratory judgment and demand that the court proclaim a contract null and void on the grounds that the agreement is anti-competitive under the Competition Act.

ii Claim for establishment of an infringement and termination of certain actions that violate the Competition Act

As indicated above all natural and legal entities whose interests have been affected or endangered by infringement of competition law[4] are granted the right to require the CPC to initiate proceedings for the establishment of the infringement.

The establishment of the infringement, however, would not have any practical impact on the market if the law did not provide the CPC with the right to order the termination of the infringement.

Currently, in addition to imposing financial penalties, the CPC is entitled to order the termination of the infringement regardless of whether it concerns unfair competition, prohibited agreements, decisions, concerted practices, abuse of dominant position or monopoly.[5]

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3 If the alleged infringement concerns unfair competition, however, the law requires that the applicant be a competitor of the infringer.

4 If the alleged infringement concerns unfair competition, however, the law requires that the applicant be a competitor of the infringer.

5 The latter has been explicitly stated in Judgment No. 178 of 17 February 2011, Commission for Protection of Competition, and Judgment No. 179 of 17 February 2011, Commission for Protection of Competition, concerning issues of imitation; Judgment No. 220 of 1 March 2012, Commission for Protection of Competition, concerning the issues of prohibited agreements and/or concerted practices between some of the biggest carriers in

iii Claim for damages

As stated above, damages cannot be awarded to private parties in CPC proceedings. The CPC has repeatedly stated that proceedings relating to claims for compensation are independent of and separate from the CPC proceeding for infringement of competition law. The CPC, as a public authority charged with protecting the public interest in the area of competition, has consistently emphasised that it will act only within the scope of the legal powers vested in it, and will not take on the powers of the courts that are exclusively competent to award compensation to private parties.[6]

The Competition Act expressly entitles private parties[7] to file claims for damages for infringements of competition law where the latter have suffered damage, regardless of whether or not the infringement was aimed directly against those parties. However, in order for the claim to be awarded by the civil court, the infringement should first be established under a complete administrative proceeding by the only competent authority – CPC.[8] Civil courts are not competent to establish competition law infringements in respect of CCP claims for damages suffered as a result of the infringements.

The Competition Act expressly provides that a decision of the Supreme Administrative Court,[9] confirming a Commission decision finding an infringement has been committed, shall have binding effect on the civil court, whether or not the decision of the Commission is valid and lawful. Judgments by the Commission that have not been appealed or had the complaint against them withdrawn will also have binding effect.

The right of compensation lapses if no action has been brought within five years of the judgment of the Supreme Administrative Court or if the Commission's judgment has entered into force.

Despite the options granted, parties are reluctant to claim damages. One possible explanation is provided by a case heard by the Supreme Court of Cassation. The Court held that a judgment of the CPC confirmed by a judgment of the Supreme Administrative Court that establishes an infringement of the Competition Act is binding upon the civil court but only in relation to the establishment of the infringement. In other words, the party claiming the damages is not relieved from the burden of proving the presence of all other constituent elements of the tort – presence of damage, causal link between the latter and the infringement, and the extent of the damage itself.

Bulgaria participating in the procedure for the award of a public procurement; Judgment No. 617 of 3 June 2010, Commission for Protection of Competition, *EVN Bulgaria Electricity AD* concerning the issue of tie-in agreements.

6 Decision No. 391 of 29 March 2011, Commission for Protection of Competition.

7 Both legal and natural persons, whether or not competitors of the defendant, whether or not in contractual relationship with the defendant, including the final consumer.

8 Court Order No. 520 dated 28 July 2014, Supreme Cassation Court under commercial case No. 4004/2013.

9 In Bulgaria the judgments of the CPC are appealed before the Supreme Administrative Court (collegium of three judges). The judgment of the Supreme Administrative Court (collegium of three judges) is appealed before the Supreme Administrative Court (collegium of five judges).

The CPC has stated that the person who has suffered damage from an infringement of the Competition Act is not precluded from claiming damages under the general law of tort,[10] but in this situation he or she shall bear the burden of proof of all elements of the tortious liability, namely the existence of illegal conduct, damage and causal link with the illegal conduct, and the extent of the damage. As a general rule in all tort cases guilt is presumed until proven otherwise.

III EXTRATERRITORIALITY

The Competition Act has a functional rather than formalistic approach in determining its territorial scope of application. In other words, the Competition Act is applicable to any infringement of competition law if it results in actual or possible restriction or distortion of competition within the Bulgarian market or affects trade between Member States of the European Union.

The provisions of the Competition Act mirror the general principle of European competition law: the essential factor in determining the applicability of the Competition Act is whether the infringement affects or has the potential to affect competition in the relevant market (particularly the Bulgarian market), regardless of whether the offenders are registered or established within this market or under the laws of Bulgaria (i.e., the Act shall be applicable to both domestic and foreign undertakings), and regardless of whether the infringements are performed within Bulgaria or abroad.

The Competition Act shall not apply, however, to actions resulting in actual or possible restriction or distortion of competition in another country unless otherwise provided by an international agreement, entered into force, to which the Republic of Bulgaria is a party.

IV STANDING

Under Bulgarian law standing is a mandatory prerequisite for bringing a claim against an infringer. However, under the Competition Act this general principle has unique aspects.

The Competition Act generally entitles all persons whose interests are affected or endangered by an infringement under this Act to bring an action against the alleged infringer.

Prima facie, the prerequisite of standing in the Competition Act is indistinguishable from other laws (i.e., to file a claim the claimant must provide sufficient arguments that his or her legitimate interests are actually or potentially restricted or distorted by the relevant competition law infringement).

In practice, however, the CPC does not require the claimant to provide grounds for standing in allegations of infringements capable of impeding competition.

10 Provided for in the Law on Obligations and Contracts; Decision No. 391 of 29 March 2011, Commission for Protection of Competition.

In contrast, where infringements of unfair competition are concerned (e.g., misleading and comparative advertising), the CPC still requires the claimant to prove standing (i.e., to prove that the claimant and the defendant are competitors in the relevant market and thus the conduct of the defendant has affected the interest of the claimant), otherwise the claim will be dismissed.[11]

V THE PROCESS OF DISCOVERY

The CPC is entitled to request information and obtain all other types of evidence in written, digital or electronic form, to obtain oral or written explanations and testimony, and to request information or cooperation from other national competition authorities of the Member States of the European Union, as well as from the European Commission.

Under the Competition Act all natural and legal entities, including undertakings, associations of undertakings, state authorities or local government authorities, etc., are obliged to assist the CPC in providing complete, accurate and reliable information within the terms determined by the Commission.

As in certain situations the acquisition of relevant evidence may be significantly difficult or may have serious negative consequences for the person providing it, currently the CPC is entitled to keep secret that person's identity, following a procedure provided in CPC internal rules, and to undertake 'on-the-spot' inspections, the purpose of which is to gather evidence.

Currently the procedure of gathering evidence through on-the-spot inspections is applicable to all kinds of proceedings, whether concerning unfair competition, prohibited agreements, decisions, concerted practices, abuse of monopoly or dominant position.

Each inspection is individually and explicitly authorised by the Administrative Court of Justice in Sofia, which is vested with the exclusive competence of granting such permissions irrespective of where they are conducted.

The Competition Act does not stipulate any time limit to the execution of these inspections, thus they are used to gather evidence prior to the notification of the defendant of commenced proceedings before the CPC, as well as during proceedings.

One significant legislative change introduced by the Competition Act is that evidence gathered in one proceeding can be used as evidence in another (e.g., commenced later) as long as the evidence is used solely for proceedings under the Competition Act.[12] This legislative innovation is of essential significance to the process of discovery. It is also an expression of the principle of procedural economy.

11 Judgment No. 214 of 1 March 2012, Commission for Protection of Competition; Judgment No. 142 of 10 February 2011, Commission for Protection of Competition; and Judgment No. 289 of 18 March 2010, Commission for Protection of Competition.

12 Article 48 of the Competition Act.

VI USE OF EXPERTS

If the CPC deems specialist knowledge necessary to clarify the facts of the case, it is entitled to assign on its own initiative, or at the request of any of the parties, an external expert. As the function of the CPC covers a wide range of often complex issues such as finance, economics, law, etc., the use of experts in proceedings is widespread.

The expert submits his or her opinion to the CPC. In the event of an objection against an opinion, the CPC may assign another expert, or experts. Additional information may be sought from an expert if his or her opinion is not complete or clear enough, and a second opinion may be sought if the opinion is not grounded or there is doubt regarding its correctness.

The CPC is not obliged to uphold the expert opinion. Nevertheless, the CPC shall consider it together with other evidence collected in the course of proceedings and shall give the reasons for not upholding the opinion.

In practice, the CPC and the Supreme Administrative Court have repeatedly stated that the assignment of experts is not mandatory but an optional phase in proceedings. Thus, generally, a lack of specialist expertise is not deemed to affect the correctness of the judgment.

Nevertheless, on certain occasions the Supreme Administrative Court has overruled judgments of the CPC, namely for not having commissioned a specialist assessment. The court has found that where the nature of the expertise is of essential significance the lack of such expertise could lead to incomplete clarification of the facts and constitutes a ground for overruling the judgment as unlawful.

In the Judgment of 12 December 2011, No. 16286 of the Supreme Administrative Court (a case concerning imitation of religious icons), the Court stated that commissioning a specialist assessment represents the objective and reliable method of establishing the infringement. The court held that expert opinion was of essential importance to the clarification of the facts of the case and the failure of the CPC to commission such an assessment constituted a ground to overrule the judgment of the Commission. The parties have not appealed the judgment and it has entered into force.

VII CLASS ACTIONS

Damages to private parties cannot be awarded in the course of proceedings before the CPC (see Sections I and II, *supra*). In Bulgaria, damages are claimed in a separate proceeding before the competent court and in accordance with the CCP.

The claims for damages for competition law infringement may be brought as a class action as well as in an individual claim.

Under Chapter 33 of the CCP a class action may be brought on behalf of persons who have suffered damage and (by the nature of the infringement) whose exact number cannot be accurately determined, but who can be identified.

The action may be brought by persons who claim to belong to the class, by an organisation defending the class or by an organisation protecting against such types of infringements, regardless whether created *ad hoc* or generally established as an entity to protect the interests of the persons who have suffered damage in the specific area.

The court will determine the appropriate terms for announcing the commenced class action and shall provide potential participants with the right to join the claim (opt-in), or persons already involved the right to opt out should they desire to claim damages in a separate proceeding.

Under the CCP the judgment in the class action shall be effective against the defendant and for the persons who have filed the claim and who have opted into the action.

A significant feature of Bulgarian legislation on class actions is that persons who exercise their right to opt out shall nevertheless be entitled to benefit from the judgment if the collective action is upheld.

Currently such class actions for compensation of competition law infringement are not widespread.

VIII CALCULATING DAMAGES

As indicated above, currently the persons entitled to compensatory damages are all natural and legal persons – whether or not they are: (1) competitors of the defendant; (2) in a contractual relationship with the defendant; or (3) the infringement was directed against them. In other words damages for competition law infringements are damages in tort.

The Competition Act does not limit the liability of the infringer to certain types of damages. Thus, parties suffering damage are entitled to seek compensation not only for actual loss (*damnum emergens*), but also for loss of profits (*lucrum cessans*), plus interest on both. The damages awarded to private parties, however, do not include any punitive awards.

The amount of damages must be proved by the party claiming damages in each individual case.

A significant exception was recently recognised by the Supreme Court of Cassation when the court refused to award compensation for non-material (i.e., moral, personal) damage to legal entities.[13] In the case concerned, the Supreme Court of Cassation accepted that: 'undoubtedly this is a case of recognised unfair-competition infringement within the meaning of the Competition Act, where within the market the defendant has been selling sea salt with quality indicators and consumer characteristics different from the one sold by the plaintiff, indicating on the products the trade name and number of the plaintiff […] in committing these acts the commercial reputation of the plaintiff has been discredited.'

The Supreme Court held that although the reputation (as a moral category) of the legal entity had been distorted, 'the damage suffered by the legal entity has clearly affected the patrimony of the latter and thus undoubtedly has a material equivalent'. This in the opinion of the court meant that such damages cannot have non-material (moral) dimensions and shall not be awarded. The court opined that moral damage is caused

13 The case was brought under the repealed Competition Act 1998 but is still applicable.

when damage has affected the mental or moral sphere of the injured as a durable and lasting state solely connected to human nature. Such damage is not applicable to legal entities.

The legislation does not provide for specific rules concerning fees and expenses resulting from claims for compensatory damages for competition law infringements.

Under Chapter 8, Section II of the CCP a court fee on the claim and costs of proceedings will be collected. The determination of other costs (e.g., the remuneration of witnesses and experts) shall be determined by the court. The costs shall be borne initially by the party who has requested the execution of the specific procedural action.

According to Article 78 of the CCP any litigation fees and costs shall be borne by the party who has lost the case, where the litigation costs include a fee for one attorney, if any.

IX PASS-ON DEFENCES

Pass-on defences are not prohibited by Bulgarian legislation. Furthermore, a functional similarity might be argued with the well-established civil law principle of *compensatio lucri cum damno*.

For instance, party 'A' has been obliged to buy a product from party 'B' and the contract for sale was concluded in infringement of competition rules (e.g., at inflated prices). Party A, though, has been able to resell the product to party 'C', whether at an equal, higher or lower price.

In this situation B is entitled to argue that although A has suffered losses from entering into a contract with B, A has re-sold the product to C and has derived a certain amount of benefit. According to the principle of *compensatio lucri cum damno*, B is entitled to argue that the amount of damage suffered is compensated by the amount of benefit derived. In other words B is entitled to argue that in fact A has not suffered losses, having recovered them by selling the product to C. If proved, B is entitled to argue for partial or full relief from liability. In the same situation, in accordance with the pass-on defence, B is able to argue that A is not entitled to damages because A has transferred them to C.

In practice, the very essence of both the pass-on defence and *compensatio lucri cum damno* is based on the estimation of the financial status of A and whether in entering the contract with C, A has been able to recover the losses suffered from entering the contract with B.

X FOLLOW-ON LITIGATION

As a rule public and private enforcement claims are not interdependent. Nevertheless, in cases where claims for damages resulting from competition law infringements are concerned, the recent practice of courts expressly requires private parties first to benefit from the judgment stipulated by the CPC (see Section II.iii, *supra*).

In conclusion, therefore, while the CPC judgment may be used by the claimant in court proceedings, as indicated above, the binding force of the CPC judgment is not comprehensive. Thus, the judgment shall be regarded as a proof solely of the existence of actual unlawful conduct on the part of the offender.

Anyone is entitled to claim damages under the general law of torts but shall bear the burden of proof of all elements of the tortious liability of the infringer, namely the existence of illegal conduct, the extent of damage and the causal link between behaviour and the presence of damage. As mentioned above, in all cases of tort guilt is presumed until proven otherwise.

XI PRIVILEGES

In cases where the provision of evidence has been required by the CPC, the persons whose assistance is required may not refer to production, trade or any other secrets protected by law.

The latter, however, are granted the right to treat the information as confidential and to require the Commission to protect the stated information in accordance with the Classified Information Protection Act and the Personal Data Protection Act. The person providing the information is also entitled to require the Commission to limit access to it even though participants in proceedings are generally entitled to access all materials collected in the course of an investigation.

In practice the CPC has encountered difficulty because parties have commonly defined all or most of the information provided as confidential. Thus, under the present Act if information is claimed to be confidential, the CPC requires that claims for confidentiality be grounded and that materials are provided in a version in which data considered confidential has been deleted. However, the CPC is entitled to rule that information is not confidential; in this event the party is entitled to appeal the ruling.

Another exception to the general obligation for provision of information is when the information required is subject to attorney–client privilege. Currently the CPC is not entitled to compel an attorney to provide information or materials or correspondence that has circulated between the attorney and his or her client. However, the same is not true for the client provided that he or she is asked to provide the information.[14]

In summary, no party or participant in the proceedings is entitled to refuse to provide information even if it is regarded as confidential, subject to the limitations stated above. Where the accurate establishment of the facts is essential to a case, failure to provide information may incur a sanction in that the CPC is currently entitled to assume as proved those facts in relation to which the party (or interested person) has obstructed the collection of information. This sanction for breaching the procedural obligation to provide assistance is largely effective in ensuring proper and thorough clarification of the facts of each individual case.

14 Judgment dated 16 June 2009, Administrative Court of Sofia under administrative case No. 1884/2009.

XII SETTLEMENT PROCEDURES

i Settlement procedures in cases for compensation of damage

Under the CCP opportunity for the amicable settlement of disputes is provided in the area of both individual and class action proceedings. Further, currently the law provides for the courts to instruct the parties to reach an agreement and to clarify the advantages of amicable settlement of disputes.

The conclusion of a settlement between the parties can be achieved during court proceedings (court settlement). The law has also introduced proceedings that are conducted outside the courts (out-of-court settlement). The conclusion of an out-of-court settlement generally sees withdrawal of the claim and termination of the case, with compensation paid to the claimant.

If the parties agree to a court settlement (during an individual case or a class action), the court approves the settlement as long as the conditions are not contrary to the law or good morals. In addition to the above criteria, in approving a class action settlement the court estimates whether the measures it provides are capable of sufficiently protecting the damaged interest.

ii Settlement procedures under the Competition Act

Although the Competition Act does not provide parties with the right to settle the dispute amicably before the CPC, the conclusion of an out-of-court settlement is not prohibited.

The practical result of such a settlement is the withdrawal of the applicant's claim under the agreed conditions. In this case the Commission must terminate the proceedings and as a consequence is not entitled to impose financial penalties on the defendant.

Nevertheless following the adoption of the Competition Act, where cases of competition law infringements of prohibited agreements, decisions, concerted practices, abuse of a dominant position or monopoly are concerned, the withdrawal of the claim does not constitute a ground for termination of the proceedings.

In these cases, and in contrast to the provisions of the repealed Competition Act 1998, under the current Competition Act the withdrawal of the claim is not binding on the Commission. The CPC is not entitled to terminate the proceedings and will establish whether an infringement has been committed, regardless of the withdrawal of the claim.

Thus, at present amicable settlement of a dispute in the above situations no longer protects the defendant from being sanctioned under the Competition Act.[15]

This legislative rigour may be explained by the fact that where prohibited agreements, dominance and monopoly infringements are alleged, the Commission is charged with defending the broader interest of society rather than the private interest of the claimant. In view of the significance of these prohibited practices, and in particular

15 Judgment No. 257 of 17 March 2009, Commission for Protection of Competition; Judgment No. 1497 of 25 November 2010, Commission for Protection of Competition.

their impact on the market, the establishment of the infringements is deemed to be of social rather than private importance. Thus, the establishment of such infringements cannot and should not be left solely to the discretion of the plaintiff.

In contrast, if unfair-competition infringements are alleged, the law provides an additional ground for termination of the proceedings related to the withdrawal of the claim by the plaintiff. In these cases, the withdrawal of the claim necessarily leads to the termination of the proceedings and precludes the CPC from imposing sanctions on the defendant.

In addition to the above, the Competition Act introduced a new form of settlement. Now, where proceedings concern prohibited agreements, decisions, concerted practices, abuse of dominance or monopoly, the infringer is entitled to submit a request to the CPC and to propose that the entity, in the capacity of infringer, shall adopt measures to end the infringing behaviour.

In these cases where the CPC finds that the infringement has not had or could not have had a significant and lasting impact over time on the competition of a substantial part of the national market, the Commission is entitled at its discretion to approve the measures proposed by the infringer; to terminate the proceedings without establishing whether an infringement has been committed and stating that there are no longer grounds for continuing the hearing.

XIII ARBITRATION

Under the CCP the parties to a material dispute may agree to settle it by arbitration except where the dispute relates to real estate rights or possession of real estate, maintenance or rights under labour contract.

Thus, there is no formal prohibition against parties agreeing to settle by arbitration competition infringements arising from a contract.

Furthermore, as far as private competition enforcement is concerned, the CPC itself has already stated that the settlement by arbitration of disputes concerning claims for damages will be encouraged.

XIV INDEMNIFICATION AND CONTRIBUTION

Claims for damages for competition law infringements are subject to the general principles of tort (see Section II.iii, *supra*). Thus, if a collective infringement of competition law is established, the infringers bear joint and several liability towards the person claiming damages. This person is entitled to file a claim against any of the infringers at his or her own discretion and to demand full compensation from any of the infringers. Thus, if one of the defendants has been ordered to pay the full amount of damages to the claimant in accordance with the right of recourse, that defendant is entitled to claim from the others their due share.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In Bulgaria, the right to initiate proceedings for any kind of competition law infringement is granted by law to all natural and legal entities whose interests have been affected or endangered by the infringement.[16] Thus, private parties have actively participated in the enforcement of competition rules. Over the years, the CPC has often been approached with requests to establish the existence of competition law infringements and requests to order termination of certain actions that violate the Competition Act.

Nevertheless, in most cases parties are reluctant to claim damages. One explanation for this is that under the Competition Act it is not possible to join a private claim for damages to a public action initiated before the CPC. Any claim for damages must be raised in a separate proceeding before the competent court.

In addition, under court practice, a judgment of the CPC affirmed by a judgment of the Supreme Administrative Court establishes that an infringement of the Competition Act is binding upon the civil court but only in relation to the establishment of the infringement. In other words, the party claiming damages is not relieved from the burden of proving the presence of all other constituent elements of the tort – presence of damage, the causal link between the latter and the infringement, and the extent of the damage itself. This is often found to be significantly difficult.

Another explanation for the entrenched reluctance to claim damages is that court proceedings are accompanied by high litigation costs that are initially borne by the claimant, with their reimbursement dependent on the outcome of the dispute.

The CPC, therefore, has stated that the settlement of competition law disputes concerning claims for damages through out-of-court dispute resolution methods, such as arbitration, mediation or amicable settlement, should be promoted. These dispute-resolution options offer claimants the possibility of receiving adequate compensation within an adequate time frame while avoiding the burden of litigation costs.

16 If the alleged infringement concerns unfair competition, however, the law requires that the applicant be a competitor of the infringer.

Chapter 9

CANADA

W Michael G Osborne, Michael Binetti, Michelle E Booth, David Vaillancourt and Fiona Campbell[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

i Parasitic causes of action under review

Plaintiffs in class actions based on violations of the Competition Act typically plead a number of common law and equitable causes of action in addition to a claim based on the statutory cause of action provided for in Section 36 of the Competition Act. They do so because these causes of action hold out the potential for greater recovery than Section 36. For example, Section 36 requires that the plaintiffs prove loss. Waiver of tort, however, potentially does not require any showing of loss at all. Similarly, Section 36 is expressly limited to damages that can be proven, thus ruling out punitive damages. Common law and equitable claims are not so limited.

The causes of action typically pleaded are unlawful interference with economic relations, tort of conspiracy, and waiver of tort. They are parasitic because all (except for one branch of the tort of conspiracy) depend on a showing of a breach of the Competition Act as a necessary unlawful element.

Recently, courts have begun to question whether such parasitic claims should be allowed at all. The Competition Act itself provides for a cause of action for breaches of some of its provisions, and other remedies for beaches of other provisions. The general rule is that breach of a statute does not give rise to a cause of action at common law. The question naturally arises: is the recovery provided for in the Competition Act a complete code, such that these other causes of action are not needed, and not permissible?

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In *Wakelam v. Wyeth Consumer Healthcare*,[2] the British Columbia (BC) Court of Appeal held that Parliament intended the Competition Act to be a complete code, thus excluding remedies apart from those provided in the Act.

Following this decision, the BC Supreme Court struck claims of unlawful conspiracy, unlawful interference with economic interests, and constructive trust in *Watson v. Bank of America Corp.*,[3] but certified a class action against Visa and MasterCard, major Canadian banks, and other financial institutions, alleging that the credit card interchange fees and rules breach the Competition Act. Claims based on breaches of the criminal price maintenance provisions were statute-barred, since these provisions were repealed more than two years before the action was launched, the court held.

However, less than four months later, another BC Supreme Court judge refused to strike similar claims in a case alleging that Microsoft conspired with various computer manufacturers to gain a monopoly over PC operating systems.[4] The judge said that Wakelam conflicted with the recent Supreme Court of Canada (SCC) decision on the tort of unlawful interference with economic relations in *A.I. Enterprises Ltd v. Bram Enterprises Ltd*,[5] because that case referred to an earlier case holding that a breach of a predecessor to the Competition Act could support the tort of conspiracy. A third BC judge took the same view in *Fairhurst v. Anglo American PLC*,[6] and certified a class action alleging that De Beers and diamond companies conspired to fix prices for diamonds.

In August, 2015, the BC Court of Appeal issued its decision in *Watson*.[7] The court held that *Wakelam* established that claims in restitution (such as waiver of tort) are not available for breaches of the Competition Act, but that it did not govern whether claims for unlawful means conspiracy or unlawful interference with economic relations (now simply called 'unlawful means') are available.

Whether common law claims based on breaches of the Competition Act are possible is a question of statutory interpretation, the Court held: did Parliament intend that 'the tools of common law and equity could form a basis for recovery for breach of statute'?

The Court stated the test to be applied as 'whether the Competition Act provides "a new and superior" method of remedying a breach of the statute'. But the Court then applied a slightly different test. The tort of unlawful means conspiracy is not identical to a claim under Section 36, the Court noted. The tort is narrower in scope than the statutory cause of action, but broader in its available remedies. Consequently, Section 36 was not intended to replace the tort, the Court held.

Then, in October 2015, an Ontario judge held, in *Shah v. LG Chem, Ltd*,[8] that the Competition Act is a complete code that precludes parasitic claims. Justice Perell advanced three reasons for this conclusion.

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2 2014 BCCA 36.

3 2014 BCSC 532.

4 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2014 BCSC 1280.

5 2014 SCC 12.

6 2014 BCSC 2270.

7 2015 BCCA 362.

8 2015 ONSC 6148.

First, through the 'comprehensive scheme of civil and administrative law regulation' introduced into the Competition Act, Parliament indicated its intention that remedies under the Act, including the statutory cause of action, were to be comprehensive; it 'intended to preclude a redundant and inefficient common law cause of action for conspiracy'.

Second, Parliament was not depriving a person of a civil cause of action in enacting this comprehensive scheme. Rather, 'it was Parliament that provided the predicate wrongdoing for a price-fixing conspiracy tort in the first place'; thus 'Parliament was introducing a statutory cause of action and not taking away very much from plaintiffs'.

Third, 'there is no lacuna to be filled by the common law in the amalgam that is competition law; the statutory cause of action is adequate for Parliament's regulation of competition law'.

Justice Perell expressly disagreed with the BC Court of Appeal's conclusion in *Watson*. That court's statement in *Wakelam* that there is 'nothing in the Competition Act to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies' may be *obiter dicta*, but it is the 'binding sort of obiter', Justice Perell observed.

The Court also held that the BC Court of Appeal asked itself the wrong question. It should not have asked whether the Competition Act provides 'a new and superior' remedy, but rather, 'Based on a reading of the whole statute what was Parliament's intent in introducing the statutory cause of action?'.

Parliament is not 'constrained to replacing the existing common law means of enforcing competition law with a new and superior method', the Court noted; Parliament is not required to introduce only pro-plaintiff amendments to the Act.

Ultimately, the complete code issue will likely come before the SCC for resolution.

ii Court furls 'umbrella purchaser' claim

In *Shah v. LG Chem, Ltd*, Justice Perell held that so-called 'umbrella purchasers' do not have a cause of action under Section 36 of the Competition Act and cannot be included in the class in a price-fixing class action.

Umbrella purchasers are purchasers that did not buy the price-fixed product from the alleged conspirators, 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. In *Shah*, the plaintiffs argued that the price fixing created an umbrella of supra-competitive prices, enabling non-cartel members to raise prices, causing their customers to pay an overcharge.

The Court held that umbrella purchasers do not have a cause of action, citing three reasons. First, it is inconsistent with restitutionary law, as the overcharge paid by the umbrella purchasers did not yield any gain to the defendants.[9] Second, allowing

9 This is a tenuous argument. As Justice Perell notes, restitution is concerned with the recovery of ill-gotten gains. However, the cause of action created by Section 36 of the Competition Act is not restitutionary in nature, since recovery under Section 36 is measured by the plaintiff's loss, and not by the defendant's gain. As well, benefit to the defendant is not an element of the cause of action under Section 36.

claims by umbrella purchasers would result in indeterminate liability. Third, it would unfairly impose liability on the defendants for independent price setting decisions of the non-defendants.

iii Worldwide class rejected

Ontario courts do not have jurisdiction *simpliciter* over putative class members who live outside Canada, the Ontario Superior Court held in staying a class action in relation to foreign claimants.[10] The class action alleged air cargo price fixing by a number of airlines. The defendants filed evidence indicating that foreign jurisdictions would be unlikely to recognise Ontario's assumption of jurisdiction, and would not enforce or grant preclusive effect to an Ontario judgment. As a result, foreign class members would be able to relitigate the case in their own countries. The court went further still, accepting that territorial limits in the Constitution prohibit the court from assuming jurisdiction over absent foreign claimants who do not meet the traditional test of present or consent.

iv Human rights legislation does not apply to class action distribution protocols

In 2014, courts in several provinces approved a distribution protocol for the settlement fund in the DRAM class action.[11] The protocol provided for two routes within the claims process. End consumers could claim C$20 simply by declaring that they purchased at least one product containing DRAM during the class period. A more in-depth process was available for other claimants and end consumers who purchased enough products containing DRAM to claim more than C$20. Claims by family members living in the same household had to be pooled by household.

In 2015, an Ottawa lawyer challenged the distribution protocol, claiming that it discriminated among class members by using family or marital status to determine the quantum, process, and availability of the benefits of the settlement distribution process, thus breaching Ontario's Human Rights Code. Eventually a motion for directions was heard by jointly by judges in British Columbia, Ontario, and Quebec.

In Ontario, Justice Perell held that the Human Rights Code does not apply to court orders. Moreover, the settlement proceeds were not a service to which the Code could apply, but compensation for a civil wrong, that is, for settling a price-fixing complaint. Justice Perell went further, holding that even if the Code did apply, the distribution protocol would not have breached it. The purpose of the minimum C$20 payment was to encourage claimants to apply for compensation, and not to encourage windfall payments. The distribution protocol did not preclude family members from applying for more than C$20 using the more in-depth process. The Quebec court reached essentially the same conclusion,[12] and the BC court agreed.[13]

10 *Airia Brands Inc. v. Air Canada*, 2015 ONSC 5332.

11 *Eido v. Infineon Technologies AG*, 2014 ONSC 6082.

12 *Option Consommateurs v. Infineon Technologies AG*, 2015 QCCS 4495.

13 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2015 BCSC 1846.

v Copycat class actions criticised

Courts have begun to criticise plaintiff lawyers who file multiple overlapping class actions across the country. In Ontario, Justice Perell refused to approve an agreement by two BC firms to share their fee with a Saskatchewan-based firm, Merchant Law Group (MLG).[14] More than one year after the BC firms had filed class actions in Ontario and BC alleging conspiracies in relation to credit card interchange fees, MLG started copycat actions in Alberta and Saskatchewan. The BC firms agreed to pay a share of their fee to MLG in return for MLG agreeing to stay its actions.

In a hard-hitting judgment, the Court described the fee sharing agreement as a 'ransom fee' that was unenforceable and possibly illegal. MLG's legal services were 'useless to the client'; it 'did not make a contribution to the achievement of the settlement agreement and should not share in the recovery'. He described MLG's late filing of class actions as 'suspect': 'What purpose was being served by another class action other than opportunism to share in the contingency fee?'

Justice Perell also questioned the usefulness of starting overlapping national class actions in five provinces after the BC action was commenced and then 'parking' them. He suggested that the representative plaintiffs in these other provinces could simply be added as representative plaintiffs in BC.[15]

Courts in Quebec have also reacted negatively to class action parking. In *Cohen v. LG Chem Ltd.*[16] and *Option Consommateurs v. Panasonic Corporation*[17] the court departed from the normal 'first to file' rule, and awarded carriage to a rival firm, after finding that the actions started by the first firm were simply copy-and-paste actions that had been one of many started across the country to occupy the field and then not pursued with diligence.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Like most competition regimes, Canada's Competition Act (the Act)[18] 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.

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

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14 *Bancroft-Snell v. Visa Canada Corporation*, 2015 ONSC 7275.

15 It is not, in fact, practical to run a national class action in BC. This is because BC's Class Proceedings Act requires class members outside the province to opt in to the class action. Ontario, by contrast, allows the court to include out of province class members unless they opt out.

16 QCCS File number 500-06-000632-121, 18 Dec 2015, Unreported.

17 QCCS File numbers 500-06-000703-146 and 500-06-000704-144, 22 Dec 2015, Unreported.

18 RSC 1985, c C-34.

Private actions for damages are only available for breaches of the Act's criminal provisions. The key criminal provisions are conspiracies to fix prices, allocate markets, or reduce output,[19] bid rigging[20] and false advertising.[21]

Importantly, unilateral conduct by firms with market power, such as abuse of dominance,[22] exclusive dealing,[23] tied selling[24] and refusal to deal[25] are not subject to criminal sanction. In fact, they are not even prohibited, unless they cause a substantial lessening or prevention of harm, in which case, the Competition Tribunal can prohibit the conduct. Agreements between competitors that are not hard-core cartels and price maintenance are subject to the same treatment.

Section 36 of the Competition Act creates a civil cause of action for damages caused by breaches of the criminal provisions of the Competition Act.[26] To succeed, the plaintiff must prove (1) that the defendant committed a criminal offence under the Act and (2) 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.[27] The plaintiff must show actual damages, and that these damages were caused by the offence.[28]

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.

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19 Section 45.

20 Section 47.

21 Section 52.

22 Section 79.

23 Section 77.

24 Section 77.

25 Section 75.

26 Section 36 is also available to recover damages caused by violations of orders made under the Act by the Competition Tribunal or a court. Indirect purchaser class actions under this branch are unlikely. 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.

27 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 Act to establish that no offence was, in fact, committed.

28 *Chadha v. Bayer Inc.*, [2001] OJ No 1844 (Div Ct) at paragraph 69.

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,[29] or from the day on which criminal proceedings were finally disposed of.[30]

Both direct and indirect purchasers can sue and recover damages for price fixing.[31]

Section 36 actions can be brought in the superior courts of any province, as well as the Federal Court of Canada.[32] 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)[33] provides for certification of class actions, and several other provinces have similar legislation.[34] Plaintiffs typically

29 *Eli Lily and Company v. Apotex Inc.*, 2009 FC 991, at paragraph 728.

30 Section 36(4). There is currently a debate in the jurisprudence over whether discoverability applies to this limitation period. The better view is that it does not, because the limitation period commences based on events that are not dependent on the knowledge of the plaintiff. The SCC stated the general rule in *Peixeiro v. Haberman*, [1997] 3 SCR 549 and *Ryan v. Moore*, 2005 SCC 38. Several decisions have applied this principle to find that the discoverability requirement does not apply: *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996 at paragraphs 31-33; *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, at paragraph 646; *Les Laboratoires Servier v. Apotex Inc.*, 2008 FC 825 at paragraph 488. See also *Watson*, where the Court applied the two-year limitation period without any consideration of discoverability. Other decisions have left the matter open. Only one decision has found that discoverability applies: *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2015 ONSC 2046.

31 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57.

32 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.

33 S.O. 1992, c. 6.

34 The following provinces have class proceedings legislation similar to Ontario's: British Columbia (Class Proceedings Act, R.S.B.C. 1996, c. 50), Alberta (Class Proceedings Act, SA 2003, c. C-16.5), Saskatchewan (The Class Actions Act, S.S. 2001, c. C-12.01), Manitoba (The Class Proceedings Act, C.C.S.M. c. C130), Quebec (Code of Civil Procedure, R.S.Q., c. C-25, Book IX), New Brunswick (Class Proceedings Act, RSNB 2011, c. 125), Nova Scotia (Class Proceedings Act, SNS 2007, c 28), and Newfoundland and Labrador (Class Actions Act, S.N.L. 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

start at least three class actions for each case: one in Quebec, for a class of consumers and small businesses; one in British Columbia, for BC consumers and businesses; and a national class in Ontario covering Ontario and the rest of the country.[35]

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'.[36] The court considers the proposed class action in

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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).

35 Ontario has been the jurisdiction of choice for national class actions because it has an opt-out regime for national classes, whereas BC requires out of province members to opt-in. Manitoba may become the forum of choice for plaintiffs in national class actions because its legislation adopts an opt-out regime for national classes, and, unlike Ontario's, prohibits awards of costs at any stage of a class proceeding: C.C.S.M. c. C-130, Section 37(1). Alberta, Saskatchewan and Newfoundland and Labrador have adopted an opt-in regime.

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

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 is Quebec has the lowest threshold of all: there is no preferable procedure or predominance requirement; it is enough that there are common issues: Code of Civil Procedure, Article 1003(a). In one case,

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.[37] 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.[38]

III EXTRATERRITORIALITY

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.[39] 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.

Quebec has codified a similar set of connecting factors that allow its courts to assume jurisdiction.[40]

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.[41]

The second question goes to the criminal offence under the Competition Act that serves as the basis for the claim. The offence of conspiracy under Section 45 is complete

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Quebec certified a case rejected by Ontario: contrast *MacLeod v. Viacom Entertainment Canada Inc.* (2003), 28 C.P.C. (5th) 160 (S.C.J.) with *Yadid v. Blockbuster Canada Co.* [2003] J.Q. No. 2278 (S.C.).

37 *Hollick v. The City of Toronto* [2001] 3 S.C.R. 158. See also *Western Canadian Shopping Centres v. Bennett Jones Verchere* [2001] 2 S.C.R. 534, *Rumley v. British Columbia* [2001] 3 S.C.R. 184.

38 *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 at 73 (Gen. Div.); *Bywater v. Toronto Transit Commission* (1998) 27 C.P.C. (4th) 172 at 181-82 (Ont. Gen. Div.).

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

40 Civil Code of Quebec, CQLR c C-1991, Article 3148.

41 *Vitapharm Canada Ltd v. F. Hoffmann-La Roche Ltd* [2002] OJ No 298 (SCJ); Sun-Rype, *supra* note 24 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 into Quebec as a result of price fixing is a pure economic loss that is not damage suffered in Quebec for purposes of Article

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.[42] 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.[43] 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.[44]

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. While classes that include foreign members have been certified, the Ontario Superior Court has recently suggested that foreigners cannot be included unless they opt in.[45]

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 Act or breach of an order of the Tribunal or other court made under the Act. Section 36 of the 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 Supreme Court of Canada 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

3148(3) CCQ. Also, 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.

42 Criminal Code, RSC 1985 c C-46, Section 6(2) provides that no one shall be convicted of an offence outside Canada.

43 *R v. Karigar*, 2013 ONSC 5199.

44 *Momentous.ca Corp v. Canadian American Assn. of Professional Baseball Ltd*, 2010 ONCA 722, [2010] OJ No 4595 at paragraph 34.

45 *Airia Brands Inc. v. Air Canada*, 2015 ONSC 5332.

as a result of the complained about conduct.[46] 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.[47] 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 Act), price maintenance (Section 76 of the Act), and exclusive dealing, tied selling, and market restriction (collectively Section 77 of the Act). In order 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 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 of the Act 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; it 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*,[48] the Supreme Court of Canada held that plaintiffs in a price-fixing class action were permitted to obtain as part of the production process wiretap evidence obtained 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 evidence in follow-on price-fixing class actions.

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

46 *Supra*, note 29 at paragraph 131.

47 Ibid.

48 2014 SCC 66.

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. 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. Competition Bureau officers are not immune from being ordered to attend for discovery.[49]

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.[50]

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 would also be used at trial (all price-fixing class actions in Canada to date have settled prior to trial). On the certification motion, the plaintiff bears the burden of demonstrating some basis in fact to show that all members of the class have suffered harm as a result of the alleged criminal conduct.[51] 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.[52] 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 Supreme Court of Canada 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.[53]

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49 *Canada (Procureure Générale) v. Thouin*, QCCA file number 200-09-009011-53, 22 Dec 2015, Unreported.

50 Competition Tribunal Rules, SOR/2008-141, Sections 60–64.

51 *Supra*, note 29 at paragraph 114.

52 Ibid. at paragraph 115.

53 Ibid. at paragraph 126.

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 in order to assist it regarding 'any question of fact or opinion relevant to an issue in a proceeding.'[54]

VII CLASS ACTIONS

In Canada, class action legislation has been enacted by all provinces except Prince Edward Island, though not in the territories.[55] 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.

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: (1) a numerosity requirement, and (2) no specific requirement that the proposed class action meet the preferable procedure test.

54 Competition Tribunal Rules, SOR/2008-141, Section 80.

55 Class actions are permitted to proceed in jurisdictions without class action legislation under local rules of court.

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, 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 takes 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 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, satisfying itself that the 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-près* 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 her own jurisdiction, with all participants linked by video (or telephone) conference. On 15 November 2015, the Supreme Court of Canada granted leave in two related cases, *Edean v. British Columbia*, 2014 BCCA 61, and *Parsons v. Ontario*, 2015 ONCA 158. At issue is whether provincial judges, who oversee the conduct of a class action in their provinces have the jurisdiction to sit outside their own territorial boundaries when supervising a settlement in a national class action. There are conflicting authorities as to whether this is permissible; the Court of Appeal for Ontario held it was permissible, the Court of Appeal for British Columbia holding otherwise. The Supreme Court decision will shape the scope of inter-jurisdictional coordination of national class actions.

VIII CALCULATING DAMAGES

Section 36 of the Act provides for the recovery of damages, by individuals or companies, incurred as the result of a violation of the Act's criminal provisions.[56] The damage recovery permitted by this section 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 the private defendant to simply point to anti-competitive conduct that did not affect it. This section also permits the plaintiff to recover the costs of any investigation into the matter.

Plaintiffs' claims for damages under Section 36 of the 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 Act is a complete code that was intended by Parliament to provide exhaustively the remedies available to plaintiffs for breaches of the Act.[57] The British Columbia Court of Appeal, in December 2014, heard an appeal in *Watson*. The panel has not yet released its reasons. Whatever decision is arrived at, it will be persuasive, but not binding, on other Canadian jurisdictions.

To date, none of the contested actions based on Section 36 have 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.

IX PASS-ON DEFENCES

The Supreme Court of Canada, in 2013, heard a trilogy[58] of cases that addressed, among other things, the availability of indirect purchasers to maintain a cause of again against alleged cartel members particularly given that the pass-on defence had earlier been rejected by the Supreme Court.[59] Until the trilogy, lower courts had generally avoided dealing with

56 Part VI, Sections 45º62.

57 *Supra*, note 2.

58 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Limited v. Archer Daniels Midland Company*, 2013 SCC 58; (*Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

59 See *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 SCR 74 and *Kingstreet Investments v. New Brunswick (Department of Finance)*, 2007 SCC1.

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.[60] 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.[61] Moreover, the Supreme Court of Canada recently that ruled evidence from a Bureau's criminal investigation must be disclosed to plaintiffs in a parallel class action.[62]

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 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 Act.

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

60 Section 36(1).

61 Section 36(2).

62 *Imperial Oil v. Jacques*, 2014 SCC 66: Specifically, the court ruled that wiretap evidence from the Bureau's criminal price-fixing investigation of gas stations in Quebec must be disclosed to civil plaintiffs in a parallel class action.

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 the parties made on a 'without prejudice' basis, that relate to settlement or were made for the purpose of attempting to resolve the dispute. In these circumstances, the communications will be protected from disclosure to the court by settlement privilege, subject to certain exceptions.[63]

iv Case-by-case privilege (the Wigmore test)

Communications or documents that do not fall within one of the class privileges discussed above can be 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 which 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.[64]

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

63 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.

64 *Slavutych v. Baker* [1976] 1 S.C.R. 254.

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 frequency in the 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).[65] With respect to class actions, the settlement process usually occurs in two stages: (1) certification as against a party for the purpose of settlement and notice to class members regarding the settlement hearing, and (2) approval of the settlement agreement itself. Objectors, including non-settling defendants and class members can make submissions at each stage, and 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 the agreement to be unfair.[66] 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'.[67]

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.[68]

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65 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.

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

67 *Dabbs v. Sun Life Assurance Co of Canada*, [1998] OJ No. 1598 (Gen. Div.) at paragraph 9.

68 *Dabbs* at paragraph 13, and see also *Haney v. Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R (4th) 565 (B.C.S.C.) at paragraph 23.

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.

Submitting a matter to arbitration would afford litigants the latitude to select the arbitrator(s), 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 and undertaken, such as discovery.

XIV INDEMNIFICATION AND CONTRIBUTION

Generally, rules of court, or 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 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 issues is that defendants who settle competition class action 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 numbers of private antitrust class actions in Canada, none of them have proceeded to a 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 enforcement of the Competition Act given amendments that have now been in effect for over five years that deem certain conduct, conspiracy for example, a *per se* criminal offence with the follow-on effect of more private antitrust actions.

Chapter 10

CHINA

Susan Ning, Kate Peng and Sibo Gao[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Since the enactment of the PRC Anti-Monopoly Law (AML), the use of private litigation has been rapidly growing. According to the latest information published by the Supreme People's Court, up to the end of 2014, 274 antitrust private actions were accepted by courts all over the country, 250 of which were closed. Please see the chart below based on the most recent data disclosed by the Supreme People's Court.

	August 2008–2009	*2010*	*2011*	*2012*	*2013*	*2014*
Accepted	10	33	18	55	72	86
Closed	6	23	24	49	69	79

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 year: follow-on litigation and litigation against the abuse of administrative power. With respect to follow-on litigation, as reported, an antitrust litigation against the Zhejiang branch of PingAn was filed and accepted by the Zhejiang People's Court in early 2015, following the National Development and Reform Commission's (NDRC) September 2014 penalty decision in the cartel investigation of Zhejiang insurance companies. The case is reported to have been settled by the plaintiff and PingAn. Moreover, Beijing Intellectual Property Court

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reportedly affirmed its jurisdiction over a private litigation brought by a consumer against US infant-formula manufacturer Abbott and Carrefour (which sells Abbott's infant formula products), following the NDRC's penalty decision involving six infant formula companies in August 2014. 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 defendant then lodged an appeal.

Besides these two new types of antitrust litigation, several local consumer associations have brought, or are planning to bring, public interest litigation recently, while one public interest litigation has been filed and accepted by the court. Consumer associations could be more active in the future in bringing public interest litigation, including litigation premised upon monopolistic conduct.

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 Thsware 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 case is now under appeal.

vi Emiage v. Qihoo 360

On 30 April 2015, the Beijing Higher People's Court upheld the judgment of the first-instance court and rejected Emiage's claims that Qihoo 360 had abused its market dominant position.

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 (the Tort Law) (effective as of July 2010) and the PRC Contract Law (the Contract Law) (effective as of October 1999) are also applicable in a monopolistic civil dispute. In addition, the General Principle of Civil Law (effective as of January 1987) applies where the laws mentioned above do not account for particular scenarios.

The PRC Civil Procedure Law (the 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 (the AML Judicial Interpretation) on 3 May 2012, which provides specific rules on procedures concerning antitrust civil actions.

In summary, the following shows the legislative framework of a monopolistic civil dispute:

a Regarding monopolistic violations:

- The Anti-Monopoly Law (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 Principle of Civil Law (adopted at the fourth session of the Sixth National People's Congress on 12 April 1986, effective as of 1 January 1987).
- The PRC 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).
- The PRC Contract Law (adopted at the second session of the Ninth National People's Congress on 15 March 1999, effective as of 1 October 1999).

c Regarding legal procedure:

- The PRC Civil Procedure Law (amended at the 28th session of the Standing Committee of the Eleventh National People's Congress on 31 August 2012, effective as of 1 January 2013).
- 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).
- 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.

Further, according to the AML Judicial Interpretation, where the plaintiff reports the alleged monopolistic conduct to the AML enforcement agency, the statute of limitations is interrupted from the date of such a 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.

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 the 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 the above 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 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 the 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. The 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

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.

People's Court on Evidence in Civil Proceedings (the 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, 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, 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, the plaintiffs in a monopolistic civil lawsuit 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 the market competition.

ii Evidence collection

Regarding the application of evidence collection by the court, pursuant to Article 17 of the Provisions on Evidence, a party may request the court to investigate and collect evidence, if such evidence: (1) is kept by relevant governmental agencies and is only obtainable by a court; (2) concerns state secrets, trade secrets or privacy; or (3) 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. Recently, it was reported that Beijing Intellectual Property Court affirmed its jurisdiction over a private litigation against US baby-formula manufacturer Abbott, following the NDRC's penalty decision on six infant formula companies in August 2014. As the case is still ongoing, it is currently unclear as to whether the materials retained by the NDRC are accessible to the parties. Further, in the cases where the court believes that the facts of the case may damage the interest of the state, the public interest of society 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, the withdrawal of the case, etc., 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 the 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 therefore pre-action evidence preservation is necessary.

iv Witness testimony

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

VI USE OF EXPERTS

According to the Provisions on Evidence and the AML Judicial Interpretation, the party can apply to the 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 from 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 the *Qihoo 360 v. Tencent* case, 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 obtained to appear in court to provide their professional opinion on relevant legal issues. For example, in the *Thsware v. Guangdong Education Department* case, 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 (1) whether the conduct of the Guangdong Education Department constituted administrative monopolistic behaviour and (2) whether it was a specific administrative act that was justiciable. It is rare, however, for the 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 evidence provided before it.

VII CLASS ACTIONS

There is no exact equivalent to 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. This right to file joint action is contingent upon the court's approval of such a joint action and upon the plaintiffs' agreement to file such 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 waiver 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 in relation to 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, which 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, amended in August 2012, further stipulates new provisions for public interest litigation, which state that for conduct that pollutes the environment, infringes upon the lawful rights and interests of vast 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 the behaviour that infringes the legitimate rights of numerous consumers, the China Consumers' Association and its local branches may institute legal proceedings with the people's court. However, as to whether other trade or professional associations are qualified to bring such claims on behalf of their members, it remains to be tested in practice.

Since the mechanism is not well established in China, it is still unclear as to how to implement the mechanism in practice, especially with respect to the calculation of damages. In addition, in practice, the people's court also seems to be very cautious when accepting the public interest litigation.

Recently, the Shanghai 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 has been accepted by the people's court.

VIII CALCULATING DAMAGES

According to the AML Judicial Interpretation, if the defendant carries out monopolistic conduct and causes loss to the 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 the Chinese law.

The AML Judicial Interpretation, the General Principle of 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 the losses suffered by the plaintiff should be applied to determine damages resulting in the plaintiff being placed in the same position before the infringement occurred. For example, in the *Rainbow v. Johnson & Johnson* case, the court believed that the damages should not be calculated according to the principle under the Contract Law, which would be the loss of profits should Rainbow comply with the RPM clause (i.e., a profit margin of 23 per cent). Instead, the court deemed the loss of profits should be calculated according to the normal profits in the relevant market (i.e., a profit margin of 15 per cent).

In addition, according to the AML Judicial Interpretation, upon the request of the plaintiff, the court may include in the damages any reasonable expenses incurred by the plaintiff as a result of the investigation and the monopolistic conduct.

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, *supra*, 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. It was reported that Beijing Intellectual Property Court recently affirmed its jurisdiction over a private litigation brought by a consumer against US infant-formula manufacturer Abbott and Carrefour (which sells Abbott's infant formula products), following the NDRC's penalty decision on six infant formula companies in August 2014. The consumer claimed that in February 2013, he bought a can of Abbott's infant milk at a Carrefour store, while in August 2013, NDRC fined six infant formula companies, including Abbott, for resale price maintenance. The consumer alleged that he had suffered damage due to Abbott's engagement in monopoly conduct and therefore petitioned for compensation of around 10 yuan and related litigation expenses.

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, *supra*, according to Article 16 of the AML Judicial Interpretation, the limitation period for

private antitrust claims is two 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 two-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, the findings and conclusions of antitrust enforcement authorities are not binding on the court. However, 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, which has been considered by the agency in the preceding investigation, and may use such evidence to support its arguments. In practice, however, enforcement agencies may redact information in the decision that may expose the leniency applicants to follow-on litigation. Therefore, although there are no clear provisions or precedents, there is a chance that the agency may turn down the court's request to disclose a leniency application or documents related thereto in subsequent legal proceedings.

XI PRIVILEGES

Attorney–client privilege is not recognised under the 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 the application of collecting such information is 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. The court will not compel the parties to settle or to use other forms of alternative dispute resolution during the proceeding. Instead, the

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 the proceedings. The plaintiff needs to withdraw its complaint in order to close the litigation. Since a settlement agreement is only signed by the two parties, it cannot be enforced by the court directly. In order 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. However, according to Article 2 of the Arbitration Law of the People's Republic of China (the Arbitration Law), 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 high likelihood that they can be resolved through arbitration. According to publicly available information, a multinational electronics company is seeking to use arbitration to resolve a dispute with its Chinese distributor over allegations that it committed a violation concerning a vertical monopoly agreement.

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

On 12 June 2015, the SAIC issued the Regulation on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition, which mainly regulates non-price related behaviour. In addition, according to public reports, the State Council's Anti-Monopoly Commission is also drafting antitrust enforcement guidelines in the intellectual property sphere, with the drafting of the guidelines being led by the NDRC. Although the guidelines may not be promulgated as regulations of the State Council (depending on whether the guidelines will go through the procedures for the promulgation of regulations pursuant to the PRC Legislation Law) the guidelines will in any event serve as a reference for the three antitrust enforcement agencies and also will likely to be referred to by courts, given that it will be a normative document issued on the level of the State Council.

Chapter 11

ENGLAND & WALES

Peter Scott, Mark Simpson and James Flett[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

England and Wales continues to grow as a leading jurisdiction for antitrust litigation in Europe.[2] This is, in particular, the case for claims that 'follow-on' from infringement decisions by the European Commission and the Consumer and Markets Authority (CMA) but a similar increase is also evident in stand-alone actions between commercial parties.[3]

It remains the case that there is still no final judgment in a cartel damages 'follow-on' claim in England. The high-profile *Cooper Tire*[4] and *National Grid*[5] cases settled in 2014 at points very late in the process – the remaining defendant in the *Cooper Tire* claim in respect of the *Rubber* cartel (Dow Chemical) settled only during trial and the defendants to the *National Grid* claim in respect of the *Gas Insulated Switchgear* cartel settled the week before the trial was due to start.

Nonetheless, other prominent claims are progressing through the courts, including a substantial claim by many high street retailers and supermarkets against MasterCard

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2 References throughout this chapter to 'England' should be read to mean England and Wales.

3 See, for example, the recent case of *Dahabshiil Transfer Services Limited v. Barclays Bank plc; Harada Ltd & Berkeley Credit and Guarantee Limited v. Barclays Bank plc* [2013] EWHC 3379 (Ch).

4 *Cooper Tire and Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others*; *Cooper Tire and Rubber Company and others v. Shell Chemicals UK Limited and others*.

5 *National Grid Electricity Transmission plc v. ABB Ltd and others* [2013] EWHC 822 (Ch).

and Visa in respect of interchange fees. These and many other actions could have been brought in a number of potential jurisdictions in the EU, but where there is a choice of jurisdiction, England is established as a claimant's forum of choice.[6] Much of this activity is attributable to features of the English system that make it an attractive jurisdiction for bringing private claims: the ease with which claims can be issued, the permissive approach taken by the English courts to the rules that govern jurisdiction, wide and early disclosure of documents, the expertise of the judiciary assigned to competition claims, active case management and the prospect of costs recovery.

Yet these features only partially explain why England has seen such a marked increase in these types of claims and of competition litigation more generally. Perhaps more fundamentally, there is an increasing recognition by corporate entities – and it is actively encouraged by the European Commission and the CMA – that where they are the victim of a competition law infringement, they should take private action in the courts to recover losses. Indeed, a combination of the economic downturn and innovative fee arrangements by certain firms of solicitors specialising in these types of claims (who might offer no-win, no-fee conditional fee arrangements or 'damages-based agreements', coupled with the possibility of third-party funding, which reduce the risk associated with litigation for claimants) has created an environment where follow-on claims can be an attractive business proposition.

The High Court – for the moment – is the preferred forum for issuing proceedings, despite the existence of the Competition Appeal Tribunal (CAT) as a specialist body with specific jurisdiction concerning follow-on damages claims. This preference has been due to the relative ease of issuing proceedings in the High Court in comparison with the CAT, and the confidence that litigants have in High Court judges to deal with complex commercial litigation. It is also influenced by a string of recent decisions on procedural points, in which the CAT and the Court of Appeal have narrowly interpreted the CAT's jurisdiction and its power to grant special permission to bring claims.

However, this position changed following the entry into force of the Consumer Rights Act 2015 on 1 October 2015. The Act removed a number of limitations on the jurisdiction of the CAT over competition claims and this should establish its prominence as the primary venue for private competition litigation in England. In particular, the CAT can now hear stand-alone claims (i.e., claims that are not based on a prior infringement finding) and applications for injunctions (rather than just damages claims). This means claims will be able to be started in the CAT prior to a decision of a competition regulator.

6 For example, there are claims that have been, or still are, afoot in the English courts in relation to European Commission cartel decisions concerning marine hoses, vitamins, carbon and graphite products, synthetic rubber, paraffin waxes, gas insulated switchgears, LCD screens, methionine, air cargo, industrial bags, construction recruitment services, copper plumbing tubes, copper fittings, interchange, animal-feed phosphates, automotive glass, smart card chips, domestic-size gas meters and even Italian jet fuel; and in relation to abuse of dominance decisions concerning water supply, bus services, heartburn medicine and hypertension medicine.

The most controversial change in the Consumer Rights Act is the introduction of an 'opt-out' procedure for collective actions for competition claims, a significant expansion on the limited collective redress regime that it replaces. This innovation is significant in its contrast with the 'opt-in' regime recommended by the European Commission in its Recommendation on collective redress.[7] This is likely to further increase the attraction of the English courts to potential claimants (although the uncertainty surrounding the transitional limitation rules that apply to this new regime may have the effect that claims are not issued until they are clarified).

Meanwhile, at EU level, the European Parliament has approved a new directive on antitrust damages actions (the EU Damages Directive),[8] which entered into force on 26 December 2014 following approval by the European Council. The EU Damages Directive requires EU Member States to meet a minimum legislative standard for competition litigation within two years. The EU Damages Directive will not have as significant an effect in England as in some other Member States because in most areas (including disclosure of documents and limitation) the position in England is currently advanced beyond the standard that is mandated by the Directive. However, the EU Damages Directive does nonetheless make some important changes that will require the UK government to propose further legislative amendments, such as the introduction of a rebuttable presumption that cartels cause harm and the exclusion of companies that have been granted 100 per cent immunity from the principle of joint and several liability for the loss caused by a competition law infringement.

While the precise impact of these reforms on the state of private enforcement of competition law in England remains difficult to predict, what seems certain is that activity in this area will continue to increase as we have noted in previous editions.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Basis of action

Private actions for breach of EU or UK competition rules can be commenced in the High Court or in the specialist CAT. In the High Court, proceedings can be issued in either the Chancery Division or the Commercial Court.[9]

7 As set out in the European Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

8 Directive of the European Parliament and of the Council of certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union (2014/104/EU).

9 There is provision for transfer of competition claims between the High Court and the CAT, and vice versa: see Civil Procedure Rules (CPR), Rule 30 and CAT Rules, Rule 48. The High Court recently adopted this process in *Sainsbury's v. Mastercard* [2015] EWHC 3472 (Ch) when it concluded that the case was appropriate for transfer to the CAT.

Claims in the High Court are most commonly brought on the basis of the tort of breach of statutory duty, being a breach of the duty not to act contrary to the competition rules set out in Chapters I and II of the Competition Act 1998 or Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).[10] However, it is open to claimants to found their claims on alternative bases. For example the High Court has ruled that there is no reason why follow-on competition law claims should always be structured as a claim for breach of statutory duty and that follow-on actions could, alternatively, be founded on a 'conspiracy to use unlawful means'.[11]

Claims in the CAT are brought under Section 47A of the Competition Act, which permits a person who has suffered loss or damage as a result of a competition law infringement to bring an action for damages or any other monetary claim. The Consumer Rights Act has amended Section 47A to give the CAT a new power to order injunctions.

ii Follow-on and stand-alone actions

Follow-on actions

'Follow-on' actions can be started in the High Court or the CAT where there is a pre-existing infringement decision of the European Commission, the CMA or one of the UK sectoral regulators in respect of a breach of EU or UK competition law. The CAT's jurisdiction had previously been limited to follow-on claims – such that a claim cannot be made in the CAT until a decision by a competition authority has established that the prohibition in question has been infringed. However, the Consumer Rights Act has extended the CAT's jurisdiction to allow it to hear stand-alone claims, either as issued in the CAT or as referred to the CAT from the High Court under the currently dormant procedure empowered by Section 16 of the Enterprise Act 2002. The Consumer

10 The obligations on undertakings not to infringe Articles 101 and 102 are 'enforceable Community rights' under Section 2(1) of the European Communities Act 1972, which provides for their legal effect and enforceability in the United Kingdom.

11 *WH Newson Holding v. IMI and others* [2012] EWHC 3680 (Ch), judgment of 19 December 2012 – although following the decision of the Court of Appeal in *Emerald Supplies Limited v. British Airways PLC* [2015] EWCA Civ. 1024, the circumstances in which this cause of action is available will be more limited. The conspiracy claim in *Emerald Supplies* was struck out on the basis of a lack of intent to injure the claimants. The Court of Appeal held that there could be no intention to injure where there are multiple layers of a supply chain such that the defendant was 'not even sure that the claimant will suffer any loss at all'. This means that a conspiracy claim will only succeed if the claimant can show (1) that it is unable to pass on any overcharge, or (2) that it is both an end consumer and direct purchaser of the cartelised product. We expect the claimants to appeal the Court of Appeal judgment to the Supreme Court.

Rights Act has also extended the CAT's jurisdiction so it may grant other forms of relief including injunctive relief and has introduced a new fast-track procedure for certain cases.[12]

There have now been a number of follow-on actions commenced in the High Court and a smaller number in the CAT, although a case is yet to result in a final judgment.[13]

Stand-alone actions

Stand-alone actions based on a breach of EU or UK competition law remain relatively rare and few have been successfully pursued to trial. In the absence of a pre-existing decision by a competition authority, alleged competition infringements have more frequently been pleaded as a defence to claims on other grounds (e.g., intellectual property infringements), including in applications for summary judgment.[14]

To date, only one stand-alone claim has been successful in the High Court, although it was subsequently overturned by the Court of Appeal (*Attheraces Limited v. The British Horseracing Board*).[15] However, this lack of apparent success has not deterred stand-alone claims altogether. There are a number of prominent cases which, although technically stand-alone claims, still rely on an anticipated finding of an infringement by the European Commission. For example, in *Toshiba Carrier UK Limited and others v. KME Yorkshire Limited and others*[16] actions were brought against defendants that were not addressees of the European Commission's cartel decision. The High Court (and subsequently the Court of Appeal) allowed the claims to proceed as the claimants had alleged sufficiently clearly that KME Yorkshire Ltd had participated in, and implemented, the cartel arrangements, with knowledge of the cartel agreement.[17]

Despite the limited number of stand-alone cases, the High Court has granted interim injunctions in cases alleging competition law breaches, including in *Dahabshiil Transfer Services Limited v. Barclays Bank plc; Harada Ltd & Berkeley Credit and Guarantee Limited v. Barclays Bank plc*,[18] *Adidas-Salomon v. Draper*[19] and *Software Cellular Network*

12 The first fast-track stand-alone injunction application was issued in the CAT in late 2015 – *NCRQ Ltd v. Institution of Occupational Safety and Health* (Case No.: 1242/5/7/15).

13 The *Cooper Tire* claim settled during trial.

14 For example, in *Jones v. Ricoh UK Limited* [2010] EWHC 1743 (Ch), the High Court granted summary judgment for the defendant on the basis that the agreement between the parties underlying the dispute was void and unenforceable by virtue of Article 101 of the TFEU.

15 [2007] EWCA Civ 38, judgment of 2 February 2007.

16 *Toshiba Carrier UK Ltd and others v. KME Yorkshire Ltd and others* [2011] EWHC 2665 (Ch), judgment of October 2011.

17 [2012] EWCA Civ 1190, judgment of 13 September 2012.

18 [2013] EWHC 3379 (Ch).

19 [2006] EWHC 1318 (Ch).

Limited v. T-Mobile (UK) Limited.[20] None of these cases proceeded to a full trial.[21] However, these cases are rare because of the challenges applicants face in competition law cases in meeting the standard for injunctive relief ('a real prospect of success' at trial) without the support of an infringement decision by a competition authority. This is particularly the case in abuse of dominance cases, where applicants will need to file sophisticated economic evidence to prove market definition in relation to the alleged abusive conduct.[22]

The Consumer Rights Act gives the CAT a new power to order injunctions but claimants will face the same issues making their case for an interim injunction in the CAT.

iii Limitation

Proceedings in the High Court are subject to the general rule on limitation that applies to tort claims, which requires that a claim must be brought within six years from the date on which the cause of action accrued.[23] The limitation period for tort claims starts from the date on which the damage was suffered by the claimant, but it is generally accepted that one of the exceptions to the general rule will apply to claims relating to cartels or other 'secret' activities, where the period of limitation will not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it.[24] In follow-on damages cases, this may not be until a competition authority has announced a decision or reached a settlement with a cartel participant. The operation of the limitation provisions – and in particular the operation of the deliberate concealment exception in Section 32(1)(b) was recently considered by the High Court in *Arcadia v. Visa*.[25] This is a claim for damages by a number of high street retailers against Visa, claiming that by setting multilateral interchange fees paid by banks within the Visa transaction system Visa had infringed competition law. The claim sought to recover damages for excessive fees going back to 1977. The court held that the limitation rules applied and excluded much of the claim. In particular, the exception to the six-year limitation rule for wilful 'concealment' of relevant facts should be construed narrowly

20 [2007] EWHC 1790 (Ch).

21 Competition law grounds were also relevant to injunctions granted in two earlier cases: *Jobserve Limited v. Network Multimedia Television Limited* [2001] UKCLR 814 (upheld by the Court of Appeal [2002] UKCLR 184) and *LauritzenCool AB v. Lady Navigation Inc* [2004] EWHC 2607 (upheld by the Court of Appeal [2005] EWCA Civ 579).

22 See *Chemistree Homecare Ltd v. AbbVie Ltd* [2013] EWHC 264 (Ch), judgment of 11 February 2013.

23 Limitation Act 1980, Section 2. Contribution claims are subject to a two-year limitation period from the date on which that right accrued under the Civil Liability (Contribution) Act 1978 (i.e., the date of judgment, arbitration award or settlement agreement, whichever applies – Limitation Act 1980, Section 10).

24 Section 32 of the Limitation Act 1980.

25 *Arcadia Group Brands Ltd and others v. Visa Inc and others* [2014] EWHC 3561 (Comm).

and only applies to facts that are essential to the cause of action. Concealment of facts that improve a claimant's claim but without which the claim could still be pleaded is insufficient to postpone the limitation period. This decision is currently under appeal.[26]

The *Arcadia v. Visa* judgment – where the fact that interchange fees were set by Visa was always well known by merchants – is of limited application to cartel cases as, by the very nature of cartels, the key facts as to their existence and effects will be unknown until they are uncovered. But what the judgment does suggest is that if a claimant has enough facts to support the pleading of a *prima facie* cause of action it would be advisable to do so as soon as possible rather than waiting for further facts to emerge. Where jurisdiction is not in issue, claimants may therefore be expected to have proactive recourse to the procedures in the CPR to make requests for information and pre-action disclosure in order to advance their claim.

There were previously special limitation rules that applied in the CAT that had the effect of making the High Court the favourable forum for claimants. The position has now been harmonised with that of the High Court by the Consumer Rights Act, which introduced a new Section 47E of the Competition Act. This means that the limitation period in the CAT is now six years from the date on which the cause of action accrued.

In addition, the Consumer Rights Act includes new limitation provisions for collective actions under Section 47B of the Competition Act. The standard six-year limitation period will be suspended when a collective claim is issued. This is because a collective claim will only be allowed to proceed once it has obtained approval in the form of a collective proceedings order from the court (i.e., similar to 'certification' in the US and Canadian systems). This process will take some time and in the absence of a suspension rule could result in the limitation period for an individual claim expiring in the period between issue of a collective claim and issue of the collective proceedings order by the court. This means that individuals should not be required to issue protective claims under Section 47A to protect the limitation position in the event that the collective proceedings fail.

However, the Consumer Rights Act also contains a transitional rule whereby the old limitation rules continue to apply to claims 'arising' before 1 October 2015. The limitation rule provides that these claims can be made within a period of two years beginning from the later of (1) the date on which the decision can no longer be appealed (including the determination of any appeals), or (2) the date on which the action accrued.[27] Arguably this has the effect that claims relating to pre-1 October 2015 cartels can only be commenced in the CAT once the infringement decision has become final, unless the CAT grants special permission.[28] It is unclear how the CAT will apply these limitation rules; this uncertainty is likely to deter claims until it is resolved.

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26 A3/2014/3813 *Arcadia Group Brands Limited & ors v. Visa Inc. & ors*.

27 CAT Rules, Rule 31.

28 The operation of the old CAT limitation rules has been highly contentious with significant litigation on whether claims are out of time. Three cases clarified the issue: (1) *Emerson Electric v. Morgan Crucible* [2007] CAT 30; (2) *BCL Old Co v. BASF* [2008] CAT 24; [2009] EWCA Civ 434; and (3) *Deutsche Bahn v. Morgan Crucible* [2011] CAT 16. We have

The EU Damages Directive also includes provisions for the harmonisation of minimum limitation periods, requiring Member States to implement at least a five-year limitation period starting from the date on which the party had the possibility to discover that it had suffered harm from an infringement. The existing English limitation rules already exceed this requirement. However, the Directive contains additional provisions which will require implementation at UK level: (1) that the five-year limitation period should be suspended for the period of a competition authority's investigation, and (2) in any event, that claims should not be time-barred provided they are brought within one year after any infringement decision.

In relation to claims in the High Court, parties to potential litigation may be able to suspend time for the purposes of limitation by entering into a standstill or 'tolling' agreement.

III EXTRATERRITORIALITY

i Founding jurisdiction in the English courts

A foreign-domiciled defendant served with a claim issued in the English courts can indicate an intention to challenge the jurisdiction when acknowledging service. The jurisdictional challenge will then be heard at a preliminary hearing.

Whether the English courts (including the CAT) have jurisdiction to hear a private action concerning an infringement of competition law will, in general, be determined by the relevant EU law rules, as set out in Regulation 1215/2012 (the Judgments Regulation).[29] The general rule under the Judgments Regulation is that a defendant domiciled in an EU Member State should be sued in the courts of that Member State (Article 4). Two relevant exceptions apply to this general rule, allowing the possibility in certain circumstances of a competition claim being brought in the English courts against a defendant domiciled outside the UK and in another EU Member State – these exceptions are found in Article 7(2) and Article 8(1) of the Judgments Regulation.

Article 7(2) applies to tort claims, which will include a competition claim for breach of statutory duty. It provides that a defendant domiciled in a Member State can be sued in the courts of 'the place where the harmful event occurred or may occur'. General

not described this case law in detail in this chapter because it has been superseded by the Consumer Rights Act. Please refer to the seventh edition of this publication for a detailed discussion.

29 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Jurisdiction concerning claims against EFTA countries that are not also EU Member States will be determined according to the rules set out in the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which are substantively equivalent to those set out in the Judgments Regulation. For non-EU or EFTA-domiciled defendants, the jurisdiction of the English courts will be determined by the private international law rules found in the common law and the CPR that apply to applications to serve claims outside the UK.

tort case law has interpreted this phrase to mean the place where the damage occurred or the place where the event giving rise to the damage occurred. The application of Article 7(2) (then 5(3)) was considered in *Cooper Tire v. Shell* – a claim by a consortium of tyre manufacturers against 23 defendants said to have been involved in, or to have implemented, the synthetic rubber cartel. In hearing an application challenging jurisdiction, the High Court briefly considered the then Article 5(3) and commented that in the context of a Europe-wide cartel where cartel meetings (the event giving rise to the damage) took place in several countries, it would be difficult to contend that the place where the harmful event occurred was England, as the harmful events took place in a number of countries.[30] The court therefore considered that the claimants could only rely on the then Article 5(3) in relation to the place where the damage caused by the cartel occurred. However, were jurisdiction established on that basis, that would only be in respect of the damage that occurred in England (i.e., concerning sales in England).

The English courts have demonstrated a more liberal approach to the application of Article 8(1) to establish jurisdiction over follow-on claims against defendants domiciled in other Member States. Article 8(1) provides that where the jurisdiction of the English courts has been established over one defendant (e.g., under Article 4), additional defendants domiciled in other Member States can also be sued in England in the same action, 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'. The High Court's interpretation of this phrase in follow-on damages cases has allowed claimants to bring claims against all EU-domiciled cartel participants based on the identification of a single 'anchor' defendant in the jurisdiction, although there are now signs that the High Court could in the future apply greater scrutiny to the anchor defendant's link to the infringement.

The application of Article 8(1) (previously 6(1)) in follow-on cases was first considered in the context of a jurisdictional challenge in an interim hearing on a strike out application in *Provimi v. Roche*[31] – an action following on from the European Commission's 2001 *Vitamins* cartel decision. The claimants sought to rely on the UK subsidiaries of non-UK parent companies as Article 2 (anchor) defendants, so that jurisdiction could be established against the parent companies that were addressees of the Commission decision using the then Article 6(1). The UK subsidiaries were not addressees of the decision, and had not at any time had a trading relationship with the claimants. The High Court held that there was 'a good arguable case' that the 'so closely connected/risk of irreconcilable judgments' test was met in the context of a cartel follow-on action that named the members of a cartel as co-defendants, in particular because the claims for damages against the defendants arose out of the same cartel finding. More controversially, the High Court accepted that it was arguable that such claims could seek to recover losses against defendants that were subsidiaries of the parent

30 [2009] EWHC 2609 (Comm). The claimants had argued that the fact that the first and last cartel meetings had taken place in London was sufficient for the harmful event to have occurred in England.

31 *Provimi Ltd v. Roche Products Ltd and other actions* [2003] EWHC 961 (Comm).

companies addressed by the European Commission infringement decision, on the basis that they were part of the same 'undertaking' and so could be said to have (perhaps unknowingly) 'implemented' the cartel in England.[32] This allowed the claimants to claim against the English subsidiary (as the anchor defendant under Article 4 (then Article 2)) in the absence of any assertion about a trading relationship.

This approach was followed in the *Cooper Tire* case where the claimants sought to establish jurisdiction against non-English addressees of the European Commission's decision using the then Article 6(1) through including three anchor defendants that were domiciled in England and subsidiaries of the cartel participants (but not themselves addressees of the decision). The High Court confirmed that it was arguable that a subsidiary of a party named in an infringement decision could be liable in a follow-on damages claim even where it was not party to, or aware of, the infringement of competition law but based on mere implementation of the cartel arrangements. Specifically, the court held that the claimants had demonstrated that the anchor defendants had sold synthetic rubber within the jurisdiction, which provided a sufficiently arguable case that they had implemented the cartel arrangements. The defendants' subsequent appeal was dismissed as the claimants had alleged that each of the anchor defendant subsidiaries were party to the infringing arrangements. The Court of Appeal was able to side-step the issue of whether a subsidiary of a party named in an infringement decision could be potentially liable even where it was not party to or aware of an infringement of competition law. However, the Court observed that had implementation without knowledge been the sole allegation then it would have been inclined to make a reference to the ECJ.[33]

The point was considered again by the Court of Appeal in *Toshiba Carrier v. KME*.[34] The claimants attempted to found jurisdiction against the non-UK companies named in the European Commission's 2003 *Copper Tubes* cartel decision by including three English subsidiaries (which were not addressees of the decision). This was challenged by the defendants. At first instance, the High Court – following *Provimi* and *Cooper Tire* – found against the defendants and concluded that there was jurisdiction to hear the claims against the non-English defendants.[35] The case was subsequently appealed to the Court of Appeal, which upheld the High Court's decision on the basis that the claimants had alleged sufficiently clearly in their pleadings that, although the companies in question were not addressees of the infringement finding, they had participated in and implemented the cartel arrangements with knowledge of the cartel.[36]

The High Court's relatively liberal approach to jurisdiction has not been followed by the CAT. In the follow-on action of *Emerson Electric v. Morgan Crucible* (*Emerson IV*)[37] an English subsidiary (Mersen UK Portslade) of a non-English addressee of the

32 Under the EU concept of 'undertaking' parents and subsidiaries within a corporate group are considered part of a single economic entity for the purposes of competition law.

33 [2010] EWCA Civ 864.

34 Claim No. HC09C04733, High Court (Chancery Division).

35 [2011] EWCH 2665 (Ch).

36 [2012] EWCA Civ 1190.

37 [2011] CAT 4.

European Commission's decision in the *Carbon and Graphite Products* cartel applied to the CAT to dismiss certain claims for damages against it. The English subsidiary argued that there was no infringement decision against it on which the claimants could base their claims and furthermore that it was not referred to anywhere in the European Commission decision.[38] The CAT agreed and struck out the claim, subsequently refusing the claimants permission to appeal its judgment. Although the claimants were granted permission to appeal by the Court of Appeal on 11 October 2011, the decision to strike out the claim against Mersen UK was upheld on 28 November 2012.[39] Ultimately, on 1 May 2013, the CAT published a Supreme Court order consenting to the withdrawal by the applicants of their application to appeal, after a settlement was reached.[40] The judgment of the Court of Appeal upholding the CAT's decision in *Emerson IV* illustrates the limited application of Article 6(1) for founding jurisdiction in the CAT by identifying English subsidiaries that can be used as anchor defendants to found jurisdiction under Article 6(1) for claims against non-English addressees of a European Commission cartel decision. This follows from the (current) limitation of the CAT's jurisdiction in relation to follow-on claims, which requires that the subsidiary itself must have been found to infringe Article 101. The CAT's approach can be expected to change when it obtains jurisdiction to hear stand-alone claims in October 2015.

ii Resisting jurisdiction of the English courts

The *lis pendens* provisions in the Judgments Regulation provide scope for a potential defendant to a competition action to issue declaratory proceedings pre-emptively in another jurisdiction (an 'Italian torpedo') and frustrate a claimant's attempt to bring the action in England.[41] Under Article 29, where proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, any court other than the court first seized must stay its proceedings. This principle has been applied by the English courts without controversy in other contexts. Article 30 sets out a similar requirement in relation to related actions (i.e., not between the same parties) in the courts of different Member States, providing that any court other than the court first seized has the discretion to stay its own proceedings pending the outcome of the action in the first court seized.

38 The basis for the subsidiary's application was that pursuant to Subsection 47A(6)(d) of the Competition Act 1998, no claim for damages under Section 47A could be brought against it unless the European Commission had decided that it had infringed Article 101(1) TFEU.

39 *Emerson Electric Co & Ors v. Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, judgment of 28 November 2012.

40 [2013] Case 1077/5/7/07, Supreme Court order of 15 April 2013.

41 The fear of pre-emptive action means that claimants will rarely send a letter before action to bring the claim to the attention of potential defendants (as would be expected in most commercial disputes as part of the 'pre-action protocol'). Rather, the normal course of action is to issue proceedings and only then seek to engage with the named defendants, usually offering agreement to a stay of proceedings to explore the possibility of an early settlement.

The application of the *lis pendens* provisions was considered by the High Court and the Court of Appeal in *Cooper Tire*. Upon becoming aware of a potential action in England, one of the cartel participants named in the Commission's decision issued proceedings in Italy seeking a negative declaratory judgment.[42] The claimants then issued proceedings in England against the other cartel participants and a slew of subsidiaries. One of the defendants in the English proceedings subsequently sought a stay on the basis of *lis pendens* pending the outcome of the Italian proceedings (i.e., under Article 30 (then Article 28), on the basis that the actions were related). The High Court accepted that there was a risk of irreconcilable judgments but declined to order a stay because the matters relevant to exercising its discretion under the then Article 28 weighed against doing so. In particular, the risk of irreconcilable judgments could not be avoided by a stay as some of the defendants had submitted to the English jurisdiction and those proceedings would continue. Further, the High Court considered that the delays in the Italian system meant it was more likely that the English court would arrive at a substantive decision before the case was finally decided in Italy. The approach of the High Court (subsequently approved by the Court of Appeal) suggests that the English courts will be reluctant to let a torpedo sink a damages claim unless the stricter terms of Article 29 apply to remove its discretion (i.e., the claim would need to be a mirror image both in substance and in identity of parties).

The Judgments Regulation might also allow jurisdiction to be resisted where a jurisdiction clause in a contract provides for the jurisdiction of the courts of another Member State (Article 25). The application of this provision to competition actions was considered in *Provimi*, where some of the vitamins supply contracts included exclusive jurisdiction clauses naming courts in other Member States. However, the High Court concluded that by referring to 'disputes arising out of' the sales contracts, those clauses were too narrow to cover cartel damages claims. This suggests that a jurisdiction clause could only be relied on to oust the jurisdiction of the English courts if it unambiguously refers to competition or tort claims (or both).[43]

iii Applicable law

An issue related to, but separate from, jurisdiction is 'applicable law', which arises in a case involving a tort that contains a foreign element. 'Applicable law' refers to the court's choice of which law to apply in determining the substance of a claim. Although this subject is complex, it is worth summarising the considerations that apply in determining applicable law in the context of competition law claims.

Applicable law can arise as an issue in competition law actions because infringements (e.g., cartels) can often have effects in more than one jurisdiction and the national laws that apply to their determination can vary considerably between different

42 The application in Italy sought a declaration that: (1) there was no cartel; (2) if there was, the applicant was not a party to the cartel; or (3) even if the applicant was involved in a cartel, the tyre manufacturers had not suffered any loss.

43 Any clause relied upon to found jurisdiction in the English courts for a competition claim would therefore need to be tightly drafted to ensure it covers a competition action.

Member States. This makes the question of which law should be applied to questions of substantive law – for example, issues such as causation, attribution of liability, the nature of the remedies that can be awarded and rules relating to settlements[44] – an important consideration for claimants and defendants that can provide incentives for 'applicable law shopping'. Two particular issues where there are significant divergences in the laws of Member States could turn on applicable law in competition law claims: limitation (where applicable periods in the EU range from one year to anything up to 10 years or more); and passing on (which has been expressly accepted as applying in the law of some Member States, and may be more uncertain in others). For both issues, a court's acceptance of one law over another could effectively extinguish a claim, although an English court is yet to consider arguments that a foreign law should apply to a competition law claim brought in the jurisdiction.

The choice of law rules has now been harmonised across the EU by the Rome II Regulation.[45] Rome II includes a specific provision for competition law claims. This provides a general rule that the applicable law shall be the law of the country where the market is, or is likely to be, affected.[46] Most importantly for the purposes of infringements that might have effects in, or defendants from, multiple EU Member States, this rule is subject to an exception so that the applicable law may be the law of the forum in the case of either the market affected being in more than one country, or where there are co-defendants, for example where Article 8(1) of the Judgments Regulation has been employed.[47] In both situations the claimant can choose to base the claim on the law of the forum, as long the market of the Member State of that court has also been 'directly and substantially affected'.

However, the rule provided by Rome II has had little practical relevance to cases before the English courts to date as it only applies to damage that has occurred after 10 January 2009.[48] It will therefore be some time before Rome II is applied by the courts. The question of applicable law in the cases currently before the English courts – in many cases relating to cartels found to have operated as far back as the 1980s – falls to be determined under the English tort law rules on choice of law, which are a mix of common law and statute. In summary, claims relating to conduct and damage prior to 1 May 1996 will be determined under the common law rule of 'double actionability',[49]

44 While EU law confers rights on individuals to seek redress for harm caused by infringements of EU competition law rules (rights which are 'directly effective') (see Section IV, *supra*) the manner in which those rights are enforceable before national courts is a matter for each Member State's national laws.

45 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L199/40.

46 Regulation (EC) No. 864/2007, Article 6(a).

47 Regulation (EC) No. 864/2007, Article 6(b).

48 Regulation (EC) No. 864/2007, Article 31 and 32.

49 'Double actionability' means that in order for a foreign law to be applied it must be established that the defendant's conduct is actionable under both the law of the forum and

while conduct and damage that occurred between 1 May 1996 and the entry into force of Rome II on 11 January 2009 will be determined under the Private International Law (Miscellaneous Provisions) Act 1996.[50]

IV STANDING

Any person who has suffered loss or damage as a result of an infringement of either UK or EU competition law may bring a claim for damages in the CAT (Competition Act, Section 47A). The same criterion applies to claims before the High Court on the basis that the law of tort applicable to breach of statutory duty confers a right of action on any persons harmed by a breach that is directly enforceable.

Most obviously, this will include direct purchasers of a product whose price was inflated as a result of a competition law infringement and competitors excluded from a market. Also, the ability of indirect purchasers to bring claims has not, to date, been disputed in the English courts.[51] In *Devenish Nutrition v. Sanofi-Aventis*[52] – a claim by indirect purchasers of animal vitamins following the Commission's 2001 *Vitamins* cartel decision – it was assumed in interim proceedings on points of law that indirect purchasers were entitled to claim damages, including before the Court of Appeal. In *BCL Old Co v. BASF* – a similar claim by indirect purchasers – the defendants did not challenge the standing of the indirect purchasers to bring the claims, although the CAT and the Court of Appeal held that the claim was time-barred. There has been at least one subsequent case in the CAT where indirect purchasers have brought claims and this point is yet to be disputed.[53]

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the law of the place where the conduct or damage occurred. This rule is, however, subject to an exception that gives the court the discretion to make a different choice where the issues arising in the action have their most significant connection to a particular law.

50 The Private International Law (Miscellaneous Provisions) Act 1996 abolished the common law rule of double actionability and essentially provides for a general rule that the law of the place where the conduct or damage occurred should apply, subject to an exception for situations where the most substantial connection is with the law of another jurisdiction.

51 Indeed, as a matter of EU law, the ECJ's decision in *Manfredi v. Lloyd Adriatico* [2006] ECR I-6619 – where the ECJ held that any person who has suffered actual loss must be entitled to compensation before a national court – arguably requires that standing extend to indirect purchasers. This position has since been codified by the Damages Directive which Member States are required to implement by 27 December 2016.

52 [2008] EWCA Civ 1086.

53 For example, in *Moy Park v. Evonik Degussa* (Case No. 1147/5/7/09), the claimants brought a claim for damages in the CAT following the European Commission's decision in the methionine (animal feed) cartel. The claimants argued that they were indirect purchasers of the methionine from the addressees of the European Commission's decision, or their subsidiaries, as the claimants absorbed the resulting overcharge from the cartel activities through the claimants' suppliers. It appears that a settlement was reached before the issue was considered by the CAT so the question remains open.

The ECJ's judgment in *Courage v. Crehan*[54] dealt with a claim for damages by a party to an anti-competitive agreement against another party to that agreement. It held that where one party bears 'significant responsibility' for the infringement of competition law, that party is likely to be barred from making a claim under the principle of English law that a person should not be permitted to claim where it arises from his or her own illegal act (*ex turpi causa non oritur actio*). However, on the facts of *Crehan*, the claim was allowed to proceed.

Certain designated groups can also have standing to bring representative actions for damages before the CAT (see Section VII, *infra*).

V THE PROCESS OF DISCOVERY

i General obligation of disclosure

Generally, all parties to civil proceedings before the courts in England must give disclosure of those documents relevant to the case.[55] The ability to inspect a defendant's documents is potentially attractive to a claimant in proving its case and is one of the features of the English court system that makes England a popular forum, in particular, for follow-on damages actions.[56] However, disclosure is a double-edged sword, as the claimant must also disclose relevant documents, which might allow a defendant to challenge causation or make out the passing-on defence, or both (see Sections VIII and IX, *infra*).

The disclosure obligation continues throughout the proceedings and extends to documents that are created following the commencement of legal proceedings unless they are protected by privilege (see Section XI, *infra*).

The timing for disclosure in follow-on actions was the subject of dispute in *National Grid v. ABB*, a continuing claim relying on the European Commission's 2007 decision concerning the gas-insulated switchgear cartel.[57] The High Court refused to order a stay of proceedings until the outcome of appeals against the European Commission's decision, ruling that procedural steps up to trial, including disclosure, should take place before a *Masterfoods* stay[58] is imposed. The consequence of this decision is that claims before the High Court can be expected to proceed at least to disclosure while appeals to the European courts remain unresolved.

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54 [2001] ECR I-6297.

55 Under CPR 31.6, a party is required to disclose: (1) documents on which it relies; (2) documents that either adversely affect its own case, adversely affect another party's case or support another party's case; and (3) documents that are required to be disclosed by a relevant practice direction. A party's standard disclosure obligation is to conduct a reasonable search for documents that are or have been under its control that fall within the aforementioned categories: CPR 31.7.

56 Although the EU Damages Directive requires all Member States to introduce at least limited disclosure rules.

57 *National Grid Electricity Transmission plc v. ABB Ltd* [2009] EWHC 1326 (Ch).

58 A '*Masterfoods* stay' refers to the judgment of the ECJ in *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, in which the court emphasised, in accordance with the duty of

In a case management ruling in *National Grid v. ABB* on 4 July 2011, the High Court granted an application by the claimant for two of the 23 defendants to disclose certain documents obtained from the European Commission's file despite acknowledging the possibility that the Commission might reopen its investigation into the gas-insulated switchgear cartel if the defendants were successful in their appeals to the ECJ.[59] The High Court held that disclosure between parties to English court proceedings, under the protection of a confidentiality ring, would not undermine a European Commission investigation.

ii Pre-action disclosure

Even before proceedings are afoot, disclosure may be ordered against any person that is likely to be a party to the legal proceedings, at the discretion of the court, in circumstances where the court considers that this is desirable to dispose fairly of the claim, assist the resolution of the dispute without proceedings, or save costs.[60] There is no scope to apply for pre-action disclosure of documents that would fall outside the respondent's duty under standard disclosure had the proceedings commenced. Pre-action disclosure may be of particular relevance in competition cases in which a defendant's anti-competitive conduct tends to have been concealed and a potential claimant may require documents from a potential defendant to establish whether it was affected by the infringement.

In *Trouw UK v. Mitsui*[61] the court stressed that pre-action disclosure should only be available in exceptional circumstances and that the main purpose of the procedure is to avoid litigation. This approach was followed in *Hutchison 3G v. O2*,[62] where the court refused an application for pre-action disclosure by H3G – the smallest player and most recent entrant into the UK mobile phone market – against its competitor mobile network operators. H3G sought broad pre-action disclosure to support a potential claim that the other operators were engaging in anti-competitive practices to prevent mobile number portability rules being liberalised. The application was refused on the ground that it was not possible for the court to be satisfied that the evidence requested would fall within the scope of standard disclosure. In any event, the court doubted that pre-action disclosure would serve a useful purpose as the claimant had admitted that it could plead its claim without pre-action disclosure, which would have been disproportionately expensive.

iii Third-party disclosure

The English courts have the power to order disclosure against a non-party to proceedings in circumstances where this is considered necessary to dispose fairly of the claim or to save

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sincere cooperation under Article 10 of the Treaty establishing the European Community, that a national court is under an obligation to stay its proceedings in circumstances where the outcome of the dispute before it depends on the validity of the European Commission decision.

59 [2011] EWHC 1717 (Ch).

60 CPR 31.16(3)(d).

61 [2007] EWHC 863 (Comm).

62 *Hutchison 3G UK Ltd v. O2 (UK) Ltd* [2008] EWHC 55 (Comm).

costs.[63] An applicant must satisfy the court that each document or class of documents sought is likely either to support the case of the applicant or to affect adversely the case of another party to proceedings.

On its face, this is an onerous standard for an applicant to meet, but the courts have applied the test liberally in other (non-competition law) contexts, and have shown that they are prepared to consider the class of documents sought rather than each document in isolation.[64]

iv Disclosure in the CAT

The CAT operates a more flexible procedure. Although its discretion to order disclosure is generally exercised, there are examples of cases where it has refused to do so. In *Claymore Dairies Ltd v. OFT*[65] the CAT stressed that disclosure is not automatic and should only be ordered where the CAT is satisfied that it is 'necessary, relevant and proportionate to determine the issues before it'. Claymore Dairies sought access to the Office of Fair Trading's (OFT, the CMA's predecessor) file following a closed investigation by the OFT into the alleged abusive conduct of a competitor. The CAT found that disclosure was not necessary or proportionate given the confidential nature of the information (relating to the claimant's closest competitor) and the fact that the claimant was able, in any event, to advance a detailed pleaded case without further information.

v Treatment of confidential documents

Confidentiality is not a bar to disclosure of documents either in the High Court or the CAT. However, it is relevant to the court's discretion in making disclosure orders. In competition cases, the parties are commonly competitors and the disclosure of confidential information might therefore be damaging to the disclosing parties' business interests. The English courts are sympathetic to this and confidentiality rings are routinely set up to restrict the number of individuals permitted to review confidential information (commonly limited to counsel, external solicitors and experts).

vi Responses to European Commission information requests

In the application for disclosure in the *National Grid* case, the claimant sought disclosure of the responses to the European Commission's information requests of two defendants and certain material under the defendants' control obtained as a result of their access to the European Commission's file during the Commission's administrative proceedings. The High Court granted the application for disclosure on the basis that additional protection would be granted to the confidential information through a confidentiality ring.[66]

63 CPR 31.17.

64 *Three Rivers DC v. Bank of England* [2002] EWCA Civ 1182.

65 [2004] CAT 16.

66 [2011] EWHC 1717 (Ch).

vii Disclosure of leniency documents

In the same case, and following the ECJ judgment in *Pfleiderer v. Bundeskartellamt*[67] – which held that there is no absolute protection for leniency material, but that the court should perform a balancing act between competing interests – *National Grid* also sought disclosure of the confidential version of the European Commission's infringement decision from the defendants together with documents that may have included leniency material.[68] The Commission wrote to the High Court making observations on the application in light of *Pfleiderer* under Article 15(3) of EU Regulation 1/2003.[69] It took the view that 'corporate statements' (voluntary statements made by a company specifically for its application for leniency) should not be disclosed given the importance of leniency applications to the competition enforcement regime. For 'other documents' (such as replies to a request for information), the Commission submitted that national courts should, on a case-by-case basis, balance the respective interests of the parties involved and consider whether disclosure would increase the leniency applicants' exposure to liability compared with the liability of non-cooperating parties.

The High Court held that the Commission should not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme as it is less well placed than the national court to assess the relevance and importance of the disclosure being sought.[70] Mr Justice Roth treated the Commission decision differently from the other requested documents. On the basis that the findings of the Commission are likely to be binding on the court, Mr Justice Roth took the view that the court (and consequently the claimant) should see some (but not all) of the confidential parts of the decision. He considered that any confidentiality concerns could be met by restricting disclosure to a narrow confidentiality ring and, in any event, disclosure would not affect a leniency applicant's defence to the damages claim. In respect of each of the other documents, the court conducted the balancing exercise prescribed by the ECJ in *Pfleiderer* (i.e., balancing the importance of disclosure against the need to maintain an effective leniency programme). Disclosure was ordered of some limited extracts of the responses by the leniency applicants to the Commission's information requests, which provided an explanation of documents supplied as part of the leniency application, the way the cartel operated and the nature of the discussions at cartel meetings. Two

67 In *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09) [2011] WLR (D) 196 the ECJ held that, in principle, no person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages should be prevented from being granted access to documents relating to the leniency procedure involving the addressee of the infringement finding. However, the conditions under which such access should be permitted or refused should be determined by the national courts and tribunals of the individual Member States on the basis of national law and having regard to both protecting the leniency regime and facilitating damages claims.

68 [2011] EWHC 1717 (Ch).

69 'National Grid Electricity Transmission plc v. ABB', Observations of the European Commission pursuant to Article 15(3) Regulation 1/2003, November 2011.

70 [2012] EWHC 869 (Ch).

defendants – Alstom and Areva – subsequently applied to the EU General Court in a bid to prevent disclosure. They argued that the European Commission was wrong to provide the High Court with their responses to the statement of objections.[71] The General Court suspended transmission of the confidential documents to the High Court[72] as, weighing the various interests involved, it considered that this would have the least impact on the proceedings as it would maintain the status quo. In June 2014, a week before the case was scheduled to go to trial, National Grid reached an out-of-court settlement with members of the cartel, including ABB, Siemens and Alstom.

British Airways was recently ordered at first instance[73] to disclose the full unredacted version of the Commission's cartel decision to a select group of the claimants' advisers, within a confidentiality ring (a standard mechanism in the English process for allowing limited disclosure of confidential information). British Airways has been the target of several damages actions in the UK as customers of the airline seek compensation for the excessive prices they paid as a result of anti-competitive conduct. The Commission had taken over four years to publish the non-confidential version of its decision. The High Court considered that this delay was unacceptable and that the 'molasses like approach' of the Commission to confidentiality representations was causing unreasonable delays to the claimants' claims. The Court of Appeal overturned the High Court judgment on the basis that the protection of third parties' rights to defence must be protected[74] in line with the General Court decision in *Pergan*.[75] The Court held that disclosure can only be made – even within a confidentiality ring – once *Pergan* material has been redacted.

The ECJ has recently had several opportunities to consider the question of whether information obtained by a competition authority in the course of a cartel investigation may be disclosed in subsequent damages actions in national courts. In *Bundeswettbewerbsbehörde v. Donau Chemie AG and others*[76] the ECJ held that disclosure of documents should be assessed on a case-by-case basis and that the risk that disclosing such documents could undermine a leniency programme is 'liable to justify the non-disclosure' of the documents in question. The ECJ made it clear that Member States should not draft national legislation that would hinder the effective enforcement of the competition rules or the rights of claimants to seek damages.

The EU Damages Directive contains provisions designed to resolve any uncertainty in this area and to facilitate damages claims by victims of antitrust violations. It limits disclosure of evidence held in the file of a competition authority. In particular, leniency

71 Case T-164/12, *Alstom and others v. Commission* (2012/C 165/54), Official Journal C 165/32, 9 June 2012.

72 Case T-164/12 R, *Alstom v. Commission*, Order of the President of the General Court, 29 November 2012.

73 *Emerald Supplies Limited and others v. British Airways PLC* [2014] EWHC 3513 (Ch)

74 *Emerald Supplies Limited v British Airways PLC* [2015] EWCA Civ. 1024

75 Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission* [2007] ECR II-4225.

76 C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG and others*, judgment of 6 June 2013.

statements and settlement submissions will be immune from disclosure. Documents that have been prepared specifically for the purpose of the enforcement proceedings, or that the competition authority has drawn up in the course of its proceedings will be immune from disclosure until after the competition authority has closed its proceedings.

In the meantime, uncertainty remains as to the extent of disclosure that claimants can expect to obtain through a disclosure order. Although claimants are dependent on the discretion of the judge in carrying out the balancing act prescribed in *Pfleiderer* they will be encouraged that there are prospects before an English court for obtaining access to official documents held by defendants to assist in supporting the detail of a claim for damages.

viii Application of the French 'blocking statute'

In a recent decision in the *National Grid* case,[77] Mr Justice Roth ruled on the application of the so-called French blocking statute before the English courts. The French blocking statute[78] prohibits 'any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative proceedings'.

The French defendants in the *National Grid* case (i.e., members of the Alstom group and Areva) had sought to resist disclosure of documents on the basis that disclosure would constitute a breach of the blocking statute and would put them at risk of criminal prosecution in France. It is well established that an English court has the discretion to order disclosure even where such disclosure might violate foreign law and the claimant applied to the court on this basis. Mr Justice Roth ruled that the French defendants are not subject to a real risk of prosecution under the blocking statute, and concluded that disclosure should be provided. An application by the claimants to lodge an appeal at the Supreme Court concerning the French blocking statute has since been refused.[79]

VI USE OF EXPERTS

Parties are entitled to apply to the court to appoint an expert to provide evidence on technical matters.[80] The court has control over the extent and form of expert evidence and will restrict expert evidence to cases where it will genuinely assist the trial judge in determining the matters at issue.[81] In contrast to witnesses of fact, whose evidence must be confined to their knowledge of the facts of the case, expert witnesses are entitled to express opinions.

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77 *National Grid Electricity Transmission plc v. ABB Limited and others* [2013] EWHC 822 (Ch).

78 French Law No. 68-678 of 26 July 1968 (as subsequently modified).

79 *Secretary of State for Health v. Servier Laboratories Limited and National Grid Electricity Transmission plc v. ABB Limited* [2013] EWCA Civ 1234, judgment dated 22 October 2013.

80 CPR Part 35.

81 *JP Morgan Chase Bank v. Springwell Navigational Corporation* [2006] EWHC 2755 (Comm); *Zeid v. Credit Suisse* [2011] EWHC 716 (Comm).

The expert's primary duty is to assist the court, which overrides any duty that the expert owes to the party that is paying him or her.[82] An expert's report must contain details of the instructions that the expert has received, which are not privileged against disclosure.[83]

Expert evidence is of particular relevance in competition law cases as economic analysis will often go to the heart of competition law questions. Expert evidence is commonly adduced on issues such as market definition, causation and the loss suffered as a result of an infringement (and, in particular in follow-on actions, whether this loss was passed on to subsequent purchasers).

The court encourages discussions between experts away from court, for example in the context of discussions attempting to settle the litigation. Experts are also encouraged to produce a joint statement setting out areas of agreement and areas of disagreement together with reasons for their disagreement.[84]

VII CLASS ACTIONS

Class actions – in the US sense of the term – are a new development in England. The Consumer Rights Act introduced an 'opt-out' collective action regime (effective 1 October 2015), allowing competition law claims to be brought on behalf of a defined set of claimants (excluding those claimants that expressly opt out). Previously the English litigation procedural rules had provided only limited scope for group actions in competition law cases.[85] This new regime contrasts with the more conservative approach recommended by the European Commission, which has set out a series of non-binding principles for collective redress mechanisms in Member States,[86] but on an 'opt-in' basis.

The Consumer Rights Act introduced an 'opt-out' collective action regime for both stand-alone and follow-on competition law claims brought before the CAT. This allows a representative claimant to bring a claim for damages in the CAT on behalf of all persons and entities that fall within a defined class (with the exception of those persons that explicitly 'opt out'), thereby expanding the old position under Section 47B of the

82 CPR 35.3.

83 CPR 35.10(3), CAT Guide to Proceedings 12.10.

84 CPR 35.12(3).

85 Under the old Section 47B of the Competition Act 1998 and through the representative action and group litigation order procedures under Part 19 of the CPR. The English courts had resisted attempts to use the more limited collective action proceedings that are available to establish US-style claims, where a group of claimants purports to bring an action on behalf of a general class who have not individually consented to representation: see, for example, the High Court judgment in *Emerald Supplies v. British Airways* [2009] EWHC 741 (Ch), a decision upheld on appeal by the Court of Appeal ([2010] EWCA Civ 1284).

86 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

Competition Act (which allowed only the Consumer Association, 'Which?', to bring claims and only on an opt-in basis) and is designed to address the perceived inadequacies of that procedure.

Consumer claims can be brought under the new procedure where they raise the same, similar or related issues of fact or law. We expect that a key battleground will be how the class of claimants is approved. Representative bodies will seek to claim on behalf of the broadest possible group of claimants. The CAT will then be required to rule on whether: (1) the class of claimants is adequately defined; and (2) all claimants will have the same interests throughout the claim. The representative body will be required to advertise the action to enable potential class members to 'opt out'. Foreign (i.e., non-UK based parties) will not be caught by the opt-out nature of a collective action and will need to expressly 'opt in' to the claim.

In terms of safeguards against unmeritorious claims, the Consumer Rights Act applies the standard costs rules such that the losing party will be required to pay the successful party's costs. As a further safeguard, damages-based fee arrangements will be prohibited for collective actions and exemplary damages will not be recoverable.

Although the new regime will expand the list of bodies that can act as representatives and issue a collective action, there will still be significant restrictions. The CAT will only authorise a person to act as a representative if it is 'just and equitable' to do so. It is likely that this will restrict representatives to claimants and representative trade associations. Law firms and litigation funders will not be entitled to act as representatives.

The Consumer Rights Act also includes a settlement procedure. This provides a mechanism whereby the representative body can obtain approval from the CAT for settlements on an opt-out basis.

As explained in Section II.iii, *supra*, the old CAT limitation rules apply to collective claims 'arising' before 1 October 2015. It is unclear how the CAT will apply these rules but it adds an additional element of uncertainty that may discourage claimants from issuing claims relating to conduct that took place before 1 October 2015.

The issue of collective redress, and in particular the proposal of an opt-out system, has led to much debate in the UK. Notwithstanding the checks and balances in place to discourage unmeritorious claims – which may blunt the commercial incentives for claimant-focused law firms to take the risks associated with bringing such claims – it seems probable that a test case will be brought under the new regime in due course. How any such action proceeds in practice will be critical to the future prospects for collective actions for competition claims to establish in England.

i EU-wide reform

On 11 June 2013, the European Commission published a Recommendation on collective actions setting out a series of non-binding principles for compensatory collective redress in respect of infringements of EU law rights (i.e., not limited to breaches of competition law), which it believes should be common across Member States. The Recommendation

was that actions for collective redress should be on an opt-in basis other than in exceptional circumstances.[87] The Recommendation, together with the EU Damages Directive, follows a series of papers and consultations on the subject.[88]

VIII CALCULATING DAMAGES

i Availability of damages

Claimants can seek to recover damages for losses suffered as a result of anticompetitive conduct, including for lost profits, and interest on those losses. This is in line with the ECJ's statement in *Manfredi v. Lloyd Adriatico*[89] that any person harmed by anticompetitive behaviour can claim compensation where there is a causal relationship between the harm and the infringement of EU competition rules.

Devenish Nutrition v. Sanofi-Aventis[90] – a follow-on action for damages pursuant to the European Commission's 2001 *Vitamins* cartel decision – remains the leading case in this area. It confirmed that the appropriate measure for the calculation of damages in competition law claims in England should be tort-based compensatory damages (which aim to put the claimant in the position it would have been in 'but for' the infringement).

In *Devenish* the claimants argued that the calculation of compensatory damages was too difficult, and that other types of relief, including restitution (in the form of an account of profits made by the defendants) and exemplary damages (i.e., an award of damages to punish the defendant and deter it from repeating the behaviour) should be available to the claimants.

The High Court and the Court of Appeal both rejected these arguments, emphasising that the English courts are willing to take a 'pragmatic view of the degree of certainty with which damages must be pleaded and proved'.[91] Arguably, the complications inherent in the largely counterfactual calculation of compensatory damages should not therefore be a bar to recovery in competition actions.

As regards exemplary damages, the High Court in *Devenish* noted that a fine imposed by a competition authority for an infringement of competition law served the same punitive and deterrent purpose. In view of the principles of *ne bis in idem* in EU

87 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 (2013/396/EU).

88 These include the February 2011 consultation, to identify common legal principles on collective redress for potential application in all Member States, the 2005 Green Paper, the 2008 White Paper and the proposed Directive of 11 June 2013 on damages actions for breach of the EC antitrust rules. All included proposals to lower the hurdles consumers face in pursuing claims for damages, including through measures to support a coherent approach to collective redress in Europe.

89 [2006] ECR I-6619.

90 [2007] EWHC 2394 (Ch); [2008] EWCA Civ 1086.

91 Lewison J in the High Court; [2007] EWHC 2394 (Ch), paragraph 30, the Court of Appeal endorsing his approach.

law, and double jeopardy in English law, the High Court considered that exemplary damages were unlikely to be available where a competition claim was being brought on the back of an infringement decision by a competition authority.

Notwithstanding this limitation, two judgments – *Albion Water Limited v. Dŵr Cymru Cyfyngedig*[92] and *2 Travel Group v. Cardiff City Transport*[93] – demonstrate that the CAT is willing to award exemplary damages in circumstances where an authority has already ruled on anti-competitive conduct and a fine has not been imposed. It it is perhaps more likely that exemplary damages will be sought in stand-alone actions, where no investigation has been carried out by a competition authority.

The Court of Appeal in *Devenish* determined that an award of restitution in the form of an account of profits (to award the claimant the profits the defendant has earned from its breach) is generally not available in competition law claims.[94] Interestingly, in *Albion Water*, at application stage, the CAT refused to strike out the claims for restitutionary damages in respect of those parts of the claim that the CAT did not consider to be 'unarguable'.[95] However, at trial the CAT ultimately rejected this aspect of the claim. The position remains uncertain, but, even if restitution was found to be available, such damages would probably only be awarded where compensatory damages are considered inadequate (which may be only in limited circumstances given the views of the Court of Appeal in the *Devenish* case).

An additional measure of compensatory damages that might be available before the English courts is so-called 'umbrella' damages (i.e., compensation for the loss caused by a person not party to the cartel who, as a result of the increased market prices, raises their own prices by more than they would have done in the absence of the cartel). Such losses are claimed not against the party that supplied the relevant goods or services but against the cartel members. This question was the subject of a reference by an Austrian court to the ECJ,[96] which held that a victim of umbrella pricing may obtain compensation for the loss caused by an increase in the prices charged by market participants that were not members of the cartel if it can demonstrate that that price increase was caused by the cartel. An English court is likely to adopt a similar approach, awarding 'umbrella' damages where a claimant can establish causation between the unlawful activity and effects on prices set by non-cartel parties, in line with the general approach to compensatory damages under the English system.

In resisting a claim for compensatory damages, a defendant may seek to challenge causation and argue that 'but for' its actions the claimant would still have suffered loss. Two types of causation defence have typically been relied on to date. First, in *Arkin*

92 [2010] CAT 30.

93 *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited* [2012] CAT 19.

94 It was held that a restitutionary award could only be made in exceptional circumstances and one of the Lord Justices expressed doubt that a cartel could satisfy this requirement.

95 [2010] CAT 30, paragraph 25.

96 C-557/12, request for a preliminary ruling from the Oberster Gerichtshof (Austria), judgment of 5 June 2014.

v. Borchard[97] the defendant argued that the losses claimed arose from the claimant's mismanagement of its affairs. In that case, it was held that the claimant's failure to leave the market and its price cutting was so unreasonable and incomprehensible that it represented an intervening cause, such that it was the predominant cause of the losses the claimant suffered. By contrast, in *Crehan v. Inntrepreneur Pub Company*[98] the High Court rejected a similar argument that Mr Crehan's downturn in sales was caused by mismanagement, as this could not have made him responsible for the effects of a network of restrictive agreements. Second, defendants may seek to argue that an external cause, such as a downturn in general market conditions, was responsible for the claimant's losses (as the defendant also argued in *Crehan v. Inntrepreneur*).

ii Approaches to quantification

The quantification of damages in cartel cases will inevitably involve a number of complex issues, in particular concerning the most appropriate economic approach.

Crehan v. Inntrepreneur remains the only competition case where an award of final damages has been made (although the (then) House of Lords subsequently quashed the award on appeal). There has been one award of interim damages in a competition case by the CAT in *Healthcare at Home v. Genzyme*[99] (subsequently settled), but the calculation made was a relatively straightforward estimate of lost profits based on a margin squeeze, which took the supplier's pricing and applied the discount that should have been available to wholesale purchasers.

Recent cases have shown that the English courts are likely to prefer a 'but for' approach to the assessment of damages, as outlined in *Arkin v. Borchard*. In that case, although it concluded that there was no breach of competition law, the High Court suggested that any damages should be assessed by comparing a hypothetical scenario based on the situation immediately prior to the infringement and asking what, 'as a matter of common sense', was the loss directly caused by the infringement.[100] Using this approach, the English courts can be expected to favour a comparison of the market conditions observed during the infringement period with a reconstruction of the market conditions that might have prevailed in the absence of the infringement. For example, in a cartel follow-on action, it is likely that this would involve an economic analysis of the price paid by the claimant and hypothetical 'but for' prices based on prices observed before or after the existence of the cartel or as observed in a comparable market.[101]

97 [2003] EWHC 687 (Comm).

98 [2003] EWHC 1510 (Ch).

99 [2006] CAT 29. English procedure provides for the possibility of an order for an interim payment of damages, both in the High Court and the CAT: see CPR 25.7 and CAT Rules, Rule 41(5).

100 [2003] EWHC 1510 (Ch), paragraph 591.

101 The European Commission has published a Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU – C(2013) 3440, 11 June 2013 –

iii Interest

Interest can make a significant difference to the total quantum of damages, in particular in follow-on claims where the infringement may have continued for many years.

In *Manfredi* the ECJ held that interest must be available in respect of claims for damages based on infringements of competition law. The general rule under English procedure is that the court has the discretion to award simple interest on all or any part of the damages awarded, for all or any part of the period from the date on which the cause of action accrued to the date of judgment.[102]

The court has the discretion to award interest at either the judgment rate or the commercial rate.[103] The commercial rate is usually applied by the English courts as this seeks to compensate the claimant for the time value of money that it has lost at the rate at which the claimant typically borrows money. Where the claimant's typical borrowing rate is unclear, the court will apply 'a fair commercial rate' – typically the Bank of England base rate plus 1 per cent.[104]

Claimants in cartel damages actions tend to claim compound interest. There is no authority directly on point concerning whether compound interest is available in a cartel damages action. However, claims for compound interest are likely to rely on the judgment of the (then) House of Lords in *Sempra Metals v. Inland Revenue*.[105] In that case – which concerned a claim in restitution for overpaid tax – the Lords made an award of compound interest to deprive the defendant of its unjust enrichment. The judgment also contained non-binding *obiter dicta* suggesting that compound interest might be available in a claim for breach of statutory duty provided certain requirements are satisfied. The Lords expressed the view that the burden of proving that compound interest should be recoverable rests on the claimant, which is required to particularise and prove its interest loss. Although the application of this principle to competition claims is untested, a claimant in a cartel damages action would probably have to prove that it had to borrow to fund the overcharge that resulted in loss that should be compensated at a compound rate of interest.

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together with a practical guide. This is not binding on national courts but provides practical methods and techniques to assist national courts as well as claimants and defendants when calculating damages.

102 Section 35A of the Senior Courts Act 1981.

103 The judgment rate is a statutory rate of interest that is prescribed in the Judgment Debts (Rate of Interest) Order 1993, which for interest on damages incurred after 1 April 1993 would be awarded at 8 per cent per annum.

104 However, a small number of cases in other (non-competition law) areas have shown that there is a possibility of the courts using their discretion to award interest at a higher rate to claimants that have a high cost of borrowing (see for example *Claymore Services Limited v. Nautilus Properties Limited* [2007] EWHC 805 (TCC)).

105 [2007] UKHL 34.

iv Costs

Under the English system the successful party will normally be awarded its costs, in particular where the losing party has made a Part 36 offer that the successful party has failed to match or beat at trial[106] (see Section XII, *infra*), although the courts have discretion as to the amount that should be paid. In a typical case, the successful party can expect to regain approximately two-thirds of actual costs incurred. This can vary depending on how the parties conduct themselves. The CAT adopts a similar approach, although it is less prescriptive and can often award less to the successful party than the High Court.

The Civil Procedure Rules enable defendants to apply for an order granting 'security for costs' to protect a defendant from the risk that a claimant is unable to pay a costs order should the claim fail. A defendant to any claim, including a Part 20 claim (i.e., a counterclaim or a contribution claim) may apply for an order for security for costs under CPR 25.12. Such an order requires the claimant to deposit money with the court or provide a guarantee as security for the defendant's costs. The High Court may award security for costs if it is satisfied, having regard to all circumstances of the case, that it is just to make such an order and provided certain conditions are satisfied.[107] The most common conditions are that the claimant is resident out of the jurisdiction (and not domiciled in an EU or EFTA contracting state) or that the claimant is a company and there is reason to believe it will be unable to pay the defendant's costs if ordered to do so.

Similar rules apply in the CAT,[108] which has considered recent applications for security for costs in *BCL Old Co v. Aventis*[109] and *Albion Water Limited v. Dŵr Cymru Cyfyngedig*.[110]

The general costs rules in England have recently undergone significant reform. The government enacted the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in response to recommendations from Lord Justice Jackson.[111] The Act includes provisions that abolish the recoverability in costs awards of success fees under conditional fee arrangements and of 'after the event' insurance premiums from unsuccessful opponents under costs orders. The concession for claimants is that contingency fees (through so-called 'damages-based agreements') are now permitted, and the courts have the ability to apply a premium to damages awards where a defendant fails to beat a claimant's settlement offer. There is also a provision for unsuccessful claimants to pay only a proportion of defendants' costs provided they have acted reasonably. The costs rules for collective actions are more restrictive.

106 CPR 44.3(2).

107 These are detailed in CPR 25.12 to 25.15.

108 Defendants must establish that one or more of the factors listed in Rule 45(a) to (g) of the CAT Rules applies.

109 [2005] CAT 2.

110 [2013] CAT 6.

111 The 'Jackson Review' was commissioned by the Master of the Rolls, Lord Neuberger, to investigate how concerns about the costs of civil litigation and access to justice might be addressed. The final report was published in January 2010.

IX PASS-ON DEFENCES

Under the compensatory measure of damages, claimants in the English courts can only recover damages that represent their actual, unmitigated losses. The defendant may be able to claim that the claimant in fact suffered no loss, as it passed on the effects of the infringement (e.g., an overcharge) to its own customers. The burden of proof is on the defendant to show that the claimant mitigated its loss in this way.

There is currently no precedent in the English courts for the availability of the passing-on defence.

However, although the question of whether the passing-on defence is available under English law was not the subject of the appeal, in the *Devenish* case the Court of Appeal remarked that if the claimant has in fact passed a charge on to its customers 'there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss'. The ECJ cases of *Manfredi* and *Courage v. Crehan* have also been cited as supporting the view that the defence will be recognised in England.

The EU Damages Directive recognises the ability of the defendant to rely on the passing-on defence, provided it is legally possible for the end user (i.e., the customer to whom the cost was passed on) to claim compensation. It remains to be seen whether the UK government believes it will need to legislate to implement this aspect of the Directive. Its view may be that the law is already compliant. For example, in its response to the BIS Consultation, the UK government stated its view that, under general principles of English tort law, there is no reason why the passing-on defence should not apply and that its application would be better addressed through judicial consideration than via legislation at UK level.[112]

X FOLLOW-ON LITIGATION

Section 58A of the Competition Act provides that the English courts are to be bound in a subsequent damages action by a prior infringement decision by the CMA or the CAT, provided the decision is no longer appealable. This reflects the position under EU law in relation to infringement decisions by the European Commission, in particular as set out in the duty on national courts under Article 16(1) of Regulation 1/2003 not to rule counter to a decision that has established an infringement of EU competition law.

There are, however, limits to the binding force of prior infringement decisions on the English courts. For example, in *Inntrepreneur v. Crehan*, the House of Lords ruled that a court is not required to follow a prior decision that relates to an agreement different from the subject of the claim, even if the surrounding facts are similar. In such cases, the competition authority's observations may be relevant as evidence, but this does not excuse the court from undertaking its own factual enquiries. Previously, the Court

112 Private actions in competition law: a consultation on options for reform – government response, paragraph 4.38.

of Appeal emphasised that when awarding damages the jurisdiction of the CAT was inherently limited by the infringement finding established by the relevant decision and did not extend to allowing the CAT to make a finding of infringement (see *Enron Coal Services v. English Welsh & Scottish Railway*[113]). However, the Consumer Rights Act has now brought the CAT into line with the High Court.

In terms of awards against parties that have already been fined by a competition authority or benefited from immunity under a leniency programme, there is no restriction on private litigants seeking to recover damages for loss, as long as there is no risk of double jeopardy as established in the *Albion Water* case.

XI PRIVILEGES

Privilege is recognised in England as a right that entitles a party to withhold evidence, whether oral or written, from production during the course of regulatory or legal proceedings. It is particularly important in the context of litigation brought in the High Court or the CAT, where the fact that documents contain confidential information, business secrets or otherwise damaging or sensitive material does not prevent their disclosure, whereas privilege is an absolute bar.

The rules on privilege have developed under the common law, but despite the House of Lords having considered certain aspects of privilege in the leading case of *Three Rivers DC v. Bank of England*[114] the law remains in an uncertain and unsatisfactory state in some key respects.

Legal advice privilege applies to all direct and confidential communications between client and lawyer that are created for the purpose of giving or obtaining legal advice, and to documents which evidence such communications provided that they are directly related to the performance by the lawyer of his or her professional duty as legal adviser of the client. This description raises some fundamental and difficult issues concerning the scope of privilege in English litigation.

First, the scope of the 'client' is difficult to define. It was held by the Court of Appeal in *Three Rivers (No. 5)*[115] that where a corporate entity instructs a lawyer, the client will not be the entity itself, but rather only the persons within the entity who are personally responsible for instructing the lawyer and receiving the advice. This restrictive interpretation means that care must be exercised by companies instructing lawyers to ensure that all those people within the organisation who will be dealing with the lawyer are sufficiently identified as the 'client'.[116]

113 [2009] EWCA Civ 647; [2011] EWCA Civ 2.

114 [2004] UKHL 48.

115 [2003] EWCA Civ 474.

116 Nevertheless, to the extent that privileged advice is disclosed to company directors, this does not invoke any waiver of the company's privilege because the directors receive and act on that advice as the mind and directing will of the corporate entity: *Bank of Nova Scotia v. Hellenic Mutual War Risks (the 'Good Luck')* [1992] 2 Lloyds Rep 540.

Second, the scope of 'legal advice' has been clarified by the House of Lords in *Three Rivers*, which affirmed that 'legal advice' should extend to include advice about what should prudently or sensibly be done in the relevant legal context (thereby reversing the earlier Court of Appeal decision that took a very narrow approach as to what amounted to legal advice). If the communications directly relate to the performance by a solicitor of his or her professional duty as legal adviser of his or her client (despite the fact that they do not contain advice on matters of law), they will form part of a 'continuum of communication' and fall within the scope of legal advice privilege.

Third, under English law, the 'lawyer' encompasses both external and in-house counsel.[117] This position can be contrasted with the EU law position confirmed by the ECJ decision in *Akzo Nobel Chemicals v. European Commission*, in which it was confirmed that in the context of a competition investigation by the European Commission legal professional privilege does not cover exchanges within a corporate group with in-house counsel.[118] The conflict between this position and the wider privilege recognised in England could lead to tension concerning the disclosure of in-house legal advice in the context of follow-on claims. For example, the European Commission, as part of its investigation, might seize documents concerning legal advice from in-house counsel to other parts of the business being investigated. In light of the possibility of disclosure of documents held on the Commission's file following the *Pfleiderer* and *National Grid* decisions, it is possible that claimants may attempt to have such advice disclosed in any damages actions in the English courts. Although the advice would usually be privileged under English law, a necessary prerequisite is that the communication is confidential and there might be an argument that this has been compromised by the European Commission taking the documents into its possession and possibly relying on them in any decision.

Litigation privilege applies to confidential communications made after proceedings were commenced or contemplated between a lawyer and either a client or a third party, provided that the sole or dominant purpose of the communication was for seeking or giving advice or obtaining evidence in relation to the litigation. The key question in this context is what amounts to 'proceedings'. The conservative assumption has been that courts would not extend litigation privilege (beyond court and arbitration proceedings before a tribunal exercising judicial functions) to documents that came into existence for the purpose of a regulatory inquiry or investigation. However, in the recent case of *Tesco Stores Ltd v. Office of Fair Trading*[119] the CAT held that from the point an investigation could be properly classified as adversarial – as opposed to merely investigative or inquisitorial – material gathered could be subject to litigation privilege. In *Tesco*, the proceedings were classified as adversarial on the facts of the case – the OFT had already issued a statement of objections. *Tesco* does not provide certainty as to the point at which an investigation becomes adversarial so caution is advisable, especially in

117 This is provided that they are qualified in any jurisdiction as under the Legal Service Act 2007.

118 Case C-550/07.

119 [2012] CAT 6.

the early stages of an investigation. Until an investigation can be classified as adversarial, documentation falling outside the scope of legal advice between lawyer and client – for example, economic reports and even some leniency-related material – is unlikely to be privileged and could therefore be disclosed in any subsequent follow-on litigation in England.[120]

In addition to legal professional privilege (the name often given to legal advice privilege and litigation privilege), common interest privilege and joint privilege may apply in situations where privileged material is created or shared between two or more parties – meaning these forms of privilege could apply in multiple-party competition cases (e.g., follow-on actions naming all the addressees of a competition authority's decision as defendants). Joint privilege requires different parties to instruct the same lawyer (and thereby share the same privilege in the advice), whereas common interest privilege applies where the parties have a shared or similar interest, most often in litigation, but also in other situations (where legal advice to one of the parties might be shared with others with the same interest). In addition, there is a privilege against self-incrimination, and communications made 'without prejudice' are also protected under a type of privilege.

Where one party to an investigation decides not to appeal any infringement decision, it may be concerned that otherwise privileged material relating to that party might be disclosed. This situation occurred in *Imperial Tobacco Group v. OFT*.[121] Sainsbury's – which was granted immunity from fines under the OFT's leniency programme – applied to intervene in the appeal against the OFT's tobacco pricing decision[122] to challenge any use in the proceedings of any documents over which it claimed privilege. The CAT granted its application on the basis that Sainsbury's was deemed to have a sufficient interest to intervene.

XII SETTLEMENT PROCEDURES

Competition law cases begun in the English courts have typically been settled rather than proceeded to trial. Uncertainty over proving causation and loss and around a number of legal issues (e.g., the availability of a passing-on defence) has undoubtedly encouraged parties to settle. The high costs of litigation coupled with the adverse cost rules are also likely to have weighed on the minds of litigants.

For claims in the High Court, Part 36 of the CPR creates costs-based incentives for parties to settle disputes. A claimant may offer to settle for a certain monetary amount, and frame this offer as a formal Part 36 offer. If the claimant subsequently obtains judgment for the same or a higher amount, it will be entitled to recover its costs from the date the offer expired on the indemnity basis rather than the standard basis (i.e., with the benefit of any doubt as to whether costs have been reasonably incurred

120 *Wheeler v. Le Marchant* (1881) 17 ChD 675, where the Court of Appeal held that privilege did not extend to letters between the client's solicitors and the client's surveyors at a time when no dispute had arisen.

121 [2010] CAT 24.

122 Pursuant to Rule 16 of the CAT Rules.

being resolved in the claimant's favour) with more generous interest awarded on the judgment amount and costs (being up to 10 per cent over the Bank of England base rate). A defendant can also make a Part 36 offer, which will enable it to recover its costs on the standard basis if the claimant succeeds at trial but fails to better that offer. The CAT Rules include a similar procedure but this only allows formal offers to be made by defendants.[123]

The terms and even the fact of a settlement agreement in competition cases will almost always be made on a without prejudice basis and be confidential. Consequently, it is difficult to form a picture of the way in which claims have been settled in England. Discontinued claims that have been settled include claims relating to the European Commission's cartel decisions concerning vitamins, methionine and seamless steel tubes (to name a few). Settlements in the US can also have a bearing on companies and individuals in the UK. For example, in the British Airways passenger fuel surcharge cartel settlement the Californian Appeal Court determined that the settlement could apply to UK-based consumers.[124]

In some cases, a single defendant may settle proceedings early, leaving the other defendants to continue to contest the claim. This occurred in *Cooper Tire v. Shell*, where Shell settled before the resolution of the jurisdiction challenge, leaving the other defendants in the litigation. This also occurred in the *Emerson* case, where one of the claimants, Robert Bosch, withdrew its claim for damages against one of the defendants, SGL Carbon, after reaching a settlement, the details of which remain confidential.[125]

The Consumer Rights Act includes provision for alternative dispute resolution in collective claims, by way of a statutory 'voluntary redress scheme'. Under this procedure, the CMA would approve a voluntarily agreed scheme for compensation to be paid by alleged infringers to a class of victims of a competition law infringement. As an incentive to alleged infringers to agree to such a scheme and to do so at an early point, the UK competition authority would be entitled to take it into account in reducing any fines imposed on the infringing parties.

123 A defendant can offer to settle the dispute by making a payment into the CAT. If the claimant does not accept the defendant's offer to settle, and does not better the defendant's offer at a substantive hearing, the CAT will probably order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted (likely to be 14 days before the hearing). The CAT Rules state that such costs may bear interest and will be assessed on an indemnity basis. Where a claimant makes an offer to settle that is not a payment into the CAT, which is not bettered by the claimant in a substantive hearing, the CAT Rules state that the CAT may take this into account when assessing costs: CAT Rules, Rule 43(10).

124 The court based its decision on the fact that the defendants had not contested jurisdiction, that the settlement was an opt-in settlement (rather than the opt-out system more usually seen in the US) and that there had been no similar UK-based case pending.

125 CAT Order dated 7 February 2011. However, as the claim was also brought by other claimants, SGL Carbon remains a defendant to the *Emerson* proceedings.

As already noted, the Consumer Rights Act also introduced a new 'opt-out' collective settlement regime for competition law cases in the CAT. This procedure complements the collective action mechanism, and is intended to give businesses the opportunity to settle cases out of court at an early stage of proceedings even if proceedings had initially been brought as separate claims.

XIII ARBITRATION

As with other commercial disputes, competition claims can be resolved through alternative dispute resolution, including arbitration and mediation.

i Arbitration

Arbitration can be undertaken in accordance with the mechanisms set out in the Arbitration Act 1996. The courts will stay proceedings in favour of arbitration where there is evidence that the dispute is subject to a valid arbitration agreement.[126]

The *Eurotunnel*[127] case made it clear that competition claims are capable of being arbitrated. The High Court held that 'there is no realistic doubt that such 'competition' or 'antitrust' claims are arbitrable; the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction'.[128] The successful party in arbitration may apply to the court for an order to enforce the award as if it were a judgment of the court. The grounds on which a party can appeal against the ruling of an arbitration based in England are limited to appeals on a point of law[129] or for serious irregularity[130] (i.e., where the decision is contrary to public policy[131]). It is also conceivable that an English arbitration award could be challenged by a party seeking a declaration that, to the extent that it does not take account of relevant competition law issues, the award itself infringes competition law.

ii Mediation

In the case management process the High Court and the CAT will encourage the parties to mediate to seek to avoid the costs of litigation. The courts may make costs orders that depart from the usual principle that the successful party recovers its costs, penalising the

126 For competition claims, the arbitration doctrine of 'separability' might also be relevant: an arbitration clause will not be deemed invalid if the agreement containing the clause is rendered void (e.g., if Article 101(2) of the TFEU applies to otherwise provide that the agreement is null and void).

127 *ET Plus SA v. Welter* [2005] EWHC 2115 (Comm).

128 Ibid., paragraph 51.

129 Section 69 of the Arbitration Act 1996.

130 Section 68 of the Arbitration Act 1996.

131 *Eco Swiss China Time v. Benetton Ltd* [1999] ECR I-3055.

party that succeeds at trial where that party at an earlier point has unreasonably refused to mediate,[132] especially where that party has ignored judicial encouragement to do so. The CAT expressly encourages mediation in its rules.[133]

The court may order a stay to allow a window for mediation to take place. Mediation – which is generally a non-binding process – is not covered by a statutory framework and is carried out by rules agreed between the parties. A mediated resolution will be recorded in an agreement, which will be enforceable between the parties as a binding contract.

In April 2011, CPR 78.24 came into effect to give the court the power to make an order that a cross-border mediation settlement agreement[134] is enforceable on a cross-border basis in the absence of court proceedings. This is an important development as parties to follow-on proceedings from an infringement finding by the European Commission may be domiciled across the EU, making it difficult to enforce mediation settlement agreements. However, an order under the new CPR 78.24 will only be made if the parties to the mediation settlement agreement are not domiciled in the same EU Member State and if the parties give explicit consent to the application for the order and are domiciled in EU Member States. This means it will be important for consent for enforcement to be included in mediation settlement agreements in cases involving parties from different Member States.

XIV INDEMNIFICATION AND CONTRIBUTION

Although not yet formally confirmed by any case, liability for competition law infringements – both before the High Court and the CAT – is almost certainly on the basis of joint and several liability, which means that a claimant might elect to sue only one (or all) of the addressees of the relevant decision for the entirety of the loss suffered as a result of the anti-competitive conduct.[135] To date, most follow-on actions have been initiated against a number of defendants, in some cases all of the addressees of the relevant decision and in others only those defendants from whom the claimants had purchased cartelised products.[136]

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132 *Dunnett v. Railtrack plc* [2002] EWCA Civ 303.

133 CAT Rules, Rule 44(3).

134 Defined as being a written agreement resulting from mediation of a relevant dispute.

135 To safeguard the effectiveness of the leniency regime, the European Commission has included provision in the EU Damages Directive limiting the immunity recipient's liability to the harm it caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. The leniency applicant will no longer be jointly and severally liable for the entire harm caused by the cartel which is likely to have an impact on claimant strategy in selecting defendants.

136 The application of joint and several liability to competition claims is yet to be confirmed in England as a multi-defendant action has not (as yet) gone to full trial. However, the general principles from tort law can be expected to apply, which means that a single defendant could be held responsible for all of the losses caused by a competition law infringement. It

A recently observed tactic is for a claimant to sue just one (or two) defendants and force that defendant to join others to the action to seek a contribution in respect of any damages that might be awarded.[137] This leaves the defendant singled out to initiate contribution actions under Part 20 of the CPR.

The Civil Liability (Contribution) Act 1978 provides that any person liable in respect of any damage suffered by another person may recover a contribution from any other person liable in respect of the same damage.[138] The court then has discretion to award such contribution as it considers just and equitable having regard to each person's responsibility for the damage.[139]

Contribution claims can be made in the context of the primary action, where they may be consolidated and heard together, or after judgment in the main action.[140] Alternatively, a contribution may be sought even where a party has already settled the claim with the claimant.[141]

How contribution might be assessed in a cartel damages action is yet to be considered by an English court but the High Court and the CAT are likely to look to apply the principles developed in respect of other types of civil claims to assist a court in exercising its discretion to assess contributions, including looking at: (1) the extent to which a party has profited from the wrongdoing; (2) the causative potency of each wrongdoer's actions with regard to the claimant's loss; and (3) relative degrees of blameworthiness. The position will change following the implementation of the EU Damages Directive which prescribes that there are limitations to the leniency applicant's joint and several liability. The leniency applicant is only jointly and severally liable to its direct or indirect purchasers and to other injured parties where full compensation cannot be obtained from the other undertakings involved in the same infringement of competition law.[142]

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remains to be seen how the English courts will divide damages between multiple defendants and whether they will entertain arguments that a defendant can avoid or reduce its liability because its own role was very minor or did not directly cause the claimant's loss. In its response to the BIS consultation, the government considered that it is an area where action at European level would be preferable, both for reasons of consistency and effectiveness, as well as in terms of providing certainty for those considering applying for leniency.

137 For example, this tactic has been employed in follow-on actions initiated in the High Court in respect of the European Commission's decisions in respect of the *Air Cargo* cartel, the *Paraffin Waxes* cartel and the *Smart Card Chip* cartel.

138 Section 1(1) of the Civil Liability (Contribution) Act 1978.

139 Section 2(1) of the Civil Liability (Contribution) Act 1978.

140 A two-year limitation period applies to contribution claims in Section 10 of the High Court: Limitation Act 1980.

141 Section 1(4) of the Civil Liability (Contribution) Act 1978.

142 A company found to have committed a competition law infringement cannot look to recover the resulting fine from the individuals that were involved in the wrongdoing – *Safeway Stores v. Twigger* [2010] EWCA Civ 1472.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Consumer Rights Act has made some significant changes to the landscape of private enforcement in England. We expect these changes to result in further growth in the number of claims issued in the English courts in the coming years. This growth is likely to be seen in two areas in particular, tracking the most significant aspects of the Consumer Rights Act for competition claims: (1) the CAT will finally assume its long-anticipated mantel as the major venue for competition actions in the UK, which follows from the broadening of the CAT's jurisdiction to include stand-alone as well as follow-on cases and its new power to grant injunctions; and (2) the introduction of an 'opt-out' collective actions regime for competition law claims promises to entice enough interest for test cases, and success could encourage a steady flow of cases.

The introduction of an 'opt-out' collective action procedure remains controversial. Arguments that this will introduce the perceived excesses of the US 'class action' system persist and will undoubtedly remain an underlying concern for many as the first cases are put together and make their way through the system. This may itself create considerable satellite litigation as the system is tested and the rules are bedded down. With its expanded jurisdiction, a large number of claims could eventuate and the CAT could be very busy indeed, which may also have resource implications for the CAT.

In the meantime, despite the continued upswing in activity in the English courts, we continue to await a final award of damages in a competition claim. Although a number of cases continue to progress through the courts, a number are stayed or proceeding relatively slowly and the prospects for a full trial of a follow-on action in the next 12 months is uncertain.

A number of important legal issues remain to be finally determined: for example, how principles such as parent-subsidiary liability, joint and several liability and contribution – well understood in the context of other types of civil disputes – will be applied to competition claims. These issues may be dealt with in preliminary hearings in the near future, particularly given the approach taken in several cases of claimants electing to sue only one or a limited number of cartel members (rather than all those involved in the cartel) for all of the loss caused by the cartel, thereby forcing the named defendants to issue contribution proceedings against the other cartelists.

Chapter 12

FRANCE

Marta Giner Asins[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In the past few years, private enforcement culture has been developing and consolidating in France, partly due to several legislative reforms, and partly to the evolution of courts' practice. This evolution will be reinforced once the Directive[2] on actions for damages under national law (the Damages Directive) is implemented in French law. Member States including France have until 27 December 2016 to implement this Directive. French law will need to evolve in a number of respects to be consistent with the new principles stated by the Directive regarding, in particular, discovery and the burden of proof (see Section XV, *infra*).

Concerning legislative reforms, a 'class action' regime was introduced in France, governed by the Law of 17 March 2014, known as the 'Hamon Law'.[3] The 'French

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2 Directive of the European Parliament and of the Council 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States of the European Union. See Paris Commercial Court, *10 Medias/Amaury*, 2 November 2015 where the Court quoted notably Article 9 of the Directive (although not yet implemented under French law) in its decision to stay proceedings until the Supreme Court ruled definitely on the breach of competition rules. Article 9, Section 1 states that 'Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.'

3 Law No. 2014-344 of 17 March 2014 on consumer protection.

consumer class action' scheme is an 'opt-in with publicity' procedure that enables a group of individuals represented by an association authorised by the government (of which there are 15) to claim damages for material harm resulting from a contract or resulting from anticompetitive behaviour. Although class action regimes were expressly introduced in France in relation to consumer law, it is also possible to bring actions relating to anticompetitive practices.[4]

This reform follows a number of substantive revisions to the French regime, including the Law of 20 November 2012 and the Law of 17 June 2008. The Law of 20 November 2012[5] introduced a provision that gave the Competition Authority the discretionary power[6] to disclose its files, with the exception of those documents obtained through leniency applications.[7] The Law of 17 June 2008[8] modified the statute of limitations, reducing the period for the introduction of a private action to five years from the moment at which the victim became aware of the damage.[9] Concerning the courts' evolution, the approach of French courts to antitrust damages claims is based on traditional civil law principles, according to which the claimant must prove the existence of an infringement (*faute*), a damage suffered, and a causal link between them. This provides a clear and certain legal framework, and allows the parties to refer to the body of case law developed in other areas.

Considering the difficulty of proving damages in certain antitrust cases,[10] French courts may have, in the past, adopted simplistic solutions, particularly concerning the

4 On 17 December 2015, the French National Assembly adopted a Bill relating to the modernisation of the French health system, which introduced in its Article 45 a class action regarding pharmaceutical products which might, if confirmed by the Constitutional Council, have a decisive impact on health professionals.

5 Law No. 2012-1270 of 20 November 2012 on the economic regulation in French overseas departments, and on various provisions related to overseas departments.

6 Before 2009, the French Competition Authority was known as the Competition Council. The expression 'Competition Authority' will, in this chapter, refer indistinctly to either the former Competition Council or the current Competition Authority.

7 See Article L.462-3 of the Commercial Code. Article 6(a) of the Damages Directive also requires that oral and written statements by leniency applicants not be disclosed, thereby excluding documents obtained through leniency applications, which will significantly reduce the scope of what can be provided.

8 Law No. 2008-561 of 17 June 2008 on the reform of civil statutes of limitations.

9 *Lycées Île de France*, Paris Court of First Instance, 17 December 2013. In this case, the claim introduced by the Île-de-France regional administration against several building companies previously sanctioned by the Competition Authority for bid-rigging practices relating to tenders for the construction of schools was time-barred. Although this decision was based on the previous regime (since it concerned facts that occurred more than a decade earlier), it underlines the fact that identifying the limitation position as early as possible is a key element in any private damages procedure.

10 See, for example, Paris Court of Appeal, 2 July 2015, *EDF et ERDF v. Nexans et Prysmian*, where EDF and ERDF unsuccessfully attempted to obtain damages from Nexans and

passing-on defence. However, the case law is becoming increasingly precise and clear in this area, and a decision in a follow-on action relating to the *Lysine* cartel brought welcome clarification in this respect (see Section IX, *infra*). This decision illustrates the increasingly pragmatic approach adopted by French courts, which are now more inclined to grant damages.[11]

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition enforcement in France is based on the general tort law provisions of Article 1382 of the Civil Code in combination with the specific competition law provisions, Articles L420-1 and L420-2 of the Commercial Code and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Article 1382 of the Civil Code (tortious liability) requires the claimant to prove that a fault on the part of the defendant caused the alleged damage. Under the general tort law regime, the infringement of any legal provision – whether administrative, civil or criminal – constitutes a 'fault' for the purposes of Article 1382 of the Civil Code. French courts clearly consider that an infringement of French or EU competition law provisions constitutes a fault.[12] However, the Supreme Court has specified that a mere reference to the decision relating to the infringement, without any description of the behaviour concerned, is not sufficient to establish the fault.[13] But this case law will be less relevant once the Directive has been implemented in French law, since it provides for a fault presumption resulting from the infringement decisions.

Prysmian after the Competition Authority sanctioned them for anticompetitive practices. Even though their claim was brought after the Competition Authority sanctioned Nexans and Prysmian for their anticompetitive practices, the Court found that the elements asserted by the claimants, including their economic studies, did not produce the basis for determining with certainty the damages allegedly to have been suffered.

11 See, for example *Switch v. SNCF*, Paris Commercial Court, 26 April 2013, in which the court granted €6.9 million as compensation for the damage suffered by a victim of an anticompetitive agreement. See, more recently, *Outremer Telecom v. Orange/Orange Caraïbe*, Paris Commercial Court, 16 March 2015, in which the Court condemned Orange and its subsidiary Orange Caraïbe to pay Outremer Telecom almost €8 million.

12 *Switch v. SNCF*, Paris Commercial Court, 26 April 2013; *Sté JCB Service*, Paris Court of Appeal, 26 June 2013; even in the absence of prior formal condemnation of the infringement (e.g., commitment decision), the judge may use the elements gathered by competition authorities to characterise a fault in the frame of a private action (see for example *DKT International v. Eco Emballages and Valorplast*, Paris Commercial Court, 30 March 2015, *Kontiki v. President of the French Competition Authority and the Ministry of Economy*, Supreme Court, 7 October 2015, and *Sté JCB Service*, Supreme Court, 6 October 2015).

13 *Subiteo v. France Télécom*, Supreme Court, 25 March 2014.

It then remains for the claimant to establish the damage suffered and a causal link between the competition infringement and that damage. Tortious liability claims falling within the general regime, such as antitrust claims, are time-barred after five years from the knowledge of the behaviour causing the damage.[14]

Damages actions may also be based on contractual claims. The statutory basis for such actions is Article 1147 of the Civil Code, in combination with the relevant antitrust provisions.

Traditionally, the competent courts were the general civil or commercial courts, until a Decree of 30 December 2005 created 16 specialised courts.[15] Eight of these courts are commercial courts, competent over litigation between professionals (commercial courts of Marseilles, Bordeaux, Lille, Lyons, Nancy, Paris, Rennes and Fort-de-France); the other eight are civil courts with jurisdiction over cases between private litigants (courts of first instance situated in the same cities as the commercial courts). The Paris Court of Appeal has exclusive jurisdiction to hear the appeals lodged against the decisions rendered by these 16 courts.[16]

Criminal courts may award damages for breach of competition law in a criminal law proceeding based on Article L420-6 of the Commercial Code. When awarding damages, the criminal judge will apply the same statutory provisions as a civil judge.

Administrative courts may, under certain conditions, be competent to hear claims for damages related to public contracts[17] or involving public entities.[18]

III EXTRATERRITORIALITY

Articles L420-1 and L420-2 of the Commercial Code are limited to anticompetitive practices that have been implemented or that have effects within the French territory,

14 Article 2224 of the Civil Code.

15 As amended by the Decree of 11 November 2009.

16 Article D.442-3 of the Commercial Code; *X v. Y*, Angers Court of Appeal, 2 December 2014.

17 The Paris Court of Appeal recently considered that the administrative courts do not have jurisdiction to rule on a damages action based on tort liability (such as in the case of an anticompetitive practice) unless a special legislation authorises them to do so (*Region Île-de-France v. M. Nautin et al.*, Paris Court of Appeal, 24 June 2015). However, on 16 November 2015, this ruling was declared void and inexistent by the Conflict Tribunal on the grounds that administrative courts have jurisdiction because the damages action concerned an administrative contract.

18 In 2008, the Administrative High Court stated that administrative courts are competent to hear claims resulting from anticompetitive practices implemented in the frame of a tender process or performance of a public contract (*SNCF*, 19 March 2008). More recently, the Paris Administrative Court recognised its jurisdiction to examine a private action launched by SNCF against several of its suppliers following anticompetitive practices implemented by them, since the contracts at stake were of an 'administrative nature' (*SNCF v. Hoffmann et al.*, 2 April 2014).

regardless of where the undertaking implementing those practices is located. Tort actions can be commenced in France if the anticompetitive practice was implemented in France or the damage was suffered in France.

There is no exception for conduct by foreign parties: the jurisdictional link to the French courts is formed once the practice is implemented in France or the damage from the practice is suffered in France; thus the individual's nationality or the undertaking's location is irrelevant.

IV STANDING

To bring an action before the French courts, the claimant must be a natural or legal person. The claimant must allege a fault on the part of the defendant that caused it to suffer damage. For private antitrust cases, the claimant must therefore allege that the defendant implemented anticompetitive practices (such as agreeing to fix prices or abusing a dominant position) that caused it to suffer damage, for example, increased costs or loss of profit or sales, as well as loss of opportunity to develop one's business in the market at lower costs.[19]

V THE PROCESS OF DISCOVERY

Under French law, there is no discovery process comparable to that found in the United States. The principle in French law, stated at Article 9 of the Civil Procedure Code (CPC), is that 'each party must prove, according to the law, the facts necessary for the success of its claim'. This sets a high standard according to which parties are only required to disclose the documents they rely on.

However, this standard is modified, among others, by the two following rules:[20]

a Article 10 of the CPC states that the judge may order any measures of inquiry deemed necessary to enable the court to decide the case where it does not have sufficient elements: these measures may consist of, *inter alia*, personal verifications of the judge, auditions of the parties or third parties, statements of third parties, or the appointment of an expert; and

b Article 11 of the CPC allows a party to ask the court to order the other parties to proceedings or a third party to communicate any kind of document necessary to prove the facts alleged. It provides that third parties are not obliged to communicate documents where there is a 'legitimate impediment'. This includes documents and information covered by attorney–client privilege and in cases of force majeure.

19 *Bes Ravise v. France Télécom*, Supreme Court, 3 June 2014, confirmed by Paris Court of Appeal, 27 May 2015.

20 See also Article 138 et seq. of the CPC.

Meeting the burden of proof for the claimant has been assisted with the adoption in 2012 of a new second paragraph of Article L.462-3 of the Commercial Code, which allows the Competition Authority to disclose documents related to anticompetitive behaviour, with an exception only for leniency documents.

In the *Semavem* judgment of 19 January 2010,[21] the Supreme Court held that where a party to a follow-on action can prove that the disclosure of certain documents is necessary for the exercise of its rights of the defence, French courts may either order the Competition Authority to disclose the relevant documents or allow one of the parties to disclose the relevant documents.

Following this ruling, in the *Outremer Telecom* case, the Paris Commercial Court rejected Outremer Telecom's claim for breach of confidentiality against the defendants, considering that the documents that had been disclosed before the court were necessary for the defence of the parties who had disclosed them and known to all the parties to the proceedings.[22]

This was confirmed in the *Ma Liste de Courses case*,[23] which was introduced following a decision of the Competition Authority involving commitments from the parties. The Paris Commercial Court ordered the Competition Authority, on the ground of Article 138 of the CPC,[24] to disclose documents it had obtained during its investigation.

Following the Competition Authority's reluctance to provide the documents, the Paris Commercial Court confirmed in a second judgment its previous decision ordering the disclosure of the concerned documents.[25] However, this decision was appealed against before the Paris Court of Appeal, which held that the Competition Authority and its agents should not bear the risk of a breach of confidentiality in lieu of the party which is the only one to be able to determine which documents are necessary for the exercise of its rights of defence.[26] Thus, the principle set in the *Semavem* case is nuanced: in cases where the claimant has had access to the documents during the procedure before the Competition Authority, the risk of breaching confidentiality is borne by the claimant, who must prove that each document disclosed is necessary for its claim.[27]

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21 *Semavem v. JVC France*, Supreme Court, 19 January 2010.

22 *Outremer Telecom v. Orange Caraïbe and France Télécom*, Paris Commercial Court, 8 November 2011.

23 *Ma Liste de Courses v. Highco*, Paris Commercial Court, 24 August 2011.

24 Article 138 of the CPC allows the judge to order, at the request of one party to the proceedings, a third party, such as the Competition Authority, to disclose a document to which such party did not have access.

25 *Ma Liste de Courses v. Highco*, Paris Commercial Court, 16 March 2012.

26 *Ma Liste de Courses v. Highco*, Paris Court of Appeal, 20 November 2013.

27 See also *DKT International v. Eco Emballages and Valorplast*, Paris Commercial Court, 16 March 2012 quashed by Paris Court of Appeal, 24 September 2014. The Paris Court of Appeal determined that it was up to the claimant to produce the documents it was provided with in the course of the proceedings before the Competition Authority since their

However, these principles will have to be modified once the Directive is implemented in France.[28] Article 5 Section 2 of the Directive refers to the disclosure not only of 'specific items of evidence' but also to 'relevant categories of evidence'. Moreover, Article 6 of the Directive explicitly excludes not only 'leniency statements' but also 'settlement submissions' whereas so far under French law the rules are unclear concerning documents obtained by the Competition Authority, particularly in cases where the parties have offered commitments or chosen not to challenge the objections.

Article L.462-3 of the Commercial Code imposes no obligation of disclosure to the Competition Authority, although it allows this possibility, excluding leniency documents. Furthermore, L.463-6 of the Commercial Code prohibits the communication of documents by a party regarding another party (or a third party) that were obtained during proceedings before the Competition Authority, punishable by a criminal sanction. According to case law such disclosure does not constitute a breach of secrecy, provided that the party disclosing the documents uses them to exercise its rights of defence. Articles L.462-3 and L.463-6 of the Commercial Code seem thus to be stricter than the Damages Directive. The amendments of these two French rules regarding disclosure may be part of the implementation of the Directive.

Concerning documents held by parties other than the Competition Authority, French law has no general pretrial discovery procedures. However, Article 145 of the CPC permits the court to order preparatory enquiries to preserve evidence of the facts on which a claim is based or to establish the existence of such evidence. The claimant must adduce a legitimate reason for doing so.

VI USE OF EXPERTS

The appointment of independent experts by French courts is a common practice. In antitrust litigation, experts are sometimes used to establish the existence of an anticompetitive practice, but their intervention is more often aimed at quantifying damages.

Common methods used are:

a to compare the price actually paid during the period of the anticompetitive practices and that usually paid in the absence of the practices; and

b to evaluate the profit that would have been earned in the market in the absence of the anticompetitive practices.

disclosure was necessary for the claimant to exercise its rights. In a subsequent judgment dated 30 March 2015, the Paris Commercial Court accepted taking into account the said documents which had been disclosed by the claimant.

28 Muriel Chagny, 'Quels progrès en droit de la preuve après la Directive du 26 novembre 2014 relative aux actions indemnitaires en droit de la concurrence?', *AJ Contrats d'affaires – Concurrence – Distribution* 2015, pp. 316–317.

Experts such as economists may intervene in two ways:

a all parties may produce an expert's report or opinion to support their claims;[29] the court, however, is not obliged to hear the expert, but may choose to do so; or

b the court may appoint an expert (either at the request of the parties or by its own initiative) pursuant to the rules set forth in Article 263 et seq. of the CPC.[30]

In addition, the court has the power to refer a case to the Competition Authority to obtain an opinion on competition issues (such as market definition, abusive nature of conduct, etc.). This power has, for example, been used in the *Bottin Cartographes v. Google* case,[31] where the Paris Court of Appeal requested an opinion from the Competition Authority on Google's alleged abuse of a dominant position in the online mapping market, in a case in which the Commercial Court had granted at first instance €500,000 compensation to the claimant. However, following the Competition Authority's opinion,[32] the Paris Court of Appeal recently overturned the judgment, thus demonstrating the difficulty of stand-alone actions.[33] The power to request an opinion from the Competition Authority was also previously applied in the *Luk Lamellen v. Valeo* case[34] and in the *Carrefour Proximité* case.[35]

VII CLASS ACTIONS

Before the Hamon Law of 17 March 2014 was enacted, three types of 'consumer' actions enabled consumers who were victims of anticompetitive practices to claim damages.[36]

29 See, for example, *Outremer Telecom v. Orange/Orange Caraïbe*, Paris Commercial Court, 16 March 2015, in which a party produced two different economic studies in order to help the court evaluate the damage suffered.

30 See, for example, *Bes Ravise v. France Télécom*, Paris Court of Appeal, 27 May 2015.

31 *Bottin Cartographes v. Google*, Paris Commercial Court, 31 January 2012 and Paris Court of Appeal, 20 November 2013.

32 Opinion of the Competition Authority 14-A-18, 16 December 2014.

33 Paris Court of Appeal, 25 November 2015.

34 *Luk Lamellen v. Valeo*, Paris Court of First Instance, 26 January 2005, and Opinion of the Competition Authority No. 05-A-20 of 9 November 2005 relating to a request from the Paris Court of First Instance concerning the case between Luk Lamellen and Valeo, BOCCRF No. 10, 8 December 2006, p. 1006.

35 *Carrefour Proximité France v. Etablissements Segurel et fils*, Supreme Court, 23 September 2014 and Paris Court of Appeal, 26 May 2009.

36 The three 'consumer' actions are the following:

a Article L421-1 of the Consumer Code introduces a procedure protecting consumers' collective interest whereby a 'duly declared association' whose statutory object specifies the protection of consumer interests may exercise the rights conferred upon civil parties in respect of events directly, or indirectly, prejudicing the collective interest of consumers;

However, consumers faced significant obstacles to bring such legal actions since they were subject to strict procedural conditions and consumer associations were banned from publicising their claims in order to gather claimants.[37]

Following the enactment of the Hamon Law, the new Article L.423-1 of the Consumer Code provides for a 'French consumer class action' described as an 'opt-in with publicity' procedure. In this respect, an authorised association (out of the 15 currently approved by the government) can bring actions on behalf of a group of individuals who have suffered material harm under a contract or following anticompetitive behaviour. The main features of the scope of this class action are: (1) the monopoly of authorised associations to bring actions; (2) the class action is available only for physical consumers, excluding businesses and professionals; and (3) the compensation is limited to material harm, not corporal or moral damages. The class action involves a three-step procedure: (1) the action is brought before a court of first instance, which will decide the matter on the basis of individual cases (at least two) presented by the association and will issue a single judgment, referred to as a 'declaratory judgment on liability'; (2) consumers may join the class after publication of the judgment; and (3) consumers who joined the class may request for compensation according to the conditions of indemnification specified in the declaratory judgment on liability, which can provide either for direct payment by the business to the members of the class or indirect payment through the association or the person assisting the association.

Article L.423-10 of the Consumer Code also provides for a simplified procedure consisting of an 'opt-in system with individual publicity': when affected consumers are identified (e.g., clients of a gas or telephone-services provider) and have suffered similar harm, it will be possible to inform them by an individual letter, including a response slip. Subject to its implementation in practice, this system is expected to be as efficient as an 'opt-out' system.

Regarding claims for damages originating from undertakings, in January 2012, the Paris Commercial Court was seized of the validity of a collective action financing system implemented by an Irish company named CFI. CFI brought claims against some of the members of a freight cargo cartel, and these companies tried to challenge the validity of the CFI system, in particular the creation of a damage claims vehicle (a French

b Article L421-2 of the Consumer Code empowers consumers' associations to request any measure to stop illicit actions or to remove illicit clauses from future contracts or those previously concluded with consumers; and

c Article L422-1 of the Consumer Code creates a joint representative action whereby an authorised, national representative association can bring a damages action on behalf of identified consumers who have all suffered individual damage from the same commercial conduct. Each consumer must give the association written authorisation of representation.

37 *UFC Que Choisir*, Paris Court of Appeal, 22 January 2010, which was fully confirmed by the Supreme Court (Supreme Court, 26 May 2011).

company called Equilib), before the French courts. The Paris Commercial Court stated that the action was not admissible without going into the merits, since an action had already been brought before the Dutch courts.[38]

It is also worth mentioning that the Paris Bar Association has recently created an online platform to facilitate regrouping of claims (*Avocats Actions Conjointes*).

VIII CALCULATING DAMAGES

The general principle of damages in French law is to put the claimant in the position he or she would have been in had the fault not occurred.[39] For competition cases, this implies a very precise evaluation of the increase in costs or loss of profit suffered by the claimant. In certain cases, the French courts may grant damages resulting from a loss of opportunity, but this is rare and such claims are considered under very strict conditions.[40]

The Supreme Court has reiterated that it is for the claimant to specify the types of damage it aims to recover; courts cannot, at their own initiative, grant a different type of damage[41] (e.g., loss of opportunity instead of increase in costs).

Damages do not serve a punitive purpose and punitive damages do not, therefore, exist under French law.

Article 695 of the CPC limits the categories of costs related to the proceedings that are awarded to the successful party under Article 696 of the CPC. Attorneys' fees are not included in the exhaustive list set out at Article 695 of the CPC. Instead, they come under the expenses that the judge can, under Article 700 of the CPC, award to the successful party. In exercising this discretion, the judge will take into account the fairness of an award and the economic situation of the losing party. The judge is not obliged to award attorneys' fees and often the amount granted is symbolic rather than compensatory.

IX PASS-ON DEFENCES

The pass-on defence tallies with the objectives underlying damages awards in French law: to compensate the concerned party only for the damage suffered. If the party has

38 *Air France v. Equilib*, Paris Commercial Court, 31 January 2012.

39 However, contrary to other jurisdictions, there is no need under French law for the victim to mitigate its damage to be able to recover its loss. See for example, Supreme Court, 19 June 2003 and Supreme Court, 25 October 2012.

40 For example, *Subiteo v. France Télécom*, Paris Court of Appeal, 21 December 2012, in which the court admitted a loss of opportunity for Subiteo in not being able to supply alternative ADSL access, as compared with France Telecom services. However, in *Lectiel v. France Télécom*, the Supreme Court quashed the judgment of the Court of Appeal for excluding the claim related to the loss of opportunity due to the claimant's illicit behaviour (Supreme Court, 3 June 2014, confirmed by Paris Court of Appeal, 27 May 2015 which appointed an expert to appraise the amount of damages).

41 *Doux Aliments v. Ajinomoto Eurolysine*, Supreme Court, 15 June 2010.

passed on a part of any price increase, he or she has reduced the damage suffered. General principles of French law therefore favour recognition of the pass-on defence. However, this imposes a high burden of proof on claimants, who are required to prove that any price increase suffered by them was not passed on to their own clients.[42]

In the past, due to the difficulty of establishing whether price increases have been passed on, French courts have adopted decisions that have drawn some criticism. This was the case, for example, in a widely noted application of the pass-on defence by a French court in a follow-on action related to the *Vitamins* cartel.[43] On the issue of the loss of profit claim, the court held that it was, in fact, a claim for loss of opportunity (the opportunity for the claimant to increase its turnover) and that in this case, the claimant had not established 'the certain and direct nature of the prejudice necessary to open the right of reparation'.[44] Turning to proof of the passing-on, the court readily accepted the defendant's argument: instead of requiring documentary evidence that the passing on had occurred, the court based its acceptance on the European Commission's *Vitamins* decision and a press release of December 2001, which stated in general terms that price increases resulting from cartels were likely to be passed on to consumers. The court elaborated that the claimant had the possibility to pass on the overcharges and that in not doing so, it 'had freely decided its pricing policy so that the liability of the defendants could not be engaged'.[45] The claimant was therefore dismissed.

A similarly simplistic approach was adopted in another *Vitamins* cartel case,[46] although this seems to have been mainly motivated by the insufficient evidence brought by the claimant.

In an action against a supplier, Ajinomoto, which took part in the *Lysine* cartel sanctioned by the European Commission, the Supreme Court upheld the judgment of the Paris Court of Appeal, which considered the claimants, la Coopérative Le Gouessant and la Société Française d'Aliments, had not sufficiently proved the damage and the causal link, by relying on general, theoretical and academic econometric studies and failing to submit a tangible analysis of the evolution of effective prices. The Paris Court of Appeal's ruling was to a very large extent based on the fact that passing on costs to clients was the 'normal commercial practice', thereby creating a presumption of passing on in indemnity claims, which is, in practice, difficult to rebut.[47]

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42 *Gouessant and Sofral v. Ajinomoto Eurolysine*, Paris Court of Appeal, 16 February 2011 and Supreme Court, 15 May 2012.

43 *Arkopharma*, Nanterre Commercial Court, 11 May 2006.

44 Ibid. (author's translation).

45 Ibid. (author's translation).

46 For example, in January 2007, in a follow-on action from the European Commission's *Vitamins* decision (Decision of 21 November 2001, COMP/37.512 *Vitamins*), the Paris Commercial Court rejected Juva's claim for damages on the grounds that the evidence adduced to prove the damage suffered was insufficient (*Juva v. Hoffmann-La Roche*, Paris Commercial Court, 26 January 2007).

47 *Gouessant and Sofral v. Ajinomoto Eurolysine*, Paris Court of Appeal, 16 February 2011 and Supreme Court, 15 May 2012.

However, in another case involving Ajinomoto, the Supreme Court has clarified this issue and the Paris Court of Appeal has subsequently modified its initial unclear stance. In a first decision, the Paris Court of Appeal had dismissed the pass-on defence alleged by Ajinomoto, surprisingly considering that the fact that its indirect customer, Doux Aliments, which had introduced the claim, was able to pass the excessive prices on to consumers would not affect the extent of the compensation requested.[48] The Supreme Court quashed this judgment in June 2010,[49] holding that the Paris Court of Appeal had failed to ascertain whether Doux Aliments had actually passed on the price increase to its customers. Referred back to the Paris Court of Appeal (but with different judges), the burden of proof on the claimant was confirmed. However, the Paris Court of Appeal applied a pragmatic approach by noting that lysine represents only 1 per cent of the total cost of the chicken feed and therefore concluding that the price increase was not likely to cause an automatic and mathematical adjustment of Doux Aliments' price to its distributors. In addition, Doux Aliments faced very strong countervailing negotiating power from its clients, essentially big distributors. It was therefore highly unlikely that passing on had occurred. Thus, Ajinomoto was ordered to compensate Doux Aliments with an amount over €1.5 million.[50] This decision is important in that it demonstrates that it is possible, in practice, to rebut the passing-on presumption; this requires, however, that the claimant presents clear and convincing evidence, even if not all calculation elements are available.

Therefore, the current case law status in France may be summarised as follows:

a there is a passing-on presumption that benefits indirect customers;

b however, where indirect customers are not the final customer, the presumption also plays against them: they must prove that they did not pass the overcharge on to their own customers; and

c the presumption is difficult but not impossible to rebut, and has been rebutted in certain cases.

The implementation of the newly adopted Damages Directive may lead to a modification of this regime: on the basis of the Damages Directive, where the claimant is the direct victim of the cartel, the burden of proof lies on the defendant to demonstrate that the additional cost has been passed on to the end customers.[51] On the contrary, when the claimant is the final customer, he or she may benefit from a presumption, under certain conditions: the proof is deemed to be brought when the indirect customer shows that (1) the defendant infringed competition law, (2) the infringement has resulted in an

48 *Doux Aliments v. Ajinomoto Eurolysine*, Paris Court of Appeal, 10 June 2009.

49 *Doux Aliments v. Ajinomoto Eurolysine*, Supreme Court, 15 June 2010.

50 *Doux Aliments v. Ajinomoto Eurolysine*, Paris Court of Appeal, 27 February 2014 and corrigendum 19 June 2014.

51 Damages Directive, Article 13.

overcharge for the direct customer, and (3) the indirect customer bought the goods or services concerned by the infringement, or derived from or containing them.[52] These conditions do not exist under current French case law.

X FOLLOW-ON LITIGATION

Follow-on actions are those that follow on from a decision of the Competition Authority or European Commission condemning undertakings for anticompetitive practices: the enforcement decision establishes the fact of the practice which, in turn, establishes the fault necessary to obtain damages at civil law. It then remains for the claimant in the follow-on action to prove damage and causation. The admissibility of follow-on actions was clearly established by the Supreme Court in *Lectiel v. France Telecom*.[53]

Recent case law has confirmed the French courts' preference for follow-on litigations rather than stand-alone actions (i.e., damages actions brought directly by the claimant before commercial courts).

Even in stand-alone actions, competition authorities also have a key role, since French courts may[54] use the option offered to them by law to request an opinion from the Competition Authority (see Section VI, *infra*).[55]

In some cases, plaintiffs bring at the same time, on the one hand, a damages claim before the Commercial Court of first instance and, on the other hand, a claim before the Competition Authority for a public enforcement of competition law. The two proceedings are thus conducted in parallel.[56]

The Supreme Court has confirmed that anticompetitive behaviour already sanctioned by the competition authorities constitutes a fault, and that the victims of such behaviour are entitled to claim damages.[57] This position was followed by courts[58]

52 Damages Directive, Article 14.

53 *Lectiel v. France Télécom*, Supreme Court, 23 March 2010.

54 See *a contrario*, *SA la Montagne*, Paris Court of Appeal, 17 September 2014, where the Court decided to conduct its market analysis on its own.

55 For example, the Paris Court of Appeal requested an opinion to determine whether Google has abused its dominant position notably by applying predatory prices in the online mapping market (*Bottin Cartographes v. Google*, Paris Court of Appeal, 20 November 2013). In its recent ruling overturning the first instance judgment, the Paris Court of Appeal followed the opinion given by the Competition Authority dated 16 December 2014 in its entirety which concluded that the alleged abuse was not established (Paris Court of Appeal, 25 November 2015).

56 See the case *Bes Ravise v. France Télécom* as mentioned in Supreme Court, 3 June 2014.

57 *Lectiel v. France Télécom*, Supreme Court, 23 March 2010.

58 *Switch v. SNCF*, Paris Commercial Court, 26 April 2013; *Sté JCB Service*, Paris Court of Appeal, 26 June 2013, confirmed by the Supreme Court, 6 October 2015.

who similarly take the same position as the Competition Authority when the latter had considered that the practice at stake did not constitute an infringement of competition law or that the operator concerned did not hold a dominant position.[59]

While Regulation 1/2003 explicitly provides that European Commission decisions are binding on national courts,[60] no legislation provides the same for the Competition Authority's decisions. These do, however, have a very high probative value. Interestingly, opinions adopted by the Competition Authority on the grounds of Article L.462-4 of the Commercial Code (opinion on any competition issue) are to be analysed as advice for the Parliament and do not entail any adverse effect. They therefore do not have the binding nature of a judgment.[61] Reading between the lines, it appears that a follow-on action based on an opinion from the Competition Authority would be successful only if the court determines itself that the practice concerned is anticompetitive.

Presumably, decisions of other national competition authorities would also have high probative value. However, this has yet to be tested before the French courts. In this respect, it is also important to note that, to ensure consistency, a judge may decide to stay the proceedings until the Competition Authority has adopted a decision on the alleged anticompetitive practices at stake. French judges most frequently take this option.[62] For instance, in an action against Google, the Paris Commercial Court decided to stay proceedings due to a pending procedure before the European Commission.[63]

Fines imposed by the Competition Authority are not taken into account by the courts in assessing damages. However, Article L.464-2 of the Commercial Code states that the amount of fines imposed by the Competition Authority must take into account, *inter alia*, the 'damage to the economy'. If this damage has been calculated in detail (with the assistance of the economic team of the Competition Authority), then the decision may provide elements that may be useful for claimants in private actions.

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59 In *Optical Budget v. MGEN*, Paris Court of Appeal, 7 May 2015, the Court found that MGEN did not hold a dominant position based on a Competition Authority's decision adopted four years earlier in the context of a merger notification authorising the creation of a joint venture by several parties, including MGEN. See also *DB Enterprise v. Marc Orian*, Paris Court of Appeal, 22 May 2014.

60 Article 16(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, pp. 1–25.

61 *Carrefour Proximité France v. Klemon*, Metz Commercial Court, 27 January 2015.

62 For example, *Digicel v. Orange Caraïbe and France Telecom*, Paris Commercial Court, 11 May 2012; *1plusV v. Google*, Paris Commercial Court, 7 June 2012; *Fédération régionale des syndicats d'exploitants agricoles de la Région Bretagne v. Compagnie Financière et de participations Roullier and Timab Industries*, Rennes Court of First Instance, 17 October 2013, following the Commission decision in the *Animal Feed Phosphates* cartel. More recently, see, Paris Commercial Court, *10 Medias/Amaury*, 2 November 2015.

63 *1plusV v. Google*, Paris Commercial Court, 7 June 2012.

XI PRIVILEGES

Attorney–client privilege or professional secrecy between a lawyer and a client is established by Article 66-5 of Law No. 71-1130 of 31 December 1971. It includes consultations (attorney work product), correspondence between lawyer and client and between lawyers (except for the latter when their correspondence mentions 'official letter'), and notes from lawyers' meetings with clients. Advice from and correspondence with in-house lawyers is not covered by professional secrecy.

As France is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms, changes in the case law of the European Court of Human Rights in Strasbourg may have an effect on the delimitation and implementation of the concept of attorney–client privilege in France. The European Court of Justice's case law also has some bearing on the French notion of attorney–client privilege.

When information or documents are provided to competition authorities, these are included in the administrative file of the case, to which all parties will be given access after they have been notified of the statement of objections during the period in which they have the right to reply.[64] The parties may request that part of this information or documents be concealed on the basis that it contains business secrets:[65] these will then be classified in a confidential annex of the file. However, if one of these documents is deemed necessary to the procedure, it may be declassified by the Competition Authority.[66]

XII SETTLEMENT PROCEDURES

Settlement procedures are rather informal in France: when the parties reach a settlement agreement, they must notify it to the court by filing 'settlement pleadings' in order to obtain a declaration of enforceability.[67]

Because of the simplicity of the procedure, and for other reasons such as the wish to avoid adverse publicity, private antitrust cases in France are very often settled. *Luk Lamellen v. Valeo*[68] is an example of this practice.

XIII ARBITRATION

Arbitration procedures are available in France and arbitration rules are clearly defined by Article 1442 et seq. of the CPC. However, they are rarely used in private competition enforcement cases.[69]

64 Article L.463-2 of the Commercial Code.

65 Articles L.463-4 and R.463-13 of the Commercial Code.

66 Article R.463-15 of the Commercial Code.

67 Article 1441-4 of the CPC.

68 *Luk Lamellen v. Valeo*, Paris Court of Appeal, 10 May 2006.

69 For example, in the *Carrefour Proximité France* cases (Paris Court of Appeal, 28 September 2011; Supreme Court, 18 December 2012; Paris Court of Appeal, 6 March 2013).

XIV INDEMNIFICATION AND CONTRIBUTION

Civil law generally provides that one may claim damages from any of the defendants because they are jointly and severally liable for the damage suffered. [70] Where a number of defendants are held severally liable for anticompetitive behaviour, the victim may recover the full amount of damages from any one of the defendants. In this case, the defendant or defendants paying the award retain a right of action for contribution against the other defendants. The court determines the amount of each defendant's contribution based, in particular, on the degree of seriousness of the fault committed by each, namely, the level of their respective participation in the anticompetitive practice.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Substantial changes to the current regime relating to individual claims are to be expected concerning discovery (as discussed above) during the period of implementation of the Damages Directive (the deadline for which is 27 December 2016) (see Section V, *supra* for more details).

There are four developments in particular[71] resulting from the provisions of the Damages Directive which are particularly relevant to the position in France.

First, concerning the effect of final national decisions, the current principle whereby a decision of the Competition Authority does not bind the courts contradicts the provisions of the Article 9 of the Damages Directive, which require that when a national court hears an action for damages, the final decision of the competition authority of the same Member State or its courts of appeal shall establish conclusively the infringement of competition law, while before the courts of another Member State, such a decision must be presented and constitute at least *prima facie* case of infringement. Therefore, the final decision of the Competition Authority shall constitute irrefutable proof of the fault before French courts.

Second, the rebuttable presumption that a cartel causes harm will require a change to the rules related to the 'passing-on defence' to ensure compliance with the principles laid down in Articles 12 and 13 of the Damages Directive. Indeed, both the current regime and the Directive are based on the same presumption that an overcharge levied on a direct purchaser was passed on to an indirect purchaser. French case law requires the claimant to prove that 'no passing-on' has occurred. However, the Directive draws a distinction depending on the type of purchaser. If the claimant is the direct purchaser, the burden is on the defendant to prove that the overcharge has been passed on to the end customers. If the claimant is the indirect purchaser, the burden is on the

70 Supreme Court, 11 July 1892; Conflicts Tribunal, 14 February 2000.

71 Muriel Chagny, 'Quels progrès en droit de la preuve après la Directive du 26 novembre 2014 relative aux actions indemnitaires en droit de la concurrence?', *AJ Contrats d'affaires – Concurrence – Distribution* 2015, pp. 318–319.

claimant to demonstrate that the additional cost has been passed on to him or her. In the second assumption, the claimant can benefit from a rebuttable presumption in certain conditions.

Third, with regard to the limitation period of five years, the current rules would necessitate clarification in two ways to comply with Article 10 of the Damages Directive: (1) specifying the date of the starting point, which shall run from the date of gaining knowledge of the infringement and the identity of the infringer and the resulting harm, but shall not begin before the infringement has actually ceased;[72] and (2) creating a suspension mechanism whereby the limitation period shall be suspended or interrupted by the initiation of proceedings by a competition authority and resumed only after a minimum period of one year following the final decision or termination of the procedure.[73]

Finally, under Article 17 Section 2 of the Damages Directive, cartels are presumed to cause harm. Such a presumption can be rebutted by the defendant. It remains to be seen how this rebuttable presumption will be implemented under French law and interpreted by the French courts.

72 Article 10.2 of the Damages Directive on limitation periods.

73 Article 10.4 of the Damages Directive on limitation periods.

Chapter 13

GERMANY

Susanne Zuehlke[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The main development this year is the entry into force of the EU Private Damages Directive.[2] Member States must implement the Directive by 27 December 2016. Accordingly, work is under way in Germany to identify all rules that require a change. A proposal is expected soon. German law is already in line with many of the provisions of the Directive. Likely candidates for change are the rules on access to file, the statute of limitations and there is some debate whether German law must incorporate the EU definition of an 'undertaking', which is quite broad and significantly less differentiated than the rules applying to intra-group liability in Germany at the moment.

Other than that, private antitrust enforcement in Germany has always been quite lively and continues apace. Some of the main recent cases involved rules prohibiting the resale of products on the internet[3] as well as a matter that involved the suitability of a retailer to obtain premium suitcases that are distributed under a selective distribution regime.[4]

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2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, page 1 et seq. of 5 December 2014, (the EU Private Damages Directive).

3 See *Kammergericht Berlin*, case 2 U 8/09, judgment of 19 September 2013 (*eBay*); Higher Regional Court Schleswig, case 16 U (Kart) 154/13, judgment of 5 June 2014 (*Digital Cameras*); Regional Court of Frankfurt, case 2-03 O 158/13, judgment of 18 June 2014 (*Backpacks*) and Regional Court of Frankfurt, case 2-03 O 128/13, judgment of 31 July 2014 (*Logo-rules*).

4 Higher Regional Court Munich, case U 3886/14 Kart, judgment of 17 September 2015 (*Luxury Suitcases)*.

As regards private damages cases, CDC's action against the *Cement* cartel was prominently dismissed after a lengthy process, because the court considered that the model of CDC was designed to avoid an obligation to pay attorney fees to the defendants in case of a loss.[5] The courts considered that CDC had thus not validly acquired the damages claims and that all actions taken to fix the fault were taken only after the claims were time barred. CDC did not appeal up to the Federal Supreme Court citing prohibitive costs against potentially limited chances of success. In the meantime, it has brought a new action against one of the original defendants. It is not entirely clear whether this is based on a variation of the alleged infringement, whether there exists a tolling agreement with that particular defendant, or whether there is another reason for why the claim against this specific defendant is not time barred.[6] Pending in Dortmund is another CDC action against the members of the *Hydrogen Peroxide* cartel.[7]

Last but not least, recently the Labour Court of Düsseldorf dismissed an action for damages against a sales manager, because the cartel was created by company management[8] as well as an action against a managing director for compensation of the fine that was imposed on the company.[9]

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The legal system in Germany is a civil law system. Rules are codified in laws by the legislator and enforced by the courts. Judgments have a certain precedential value but are not generally binding. Only rulings by a higher court in the same matter are binding on a lower court in that particular case.

Public and private antitrust enforcement in Germany is primarily based on the Act Against Restraints on Competition (ARC). There also exist specialised sector rules, for example, in the telecoms and energy sector. In addition, there exist the more general rules of the German Civil Code (the Civil Code) that apply as a backdrop to all relations between private parties. The rules on civil procedure are contained in the German Code on Civil Procedure (CCP).

Private parties can bring actions in the civil courts seeking a cease and desist order, or damages awards. Interim relief is available in the form of a court-ordered injunction. Typical private antitrust enforcement matters include non-compete agreements, disputes between manufacturers and distributors or agents about restrictions in the distribution or agency contract, claims of an abuse of a dominant or a relatively strong market position as well as private damages claims either directly or – mostly – as follow-on claims.

There exist local, regional and higher regional courts and then the Federal Supreme Court. The local courts have jurisdiction over claims up to a total value of €5,000 (see

5 Higher Regional Court Düsseldorf, case VI-W (Kart) 1/15), decision of 18 February 2015.

6 See CDC press release dated 29 October 2015, see www.carteldamageclaims.com.

7 Cf. ECJ, Case C-352/13, *CDC Hydrogen Peroxide*, judgment dated 21 May 2015.

8 LAG Düsseldorf, Case 14 Sa 800/15, judgment of 27 November 2015.

9 LAG Düsseldorf, Case 16 Sa 459/14, judgment of 20 January 2015.

Section 23 GVG), which is typically exceeded in antitrust cases. Thus, courts of entry for antitrust cases are typically the regional courts. The judgments of the regional courts can be appealed to the competent higher regional court and from there under certain circumstances to the Federal Supreme Court. The lower courts may and the Federal Supreme Court must consult with the European Court of Justice by way of a preliminary ruling if national law appears to conflict with EU law. This has been relevant in the private antitrust damages setting, where the ECJ became a leader in unblocking existing practice and nudged national courts gently towards the award of antitrust damages.[10]

The basis for an antitrust cease and desist or a damages claim can be found primarily in Section 33 ARC and the following discussion will focus on this provision. However, it is very important to keep in mind that an applicant may have many more legal bases for a claim arising out of a particular conduct, *inter alia*, the parties' contractual relationship (e.g., provisions that assure compliance with the antitrust laws), the rules governing pre-contractual relationships, the general damages rules, or the rules on unjust enrichment of the civil code. There may also exist other specialised rules (such as sector regulation), whether on a stand-alone basis or in combination with rules of the Civil Code. Each of these legal bases may have different legal and factual requirements, may have different consequences (an unjust enrichment claim would be for restitution of what was unjustly received rather than damages), and be subject to varying statutes of limitations. It is thus very important to analyse each particular business situation against the entire set of potential bases for a claim. Of course, for claimants it is also very important to consider upfront whether a complaint to an authority should be part of the strategy as a public investigation can often assist in the presentation of a claim.

Claims for antitrust infringements are subject to statutes of limitations. For a cease and desist order, it is necessary to show that the relevant conduct still continues or that there exists a strong likelihood of recurrence or other interest to obtain a statement of illegality from a court. The statute of limitations is more important in the context of private damages claims.[11] In this context, it is important that the EU Private Damages Directive requires Member States to ensure the following minimum statute of limitations:

a that the statute of limitations does not start until the end of the antitrust infringement and the party concerned has knowledge or should have known of the antitrust violation;

b it has a duration of at least five years; and

c it must be tolled while the investigation by an antitrust authority is pending until that decision is final and binding.

10 Cf. ECJ, Case C-453/99, *Courage and Crehan*, judgment of 20 September 2001; ECJ, Case 295/04, *Manfredi*, judgment of 13 July 2006; ECJ, Case C-360/09, *Pfleiderer*, judgment of 14 June 2011, ECJ, *CDC Hydrogene Peroxide*, see above.

11 Contribution and indemnification claims will be discussed below, but defendants should not forget to analyse the statutes of limitations with regard to claims for contribution or indemnification and take required safeguards (e.g., tolling agreement or inclusion in a lawsuit) to avoid a surprise after a lengthy defence in the court.

While this is not law until implemented by a national law, it should be expected that the German legislator will implement the Directive in 2016. The new rules will likely apply to all claims for which the statute of limitations has not yet expired. In addition, in the interim, where German law is open to interpretation, parties should expect that judges will seek to interpret existing rules in light of the provisions of the Directive, unless it is clearly not possible.

The current German statute of limitations (Section 195 et seq. of the Civil Code) for damages claims currently expires three years from the end of the year in which the infringement occurred. It also starts from the damaging act (i.e., possibly earlier than the end of the infringement as required by the Directive) and requires knowledge or grossly negligent ignorance, which is in line with the Directive. Section 33(5) of the ARC tolls the statute of limitations pending an investigation by an authority until the infringement decision is final and binding. It is important not to forget that Section 195 et seq. of the Civil Code contain additional bases for the tolling of the statute of limitations (such as a tolling agreement, pending negotiations, the bringing of a court action, etc.) that apply to civil claims more generally and hence also to private damages claims.

There also exist two additional statutes of limitations. A claim is time barred when the first of the applicable statutes of limitations has run: according to Section 199(3) of the Civil Code, a 10-year period runs from the moment the damage occurred, and a 30-year statute of limitations runs from the moment of the act that caused the damage (even if the damage occurred later). The tolling provisions also apply to those limitation periods.

Finally, of course, where a claim is based on a different legal basis (e.g., on the contract), the statute of limitations can be significantly longer (30 years in the case of contractual claims). Note that the rules are different again for claims arising prior to 31 December 2001. This will become increasingly irrelevant, but given the long duration of cases, this could still be relevant in some cases and should be researched further if necessary.

III EXTRATERRITORIALITY

The rules of jurisdiction and applicable law are quite complex and require careful analysis on a case-by-case basis. That said, as a basic principle, the German antitrust damages rules have a wide reach and are generally available in most potential private damages cases that have any nexus to Germany. For example:

a a defendant in Germany can be sued for all conduct if it has its headquarters in Germany (see Section 17 CPP);

b a company can be sued at the seat of a subsidiary in Germany, if this subsidiary was part of the cartel (Section 21 CCP); and

c a German court is also available if any of the damaging acts were conducted in Germany (e.g., cartel meetings, pricing decisions, or even deliveries (Section 32 CCP)).

Other bases for jurisdiction in Germany may be available and will need to be carefully evaluated on a case-by-case basis. Furthermore, once a court has jurisdiction over one defendant, other defendants can be added to a case, even if they do not meet any of the

conditions for a German court to take jurisdictions. This has recently been confirmed by the European Court of Justice, even for a case where the so-called anchor defendant settled shortly after the filing of the action.[12]

Finally, according to Section 130(2) ARC as well as Article 6(3) of the Rome II Regulation,[13] German law can in principle be applied to all conduct that had an effect in Germany. This is quite broad and will cover most cases. It may in certain cases include conduct entirely outside Germany but part of a single and continuous infringement that also had an effect in Germany.

IV STANDING

Any person concerned can bring an action for a cease and desist order and for damages in antitrust cases. In cease and desist cases, the applicant has to show that it has been affected by the infringement and has an interest in it stopping or at least not recurring. Actions for damages claims can be brought by the person that suffered damage, including direct and indirect purchasers.

What seems rather obvious today was a major block to antitrust damages claims in Germany not too long ago. Until the early 2000s, it was necessary to show that the infringed provision was intended to protect the claimant specifically rather than the public good. Defendants successfully argued that the competition rules protect competition as such, not competitors or individual customers. This argument had already weakened significantly in the wake of the *Vitamin Damages* cases and was ultimately discarded following the ECJ judgments in *Courage and Crehan* and *Manfredi*.[14] This development was also reflected in the amended Section 33 of the ARC with changes adopted in the context of the 7th ARC Amendment.

Besides individuals, Sections 33(3) and 34a of the ARC accord standing to public interest groupings under certain conditions. However, this provision has not been used a lot (or possibly not at all), mainly because these groups are not allowed to keep any damages, which can only be obtained for the benefit of the federal budget. Finally, CDC has pioneered a group action model where claims are aggregated, which will be discussed in Section VII, *infra*.

V THE PROCESS OF DISCOVERY

A US-style discovery process does not exist in Germany. The civil process is a party-based process. Each party is required to submit evidence for those elements of their claim or counterclaim for which they carry the burden of proof. Except in very specific circumstances, no party can be compelled to provide evidence against its own interest.

12 See ECJ, *CDC Hydrogen Peroxide* (cited above).

13 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

14 See ECJ, *Courage and Crehan* and ECJ, *Manfredi*, cited above.

Increasingly, in particular in follow-on damages claims, access to the file of an authority has become a way to gain additional evidence to prove damages. The case law here is unsettled. There exist a significant number of cases before the EU courts aiming to clarify the rules around access to a European Commission file.[15]

The EU Private Damages Directive lists information that should be made available after the end of a procedure and also identifies two types of information that may not be made available: leniency statements and settlement submissions (but only if not withdrawn), see Article 6(6) of the Directive. In a recent case, the Federal Supreme Court found that an authority may not refuse access to the entire file on account of the fact that the matter had been settled, but instead needed to evaluate on a case-by-case basis what information might be disclosed to a third-party claimant.[16] The local court of Bonn refused access to the leniency application following a preliminary ruling from the ECJ.[17] The Higher Regional Court of Hamm allowed a court (the Regional Court of Berlin) access to the entire file held by the public prosecutor including the leniency application and confidential decision of the European Commission, noting that the requesting court would have to ensure that disclosure to the parties was limited appropriately.[18]

VI USE OF EXPERTS

German courts have discretion on whether to appoint an expert based on Section 402 et seq. of the CCP. If the court does decide to appoint an expert and the parties agree, the court should usually follow and appoint the desired expert. In all other cases, the expert must be 'neutral' (i.e., cannot have been employed by one of the parties). This is an important tactical point. It can be advantageous to ensure that a potentially desired expert is left free to become the court-appointed expert.

Separately, the parties are of course free to use experts to prepare the case or the defence and frequently do so. While there exist a number of studies and statements that the average antitrust damage caused by a cartel infringement amounts to (insert your favourite arbitrarily picked percentage here),[19] causation and the actual calculation of the amount of damages (whether direct, indirect or possibly umbrella damages) are far from clear. Thus, most parties include economists in the team from the start to ensure a good foundation of claim or defence.

15 See e.g., ECJ, C-365/ 12 P, *EnBW*, judgment of 27 February 2014.

16 See BGH, case KVR 55/14, decision of 14 July 2015.

17 See local court of Bonn, case 51 Gs 53/09, decision of 18 January 2012 dismissing request for access to file insofar as it includes leniency applications.

18 See Higher Regional Court of Hamm, cases III-1 VAs 116/13 to 120/13 and 122/13, decision of 26 November 2013.

19 See for example Oxera, Quantifying antitrust damages. Study prepared for the European Commission, p. ix and 90. The estimate appears to be based on various pieces of work by US economists Connor and Lande in 2008, 'Cartel Overcharges and Optimal Cartel Fines', chapter 88, pp. 2,203–18, in S.W. Waller (ed.), *Issues in Competition Law and Policy*, volume 3, ABA Section of Antitrust law.

Finally, the European Commission and the Federal Cartel Office may intervene as *amicus curiae* in pending proceedings that raise antitrust questions. This is at the discretion of the European Commission and the President of the Federal Cartel Office respectively. Both use this tool sparingly, not least because of the resources required.

VII CLASS ACTIONS

The EU Private Damages Directive refrained from mandating the introduction of class actions. German law does not include class actions (whether of the opt-in or opt-out variety). One procedural instrument that is often used in other disputes is the instrument of a model process, where one case is brought before the courts and litigated to resolution coupled with a tolling agreement or settlement agreement for all other parties facing the same issue. This can be quite efficient and in particular cost-effective. However, it is not comparable to a class action model.

As is by now widely known, CDC, a Belgian-incorporated company (founded and run by a German lawyer), has pioneered a group action model under which it acquired claims from customers of the cement cartel and enforced them under its own name.[20] This is in principle a valid and admissible model. The CDC action in the cement case was confirmed as admissible by the Federal Supreme Court. However, on substance, the regional court (confirmed by the higher regional court and now binding) ultimately decided that the CDC model circumvented the loser pays principle and dismissed the action on substantive grounds (see Section I, *supra*).

In the meantime, CDC has brought a new claim against one cartel member. It is not entirely clear how CDC intends to deal with the statute of limitations in that case. From press reports it would seem that CDC may have slightly varied the claim or that the claim has been brought against a defendant for whom the statute of limitations may not have run yet.

Furthermore, CDC claims that it fixed the reasons for the invalidity a while ago and that other pending cases are not affected. This remains to be seen, in particular in the pending *Hydrogen Peroxide* case.

Finally, as noted above, public interest groupings may have standing to bring claims that concern a number of companies under Sections 33(3) and 34a of the ARC. However, these provisions are not frequently used, mainly because any funds obtained will have to be handed over to the federal budget.

VIII CALCULATING DAMAGES

There are no punitive damages under German law but interest accrues on claims ultimately successful from the date they arose at base rate plus 5 per cent[21] and the loser pays the court and attorney fees of the winner.

20 Ultimately dismissed by the Higher Regional Court of Düsseldorf, see reference above.

21 Section 33(5) of the ARC and Section 288 of the Civil Code.

Given the significant amounts at stake, the typically long duration of private damages cases and the otherwise low-interest economic environment, the interest accruing can be punitive in and of itself. Court fees are based on the value of the claim brought and the procedural steps involved and are not typically a prohibitive cost factor. The reimbursable attorney fees are also based on the value of the claim brought, but the relevant value is capped at €10 million. For defendants this means that they are unlikely to be able to recover all attorney fees if they win, for applicants the fees can be prohibitive despite the cap as they do not have control over how many parties are drawn into the proceeding. Fees were cited as a reason for CDC not to appeal the adverse ruling by the Higher Regional court of Düsseldorf in the *Cement Cartel* case.

The calculation of damages itself is a complex and evolving area of practice. There are perhaps three key items to start with: causation, damages and the right of the judge to estimate the damages under Section 287 of the CCP.

i Causation

Causation is a much overlooked topic that is likely to be of key importance in most cases. While in follow-on cases, the actual infringement is considered proved by the decision of the authority, these decisions do not typically address the question of whether the conduct in question has actually caused any damages. Fines are imposed for conduct and it has long been the established and court-sanctioned practice of the European Commission and the Federal Cartel Office that there is no need to show the conduct actually caused any damages. In some cases, causation will be quite apparent. For example, where a cartel agreed to increase prices, prices were increased and paid by customers, it will be difficult to contest causation. Likewise, where two or three companies agree to rig bids and proceed with this scheme through one or more bid scenarios, causation will be easy to prove. At the other end of the scale are the talking clubs that are fined for meeting and talking, possibly even agreeing on some action items, but where there is no follow-up and decisions are not implemented. One example is the frantic industry meetings, calls, email exchanges or chat protocols in markets with overcapacity and falling prices, where all concerned acknowledge that 'something must be done'. Often these discussions are not followed up by concerted action, which, for example, would have a decisive impact on existing capacity and then also on the price. In these cases, the discussions may be considered an antirust infringement and may lead to fines, but they cause as much damage as adding a bucket of water to an already overflowing River Rhine.

ii Damages

Damages are assessed by a comparison of the current position of the applicant with the situation in which he or she would have been but for the infringement. The starting point is typically a comparison of the price paid (the cartelised price) with a hypothetical competitive price. This will certainly cover most damages in cartel cases, however, it is important to consider all potential consequences for the applicant. One hotly debated topic is whether the applicant is entitled also to 'umbrella damages' (e.g., for higher prices paid to non-cartel members) from those who were able to take advantage of the situation

caused by the cartel and charge a higher price.[22] There is also a question of whether the applicant is entitled to damages because a higher cartelised price led to a higher sales price and thus lower sales volumes for the applicant's product. Finally, Section 33(5) of the ARC points out that the judge can also consider the profits made by the defendant in the calculation of the damages.

iii Judges' estimates

Most of these questions can be rather complex and difficult to prove to the required legal standard. That said, the CCP does not require judges to calculate a 100 per cent precise amount of damages. Based on Section 287 of the CCP, judges have discretion to decide the final amount after consideration of all facts. It is of course advisable to provide such facts ideally supported by expert testimony.

IX PASS-ON DEFENCES

German law allows the pass-on defence. It places the burden of proof that the overcharge was passed on the defendant, at least in direct actions. Indirect purchasers will of course need to show that they have been overcharged by their direct supplier in order to substantiate their claim, and must thus show that the overcharge was passed on to them. Where cases move through different regional courts, it is possible for two courts to come to opposite conclusions when looking at the evidence in the particular case. This could expose defendants to two successful damages claims. That said, it would appear that so far this situation has not occurred.

The problem with the pass-on defence has always been that it is difficult to prove that an overcharge was or was not passed on, so whoever carries the burden of proof loses. For a long time, the direct purchaser had to prove that it had not passed on the overcharge in order to make a successful claim for damages against the cartel members. In most cases, the defence argued successfully that the direct purchaser had incorporated the overcharge in its pricing calculation and passed them on to the indirect purchasers, and direct purchasers had difficulty proving otherwise. This situation has been reversed. Section 33(3) of the ARC clarifies that a damage is not excluded simply because the good or service was sold on and so the burden of proof is on the defendant. Thus, the defendant must prove that the direct purchaser passed on the overcharge, rather than having absorbed it (e.g., in his or her own margin), which is difficult in most cases. It would seem that one might be able to prove this where a direct purchaser itemises purchased cartel products and bills them to the indirect purchaser separately, potentially without a mark up, or clearly indicating the mark up. In all other circumstances, it can be quite difficult to prove a pass on.

22 See ECJ, Case C-557/12 *Kone*, judgment of 5 June 2014.

X FOLLOW-ON LITIGATION

Many antitrust damages actions in Germany are brought as a follow-on claim following an infringement proceeding. Antitrust damages claims are, however, also brought from time to time in scenarios outside of hard-core cartel enforcement. There are frequent disputes between, for example, manufactures and retailers, or franchisees on antitrust grounds, which are often accompanied by damages claims.

As regards follow-on claims, the EU Private Damages Directive requires that decisions of national authority of the relevant Member State are binding on the national courts in that country and that decisions of other authorities of EU Member States are at least accorded a status of *prima facie* proof. In fact, the EU Private Damages Directive is silent on European Commission decisions. However, it is important to realise that those are already binding on national courts by their nature. German law already goes beyond those provisions and declares that final European Commission decisions, German decisions as well as decisions by authorities of other EU Member States constitute binding proof of infringement.

While this is of course very helpful for any applicant, it does not necessarily guarantee the successful outcome of a damages action. Applicants need to prepare their application very carefully and need to ensure, *inter alia*, that the action they bring is admissible, is not time barred and that the infringement has caused damages (see Section VIII, *supra*).

XI PRIVILEGES

Legal privilege is not typically relevant in civil proceedings; issues may arise in the context of access to the authorities' file. Unlike in the United States, in a civil process the parties cannot be compelled to provide certain materials. Therefore they typically do not need to be able to claim attorney–client privilege against such disclosure obligation. In exceptional cases, where a party may be required to provide a document, legal privilege is available.

Legal privilege might become relevant in cases where a party requests access to the file of an authority and where the file contains legally privileged documents. However, in principle legally privileged documents should not have become part of the authorities' file in the first place or should be removed from it during the procedure and certainly before any access to the file. In this context it is important to keep in mind that German legal privilege is rather limited and relates to correspondence between an attorney and his or her client in the defence of an actual matter. For example, the results of compliance monitoring or internal investigations may not always be covered by legal privilege under German law, in particular if they are not directly linked to an investigation by an authority. Thus, it is possible that some documents may be part of an authority's file that may be considered legally privileged by other legal systems, and those documents would then become accessible to parties requesting access to the file.

XII SETTLEMENT PROCEDURES

German law encourages parties to resolve disputes quickly and efficiently also through settlements. In fact since 2002, the CCP has required settlement negotiations to take place before the first hearing takes place. Parties are also free to settle a case at any time during the process. These tools are regularly used in private antitrust enforcement and most matters never proceed to trial.

That said, settling a cartel damages case can pose complex problems. One such problem is paradoxically caused by the fact that no class action is available. Class actions have many disadvantages in particular for defendants, but they do provide one important benefit: they close the class and allow the parties to clearly identify the hold outs. Without this tool, a settling defendant is exposed to an unknown number of future claimants who, seeing the success of the first claimant, may decide to bring their own claims. Another significant problem is when there are claims for contribution by the other defendants. Finally, once settled, it can become procedurally complex to remain sufficiently involved in the defence of a matter, although the outcome may be relevant in light of potential contribution claims.

Companies in Germany have settled antitrust claims, although the fact of a dispute and subsequent settlement is often kept confidential, as are the terms. There also exists one publicly known settlement so far of a defendant in a group action. In a group action brought by CDC against the *Hydrogen Peroxide* cartel, Degussa settled the claim against it. However, as the terms of this settlement are not public, it is not clear if or how Degussa is protected or indemnified by CDC against contribution claims from other defendants.

XIII ARBITRATION

The parties can agree to submit a private antitrust claim to arbitration once it has arisen by way of an agreement to arbitrate. The advantages are usually that the matter will be resolved more quickly and in a less formalistic manner, often with participation of well-known experts. This process is used quite extensively in antitrust matters between companies.

That said, given the requirement for each party to consent, it would appear difficult for a damages claim against multiple parties to proceed to arbitration and it does not appear to have occurred in Germany. Arbitration clauses in, for example, sales contracts are not sufficient to subject a subsequent antitrust damages claim to arbitration.

Finally, in some cases agreements to arbitrate concluded prior to an actual infringement were considered to be void, at least where it was not fully clear that the other party had knowingly, willingly and entirely voluntarily submitted to arbitration.[23]

23 Higher Regional Court Munich, Case U 1110/14 Kart, judgment dated 15 January 2015.

XIV INDEMNIFICATION AND CONTRIBUTION

Cartel infringements are torts and each cartel participant is jointly and severally liable for the full amount of damages to the applicant. The applicant has a choice of which defendant or how many are pursued for the damages. The defendants then have a claim for contribution against each other, provided such claim is not time barred.[24] The applicable provision is Section 426 of the Civil Code, which states that unless a different rule is agreed on, the total is divided based on heads. This is a very simple rule and although the law states that this is the general rule, in practice the contribution shares are allocated based on more equitable methods. In the case of a cartel, market shares might be a proper reference, although it is open whether value or volume-based. The debate has just begun and it is very unclear at this stage how the damages will ultimately be allocated among defendants.

As regards indemnification for an applicant or victim of a cartel, we refer to a range of other claims possible under the contract between the parties or the German Civil Code, which may also cover indemnification.

As regards claims for indemnification by defendants, those require a specific agreement to indemnify. For example, the seller of a business may agree to indemnify the purchaser for any claims arising out of a previous cartel infringement. Investors who own controlling shareholdings in companies should make sure to include a standard indemnification obligation by the portfolio company for cartel infringements in management agreements to hedge the very significant risk that applicants pursue them for damages claims. As noted above, companies should also always consider indemnification clauses in settlement agreements. Where such agreement is with an individual company, the settlement agreement should include indemnification against claims from indirect purchasers (or vice versa depending on who the settling party is) to avoid double exposure. Where the settlement agreement is concluded with an entity that brings group claims against the entire cartel, there must also be some form of indemnification for the inevitable contribution claims as well as protection against claims from direct or indirect purchasers (as the case may be).

XV FUTURE DEVELOPMENTS AND OUTLOOK

Germany has always had an active antitrust litigation culture and it should be anticipated that disputes involving antitrust claims will continue, whether this relates to the enforceability of non-compete obligations or to disputes between manufacturers and

24 Procedurally, it is important to make sure that all potential contributors are included at the time the action is brought. A claimant may bring a case only against some cartel participants. In such case, defendants should draw in others by way of a '*Streitverkündung*', which will also ensure that the findings of the court are binding on such additional parties, or conclude at least a tolling agreement to avoid expiry of applicable statutes of limitations.

retailers relating to restrictions, such as internet sales or sales on platforms. There is no reason to anticipate that companies and individuals would not continue to pursue such claims.

When looking at private damages, the most important expected legislative developments are the amendments to the various relevant laws, in particular the ARC, the Civil Code and the CCP, which are necessary to ensure full implementation of the EU Private Damages Directive. Discussions of potentially necessary amendments are under way. It is anticipated that changes to the ARC will be incorporated in the upcoming ninth ARC amendment.

Other than that, it is clear that Germany has experienced a paradigm shift with regard to private damages claims. While in the past it was neither accepted nor particularly promising to pursue antitrust damages claims, today no board can afford to ignore such claims owing to the risk of personal liability for a violation of their obligations to the company. Furthermore, pioneered by the legal team of Deutsche Bahn, today legal departments all over Germany are systematically monitoring cartel enforcement action in order to establish potential damages claims. In parallel, there have been a significant number of successful cases that have helped clarify the parameters for damages in such cases. Clearly, the courts are still catching up with the developments in the real world and it can be expected that many of the open questions will soon be clarified.

It will also be very interesting to follow the actions brought by CDC, which suffered a major setback in the *Cement* case. As noted above, CDC has brought a new action against the *Cement* cartel that at the very least raises questions about the statute of limitations. That said, it is important to keep in mind that the *Cement* case is not CDC's only case pending in Germany or elsewhere.

Chapter 14

INDIA

Vandana Shroff and Rahul Goel[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Competition Commission of India (CCI),[2] established under the Competition Act, 2002 (the Competition Act), has only been discharging its enforcement functions for the past five 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.

While the CCI and the Competition Appellate Tribunal (COMPAT)[4] have set the ball rolling, there is a growing need for clarity on several procedural aspects (including powers of the CCI at the *prima facie* stage of ordering an inquiry and that of the Director General (DG) at the time of investigation). There have been a number of cases filed before the High Courts seeking their intervention under their extraordinary jurisdiction under the Constitution of India, 1950 in order to prevent the overreach or exercise of excessive powers by the CCI or DG beyond the mandate of the Competition Act.

Nonetheless, certain procedural irregularities are unavoidable in the early years of execution of any legislation and are proof of fast evolution or adaptation of a legislation that has been recognised to have a ground-breaking impact on a wide gamut of enterprises

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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.

4 COMPAT is a statutory tribunal that decides appeals from the decisions of the CCI.

(companies, associations, partnership firms, individuals) operating through different mediums (online/brick and mortar) in different levels of markets (manufacturers, wholesalers, distributors, retailers).

Although there have not been major legislative changes over the past year, a recent decision of the Madras High Court has validated the possibility of a 'settlement' between an informant and an opposite party involved in a competition law dispute if it fulfils the criteria laid down therein.[5]

Additionally, the CCI passed various orders imposing heavy 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).

Penalties were imposed upon companies in the pharmaceutical,[6] insurance,[7] film distributors and exhibitors[8] and airlines[9] sectors for indulging in collusive or concerted practices such as bid rigging or price fixing. Seventeen automobile companies came under the CCI's radar for indulging in anticompetitive activities as it was alleged that genuine spare parts of automobiles were not made freely available in the open market.[10] Several subsidiaries of the government-owned enterprise Coal India were penalised on the ground of abuse of dominant position.[11] The CCI has also warned companies in the real estate development business to address the concerns of anticompetitive practices raised against them.[12] However, most of the above decisions are currently subject of appeal or judicial review.

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5 *The Tamil Nadu Film Exhibitors Association v. CCI & Ors.*, AIR 2015 Mad 106.

6 *M/s Bio-Med Private Limited v. Union of India & others*, Case No. 26 of 2013, decided on 4 June 2015.

7 *In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna. v. National Insurance Co. Ltd. and Others, Suo Moto* Case No. 02 of 2014, decided on 10 July 2015.

8 *In Re: M/s. Crown Theatre v. Kerala Film Exhibitors Federation (KFEF)*, Case No. 16 of 2014, decided on 8 September 2015.

9 *Express Industry Council of India v. Jet Airways (India) Ltd. & Others*, Case No. 30 of 2013, decided on 17 November 2015.

10 *In Re: Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Others.*, Case No. 03 of 2011, decided on 27 July 2015 (in continuation of the CCI's earlier order dated 25 August 2014)

11 See *M/s Sai Wardha Power Company Ltd. v. M/s Western Coalfields Ltd. & Ors*, Case No. 88 of 2013, decided on 27 October 2014; *Shri Bijay Poddar v. M/s Coal India Limited and its subsidiaries*, Case No. 59 of 2013, decided on 27 October 2014; *M/s GHCL Limited v. M/s Coal India Limited & Ors.*, Case No. 08 of 2014, decided on 16 February 2015; *M/s West Bengal Power Development Corporation Ltd. v. M/s Coal India limited & Ors.*, Case No. 37 of 2013 , decided on 15 April 2014; *M/s Madhya Pradesh Power Generating Company Limited v. M/s South Eastern Coalfields Ltd.*, Case No. 05/2013 & 07/2013, decided on 15 April 2014.

12 *Shri Jyoti Swaroop Arora v. M/s Tulip Infratech Ltd. & Ors.*, Case No. 59 of 2011, decided on 3 February, 2015; Also see *Mr. Pankaj Aggarwal (13/2010), Mr. Sachin Aggarwal (21/2010) & Mr. Anil Kumar (55/2012) v. DLF Gurgaon Home Developers Private Limited* [Case Nos. 13 &

In a significant ruling in *Delhi Development Authority & Ors v. CCI & Anr*,[13] a Division Bench of the High Court of Delhi directed the CCI, in the given facts, to decide the issue of jurisdiction at the preliminary stage, and pass an order thereon, before it proceeds to decide on the merits of the case.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private antitrust actions are governed by the Competition Act[14] and the regulations framed therein.[15] The provisions of the Competition Act do not bar the application of any other law.[16] However, the Competition Act expressly bars the civil courts from accepting any suits or proceedings in respect of any matter that the CCI or COMPAT is empowered to determine, which, in the case of COMPAT, includes compensation applications by aggrieved parties.[17]

Section 19(1) empowers the CCI to initiate inquiries 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.[18] A decision by the Division Bench of the Delhi High Court in *Google Inc & Ors v. CCI & Ors*[19] also clarifies the CCI's inherent powers to review or recall an order decided under Section 26(1) of the Competition Act (initiating an inquiry) and a party's right to seek relief from such order, on certain specified grounds, by applying for a recall or review before the CCI and, subsequently, through a writ petition before the High Court. Section 33 of the Competition Act empowers the CCI to temporarily restrain any party from committing or continuing any act in violation of the Competition Act until the inquiry is concluded or further orders are issued.[20] The CCI also has the power to impose a lesser penalty, in enforcement proceedings, where 'full, true and vital disclosures' are made by the person cooperating with the cartel investigation.[21] Section 46 of the Competition Act read with the CCI (Lesser Penalty) Regulations[22] prescribes the applicable procedure.

An application for compensation can be made before COMPAT under Section 53N of the Competition Act. Furthermore, application can be made to COMPAT under

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21 of 2010 & 55 of 2012], decided on 12 May 2015.

13 *Delhi Development Authority & Ors v. CCI & Anr*, 2015IVAD(Delhi)555.

14 Section 53N, Competition Act, 2002.

15 Section 64, Competition Act, 2002.

16 Section 62, Competition Act, 2002.

17 Section 61, Competition Act, 2002.

18 Section 19(1), Competition Act, 2002.

19 *Google Inc. & Ors. v. CCI & Ors.*, LPA No. 733/2014, Delhi High Court, Order dated 27 April, 2015.

20 Section 33, Competition Act, 2002.

21 Section 46, Competition Act, 2002.

22 Competition Commission of India (Lesser Penalty) Regulations, 2009.

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 COMPAT.

As present, the COMPAT has pending two compensation applications[23] filed by parties under Section 53N of the Competition Act. However, the COMPAT has yet to render a final view on those applications.

The limitation period for an appeal before the COMPAT is prescribed by the Competition Act. Section 53B provides that any person aggrieved by the CCI order can file an appeal before the COMPAT 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 the COMPAT within 60 days of the communication of the order's issuance.[24] 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.[25] 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.[26]

III EXTRATERRITORIALITY

Article 245(2) of the Constitution 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 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. The issue of the extraterritorial jurisdiction of the CCI is a subject of dispute in the inquiries initiated against Google Inc[27] by the CCI.

23 *MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd*, Compensation Application No. 01/2014(based upon the judgment dated 5 August 2014 in Appeal No. 15/2011); *Amit Jain v. DLF Ltd*, Compensation Application No. 01/2015 in Appeal No. 20/2011.

24 Section 53T, Competition Act, 2002.

25 See *Prabhakar v. Joint Director Sericulture Department and Ors.*, 2015(10)SCALE114, paragraph 36.

26 *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, M.P. Mehrotra, Indian Inhabitant and Union of India (UOI) through Secretary, Ministry of Company Affairs* [2011]100CLA190(Bom).

27 Case Nos. 07 & 30/2012, Case No. 06/2014 and Case No. 46/2014.

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.[28] The identity of the informant can also be kept anonymous during the investigation.[29]

However, the COMPAT has altered this legal position by suggesting that proceedings under the Competition Act can be treated on the same level with other disputes (civil or criminal) pending between the informant and the opposing parties and the same proceedings would be deemed to have an impact on the competition law proceedings, if any.[30] Nonetheless, a recent CCI order held that the informant would not have an impact on the merits of the decision as an informant is only a medium through which the CCI is made aware of anticompetitive conduct.[31] Thus, a Supreme Court decision is needed to clarify the position on the standing of an informant.

Any aggrieved party having suffered loss or damage in India (either because of anticompetitive activities or non-compliance with the CCI or COMPAT order) may file an application before the COMPAT or Supreme Court for compensation.[32] Further, an enterprise (including a person, government or an association) may file an application (in the prescribed manner) before the COMPAT 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.[33]

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28 *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, decided on 23 February 2015.

29 *XYZ v. REC Power Distribution Company Limited*, Case No. 33 of 2014, decided on 13 January 2015.

30 *Chemists & Druggists Association & Ors. v. CCI & Ors.*, Appeal Nos. 21/2014 to 28/2014 and IA Nos. 31/2014 to 46/2014, decided on 30 October 2015.

31 *Mr. P. K. Krishnan Proprietor, Vinayaka Pharma v. Mr. Paul Madavana, Divisional Sales Manager, M/s Alkem Laboratories Limited. & Others*, Case No. 28 of 2014, decided on 1 December 2015.

32 Section 53N, Competition Act, 2002.

33 Regulation 35, CCI (General) Regulations, 2009.

Although the CCI has the power to regulate its own procedures, it must be guided by the principles of natural justice.[34] Section 36(2) of the Competition Act empowers the CCI as well as the DG[35] to exercise the same powers as are vested in the Civil Court under CPC 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). 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,[36] inspection of documents,[37] taking of evidence,[38] issue of summons[39] and commissions for the examination of witnesses or documents.[40] 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.[41]

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.[42] It may also engage an expert to assist it in the discharge of its functions.[43] The CCI has also framed regulations to govern the procedure for its engagement.[44]

34 Section 36(1), Competition Act, 2002.

35 Section 41(2), Competition Act, 2002.

36 Regulation 35, CCI (General) Regulations, 2009.

37 Regulation 37 and 50, CCI (General) Regulations, 2009.

38 Regulation 41, CCI (General) Regulations, 2009.

39 Regulation 44, CCI (General) Regulations, 2009.

40 Regulation 45, CCI (General) Regulations, 2009.

41 See *Automotive Tyre Manufacturers Association of India v. CCI & Ors*, W.P.(C) No. 10862/2015, Delhi High Court, 26 November 2015; *Motherson Sumi Systems Limited v. CCI & Anr.* W.P.(C) No. 9680/2015 & CM No. 23143/2015 (for stay), Delhi High Court, 12 October 2015; See *M/s. MRF Limited v. Ministry of Corporate Affairs*, W.P. No. 35255 of 2015, Madras High Court, 30 October 2015.

42 Section 36(3), Competition Act, 2002.

43 Section 17(3), Competition Act, 2002 and Regulation 52, CCI (General) Regulations, 2009.

44 Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009, No. R-4007/6/REG-EXPORT/NOTI/04-CCI, dated 15 May 2009.

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. 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 the COMPAT, 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 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.[45]

Penalties can also be imposed if the orders[46] or directions issued by DG and the CCI[47] are not complied with. Any person or enterprise may file an application before the COMPAT for recovery of damages.[48] An application for claiming damages can be filed before COMPAT under Sections 53N (in an appeal arising from findings of the CCI or COMPAT), 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. Although the Competition Act is silent about the test that is to be applied in reviewing such applications, the CCI indicates that general civil law principles of irreparable or irretrievable harm are used.

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, the COMPAT 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.

45 Section 46, Competition Act, 2002.

46 Section 42, Competition Act, 2002.

47 Section 43, Competition Act, 2002.

48 Section 42A, Competition Act, 2002.

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 COMPAT is empowered to determine (which, in the case of COMPAT, 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. 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 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 Madras High Court decision held that it is possible to allow compromises and settlements to be reached between the parties provided it 'would not lead to the continuance of anticompetitive practices, would not allow abuse of dominant position to continue or would not be prejudicial to the interest of consumers or freedom of trade'.[49] The High Court further held that a memorandum of compromise or settlement could be filed before the CCI so that it can adjudicate the acceptance of the same with or without modifications.[50] The High Court held that the CCI's powers under Section 27(g) of the Competition Act allows the CCI to accept such settlements.

49 *The Tamil Nadu Film Exhibitors Association v. CCI & Ors.*, AIR 2015 Mad 106, paragraph 37.

50 Ibid, paragraph 43.

XIII ARBITRATION

The Competition Act in India does not empower the CCI or the COMPAT 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 & Ors* has held that existence of an arbitration agreement is not relevant for the purposes of competition law proceedings under the Competition Act. However, 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.

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.[51]

XV FUTURE DEVELOPMENTS AND OUTLOOK

After the current competition law legislation came into operation, the government of India 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 the Parliament.[52]

Nonetheless, the competition law regime in India is undergoing tremendous change and the CCI is actively working with the government of India as well as governments abroad to achieve its goal of furthering economic development by preventing anticompetitive practices and promoting fair competition. The CCI has issued guidelines on assisting government agencies in identifying and assessing the likely competitive impact of their policies.[53] The guidelines are effective from 1 January 2016. The CCI has also entered into MoUs with the antitrust authorities of various countries that could aid in the development of the competition law jurisprudence in India.[54]

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51 See *In Re: Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Others.*, Case No. 03 of 2011, decided on 27 July 2015 (in continuation of earlier order dated 25 August 2014); *Shri Jyoti Swaroop Arora v. M/s Tulip Infratech Ltd. & Ors.*, Case No. 59 of 2011, decided on 3 February 2015.

52 The Competition (Amendment) Bill, 2012, available at: www.prsindia.org/billtrack/the-competition-amendment-bill-2012-2571/.

53 The Competition Commission of India (Competition Assessment of Legislations and Bills) Guidelines, 2015 (Framed under Section 49(1) and (3) of the Competition Act, 2002).

54 See 'Memorandum of Understanding on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, and the Ministry Of Corporate Affairs (Government of India) and The Competition Commission Of India', available at: www.ftc.gov/system/files/1209indiamou.pdf; See 'Competition Commission of

With an increase in online spending by consumers, there has also been an increase in the information filed before the CCI against a number of e-commerce companies. While some cases have been closed,[55] investigation in some of these cases is yet to be concluded.[56] Pharmaceutical companies might also come under the CCI's radar given the regulator's active interest in them.[57]

Antitrust jurisprudence in India continues to develop but there are regulatory issues that need to be addressed. The issue of the CCI's jurisdiction in dealing with matters such as those involving intellectual property have also been the subject of debate of late.[58] Another area of concern being dealt with by the superior courts of record is that of the extent of the powers of the DG to conduct an investigation.[59] Although the Delhi High Court has held[60] that the CCI should decide on the preliminary jurisdictional question and confine its hearing to that subject matter before proceeding with the matter on merits, a consistent, uniform application of this principle has yet to be judicially endorsed.

Lastly, with the CCI adopting a proactive approach in imposing penalties on companies violating the provisions of the Competition Act, there is a need to frame guidelines on the imposition of penalties in the interests of transparency and consistency. Though these guidelines were on the anvil when the Competition (Amendment) Bill, 2012 was being debated, the CCI has recently conveyed its reluctance to adopt such guidelines.

While there are certain changes needed, the future of competition law regulation in India seems positive, with the CCI adopting a proactive, indiscriminate stance towards promoting competition and the COMPAT and the High Courts working to ensure that the CCI and the DG pursue their ends in accordance with their powers and duties under the Competition Act.

India and DG, Competition of the European Commission sign MOU on Cooperation in the Field of Competition Laws', available at: www.cci.gov.in/sites/default/files/press_release/pressrelease3.pdf; See 'Memorandum of Understanding Between the Commissioner of Competition, Competition Bureau Canada and the Competition Commission of India on Cooperation in the Application of Competition Laws', available at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03852.html.

55 *Mr. Mohit Manglani v. M/s Flipkart India Private Limited & Ors.*, Case No. 80/2014, 23 April 2015; *Mr. Ashish Ahuja v. Snapdeal.com through Mr. Kunal Bahl, CEO & Ors.*, Case No. 17/2014, 19 May 2014.

56 *M/s Jasper Infotech Private Limited (Snapdeal) v. M/s Kaff Appliances (India) Pvt. Ltd.*, Case No. 61/2014, 29 December 2014; *M/s Fast Track Call Cab Private Limited v. M/s ANI Technologies Pvt. Ltd.*, Case No. 06/2015, 24 April 2015.

57 A Brief Report on Pharmaceutical Industry in India, July 2015, available at: www.cci.in/pdfs/surveys-reports/Pharmaceutical-Industry-in-India.pdf.

58 *Telefonaktiebolaget Lm Ericsson (Publ) v. Competition Commission of India*, [WP 464/2014, WP 1006/2014, WP 5604/2015, WP 8379/2015], High Court of Delhi.

59 See *CCI v. JCB India Ltd.*, 2014(146)DRJ531; *CCI v. Grasim Industries Ltd* [LPA137/2014], High Court of Delhi.

60 *Delhi Development Authority & Ors v. CCI & Anr*, 2015IVAD(Delhi)555.

Chapter 15

ISRAEL

Eytan Epstein, Tamar Dolev-Green and Eti Portook[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The past few years have been characterised by intensive legislative activity in the antitrust law arena. The most recent in the context of private enforcement of the Restrictive Trade Practices Law 5748-1988 (the Antitrust Law) is a legislative memorandum published in February 2013 by the Israeli Antitrust Authority (IAA), in which it proposed several amendments to the Law. *Inter alia*, the IAA suggested adoption of the American triple damages model in private enforcement of antitrust, except for cases where the defendant was granted immunity from criminal prosecution under the IAA's leniency programme.

In April 2014, the IAA published a new public statement regarding the prohibition on charging excessive prices by a monopolist.[2] The public statement elaborates on the legal and economic tests for estimating whether prices charged by a monopolist are excessive under Section 29A(1) of the Antitrust Law, which prohibits a monopolist from abusing its dominant position by charging 'unfair prices'. Furthermore, the statement details the considerations that will be taken into account by the IAA when deciding to act against a monopolist that charges excessive prices. The statement provides a safe harbour for prices that exceed the production costs by up to 20 per cent. However,

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2 Public Statement 1/14 The Prohibition on charging excessive prices by a monopolist, 2014, publication 500603, available in Hebrew on the IAA's website.

it provides no guidance as to the circumstances in which the price will be considered excessive. Interestingly, according to the statement, a monopolist that charges more than 20 per cent over its production costs might be considered to be in breach of the law.

After the issuance of the draft statement in October 2013 several class actions were filed against monopolistic companies, alleging excessive pricing allegation.[3]

The Supreme Court recently ruled on the standard under which the district courts should examine applications to approve actions as class actions. Specifically, in *Phoenix Insurance Company v. Amusi*[4] (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.[5] 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 *Naor/Tnuva* class action,[6] for example, the Supreme Court upheld the requirement to include 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 shows that the submission thereof together with the claim was impossible. Time will tell how the *Phoenix* ruling will affect the approval rate of class action applications by the courts.

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 plaintiffs in these cases are typically private consumer organisations or Israeli individuals, while the respondents are foreign companies that allegedly were parties to global cartels that affected the Israeli market and consumers.

The trigger for these motions is largely based on proceedings carried out by various jurisdictions worldwide and enforcement measures taken by them with respect to the alleged global cartels. According to these motions the financial damage suffered by the Israeli consumers was caused by the broad impact of the alleged global cartels on the relevant products' markets in Israel.

3 Class Action 57534-02-14 *Zelicha v. Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd*, submitted in 27 February, 2014; Class action 35507-06-14 *Nizri v. Nobel Energy Mediterranean Ltd. et al*, submitted in 17 June 2014.

4 PCA 2128/09 *Phoenix Insurance Company v. Amusi*, 5 July 2012, published in Nevo.

5 Section 8(a)(1) of the Class Action Law 5366-2006 (the Class Action Law).

6 PCA 4778/12 *Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd v. Advocate Ophir Naor*, 19 July 2010, Published in Nevo.

In November 2013, a motion to certify a class action with respect to an alleged global cartel in the market of LCD panels for flat screens was filed against five foreign companies (the *LCD* cartel class action).[7] The motion is founded on proceedings carried out 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).[8] 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.[9] The factual basis of this motion relies on both criminal and civil proceedings that currently take place in the United States in connection with the alleged cartel.

These cases raise the matter of Israeli courts' jurisdiction over foreign respondents, particularly where all the defendants are foreign. This matter is discussed in Section III, *infra*.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private antitrust enforcement is founded in Section 50 of the Antitrust Law, under which any act (or omission) that contravenes the provisions of the Law, including instructions or conditions imposed by Director General, automatically constitutes a tort actionable in terms of the Torts Ordinance. For example, Section 4 of the Antitrust 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 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 Antitrust 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

7 Central District Court, Class action 53990-11-13 *Hatzlacha consumer movement for the promotion of equitable economic society (RA) v. AU Optronic Corporation and others*, 27 November 2013, published in Nevo.

8 Central District Court, Class action 10812-11-14 *David Merom v. LG ELECTRONIC INC. et al*, 5 November 2014, published in Nevo.

9 Central District Court, Class action 54288-05-15 *Shlomi Talmor v. Samsung SDI Co. ltd. et al*, 28 May 2015, published in Nevo.

as a result of a tort committed against him or her. Thus, in *Tower Air*,[10] for example, the applicants were able to bring their claim for pecuniary damages due to the financial damages suffered by them as a result of the respondents' anticompetitive behaviour in contravention of the Antitrust Law.

In 2006, the Class Action Law was signed into law. This legislation extracted the provisions regulating class actions from, *inter alia*, the Antitrust 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 the 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 in order to finance class actions that are of social or political significance.

Sometimes, claims alleging anticompetitive conduct are brought both under the Antitrust Law and the Unjust Enrichment Law. In *Gazgal*, the District Court of Tel Aviv ruled that although the Israeli laws do not recognise the general tort of 'unfair competition', the applicant may still get a remedy pursuant to the Unjust Enrichment Law, if certain conditions are met.[11] This ruling is unusual since the Israeli laws (unlike the US laws) do not contain a general prohibition of unfair competition and the claim was not based on the Antitrust Law. In a decision recently 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 the pharmaceutical company's monopoly and delay the entry of 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.[12]

During 2013 and 2014, two new 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 Sector, 5774-2014 (the Food Law) was enacted. The objective of this law is to increase competition in the food sector, and consequently to bring to a reduction of prices to consumers. *Inter alia*, the Food Law prohibits a supplier from dictating, recommending, or interfering in any way in decisions made by a retailer of food and consumption products, regarding the price it charges to consumers for a product of another supplier,

10 Haifa District Court, Civil Cases 1118, 1117, 1114/99 *Tower Air et al v. Aviation Services Ltd et al*, 6 May 2007, published in Nevo.

11 CA (Tel Aviv) 1462/08 *Gazgal Hashron (1992) Ltd. v. Pazgas (1993) Ltd.*, 3 August 2010, published in Nevo.

12 Central District Court, Civil Case 33666-07-11 *Unipharm v. Sanofi*, 8 October 2015, published in Nevo.

or regarding the conditions under which it sells a product supplied by another supplier. Specific prohibitions apply to 'big retailers' and to 'big suppliers', based on, among other factors, their sales volumes in the preceding year. In general, a 'big' supplier is prohibited from interfering in shelves stewardship of a big retailer, from setting prices below cost to the big retailer, from recommending the resale prices of its products and, 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 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 a big retailer to publish on the internet full and updated prices of any product sold in any of its stores.

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. 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. *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.

i Prescription

Where a civil claim for damages is brought under the Antitrust Law, the Prescription Act, 5718-1958 applies. Sections 5(1) and 6 of the Act direct that a claim (not in respect of immoveable 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, 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; 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.[13] Specifically, however, where the claim is a claim for damages, including pecuniary damages, caused by a tortious act or omission, then

13 Section 89(1) of the Torts Ordinance.

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 years.[14] Since damage is one of the elements of a cause of action brought under the Antitrust 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.[15]

In *Straus Group et al v. Carmit Candy Industries Ltd*,[16] 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.[17] 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.[18]

III EXTRATERRITORIALITY

The Antitrust Law is silent on its extraterritorial reach. In 1999, in accordance with the statutory authority granted under Section 43(a)(1) of the Antitrust Law to declare that an arrangement is a restrictive arrangement, 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 the Israeli airport. James Richardson held over 30 per cent of the Israeli market in selective fragrances and entered into restrictive arrangements with

14 Section 89(2) of the Torts Ordinance.

15 CA (District – Centre) 27911-09-11 *Marom Golan Kibbutz v. Yoram Fradkin*, 4 June 2013, published in Nevo.

16 CAP 1153/11 *Strauss Group Ltd. v. Carmit Candy Industries Ltd*, 27 February 2011, published in Nevo.

17 Section 26(a) of the Class Action Law.

18 Section 26(b) of the Class Action Law.

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 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 Antitrust Law. The Director General found support for this position in the wording of the Antitrust 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 Antitrust Law. Thus, where an arrangement is concluded abroad but may eliminate or reduce business competition in Israel, this is sufficient to establish Israeli Antitrust Law jurisdiction. The Antitrust Tribunal addressed this issue for the first time in 2011, when it adopted the Director General's position.[19]

The Director General rendered another interesting decision in September 2013,[20] which declared illegal under Section 43(a)(1) of the Antitrust 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.[21] The Director General concluded that:

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19 Restrictive Arrangement 513-04 *ACUM Ltd – the Society of Israeli Music Composers, Authors and Publishers v. the Director General et al*, 2011, paragraph 26.

20 The Director General's declaration under Section 43(a)(1) regarding a restrictive arrangement between GIS manufacturers, 16 September 2013, published in the IAA's website (No. 500473).

21 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

> *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.*

Private civil proceedings against foreign entities are subject to the rules of service outside the state of Israel as provided in the Civil Procedure Regulations, 5744-1984 (CPR). 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.[22]

The court may grant a motion for service outside of the jurisdiction if the claim falls under one of the categories listed in Regulation 500 of the CPR. Regulation 500 stipulates a list of 10 situations in which service outside the jurisdiction will be permitted.[23] The common denominator of the factors detailed in the Regulation is the existence of a link between the dispute and Israel. For instance, recognised are matters in which relief is sought against a party domiciled in Israel or that concern real estate located in Israel, matters that concern a breach of a contract entered into in Israel or breach of a contract that occured in Israel, irrespective of where the contract has been made.

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 CPR, which requires that the claim be founded on an act or omission, within the state of Israel.

According to the 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 the Israeli court jurisdiction over the foreign defendant.[24] However, two recent rulings of

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determined that considering: (1) the agreement applied to many countries (not just Israel); and (2) 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.

22 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.

23 Fulfilment of one of the grounds for the service out of the jurisdiction under Regulation 500 will allow the court to properly exercised jurisdiction over foreign entities, subject to compliance with the *forum non conveniens* doctrine.

24 CA 565/77 *Mizrahi v. Nobel's Explosives Co. Ltd.*, 16 March 1978, published in Nevo.

the Israeli district courts (given *ex parte*) in respect of service outside of the jurisdiction to foreign corporations which allegedly engaged in illegal global cartels, seem to apply a different reasoning.

In September 2014, 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 – falls within the meaning of an 'act within the State', as stated in Regulation 500(7).[25]

Similarly, in January 2015, the Central District Court reversed on appeal, a prior ruling and approved, *ex parte*, a motion for service outside of Israel in the class action submitted against the alleged foreign respondents in the *CRT* cartel class action.[26] 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).[27]

Note, however, that since both decisions were issued *ex parte*, the respondents still retain the right to submit motions to revoke leaves to serve outside the jurisdiction. Therefore, it remains to be seen whether Israeli case law will apply the nexus test of Regulation 500(7) to alleged global cartels formed outside of Israel solely by foreign entities with no Israeli subsidiaries or 'agents'.

IV STANDING

Section 3 of the Torts Ordinance provides that any person who is injured or has suffered damages 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*,[28] 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

25 Central District Court, Class action 53990-11-13 *Hatzlacha consumer movement for the promotion of equitable economic society (RA) v. AU Optronic Corporation and others*, 5 September 2014, published in Nevo.

26 The court of first instance determined that the occurrence of damage in Israel is not sufficient for the application of Regulation 500(7). The fact that this case involves a global cartel and that the Israeli consumers have a cause of action, cannot establish, by itself, grounds for approval of service outside the jurisdiction under Regulation 500(7). Taking into account, *inter alia*, the fact that the alleged damage is indirect, and that the relevant tubes were installed in televisions that are not manufactured in Israel, the court denied service outside the jurisdiction. See: Central District Court, RA 15317-12-14 *Merom and others v. LG ELECTRONIC INC and others*, 24 November 2014, published in Nevo.

27 Central District Court, RA 15317-12-14 *Merom and others v. LG ELECTRONIC INC and others*, 5 January 2015, published in Nevo.

28 Supreme Court, Civil Appeal 6222/97 *Tivol Ltd v. Chef of the Sea Ltd*, 29 June 1998, published in Nevo.

laws, and many of the first private enforcement claims of the Antitrust 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.[29]

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 in order 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 person[30]). Where one of the bases for the class action is damages, then it is sufficient for individuals to show that *prima facie* they suffered damages. Similarly, a claim that damages were 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, in 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.[31]

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29 Yizchak Yagur, *The Israeli Antitrust Law*, 3rd edition, 2001.

30 Recently, 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 Promotion of a Fair Society and Economy v. Cohen et al.*, 18 February 2013, published in Nevo. See also: Supreme Court, PCA 6897/14 *Kol Barama Radio v. Kolech- Religious women Forum*, 9 December 2015, published in Nevo.

31 Central District Court, Civil Case 13427-02-10 *Auto Line Ltd v. Universal Motors Israel 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

V THE PROCESS OF DISCOVERY

The Civil Procedure Regulations, 5744-1984 (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).[32] 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 the transcripts of recordings, video recordings, and information including lists and records contained in magnetic or electronic form).[33] 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.[34]

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.[35] 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.[36] 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, though 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

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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 Israel Ltd*, 26 December 2013, published in Nevo.

32 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.

33 Supreme Court, Permission for Civil Appeal 4249/98 *Swissa v. Hachsharat Hayishuv Insurance Company Ltd*, 19 December 1999, published in Nevo.

34 Tel Aviv District Court, Civil Case 2487/04 *STA Industries and Technologies Ltd v. Pennsylvania Investments Ltd et al*, 9 December 2007, published in Nevo; Nazareth District Court, Civil Case 1140/98 *Tzadik Chazan v. Mitzpeh Hayamim Ltd*, 5 May 1998, published in Nevo.

35 CP Regulation 112.

36 Haifa district court, Civil Case 11147-10-13 *D.B.S. Satellite Services (1998) Ltd. V. Hamuda et al*, 27 December 2014, published in Nevo.

in the affidavit of that litigant,[37] or to documents that have not been mentioned.[38] 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.[39] The onus of proof is on the party requesting the inspection.[40]

A litigant may also obtain information through a questionnaire,[41] 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[42] 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.[43]

Third-party testimony is regulated by the CP Regulations and the Courts Law (combined version) 5744-1984. CP Regulation 178(a) stipulates that litigants may summon third parties to provide testimony 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.[44] 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.[45] 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,

37 CP Regulation 114.

38 CP Regulation 117.

39 CP Regulation 120(b).

40 Tel Aviv District Court, Civil Case 3006/00 *Danoosh Dani v. Chrysler Corporation*, 24 October 2004, published in Nevo.

41 CP Regulations 109 to 111.

42 CP Regulation 122.

43 CP Regulation 114.

44 Uri Goren, *Issues in the Law of Civil Procedure*, 9th edition, 2007.

45 CP Regulation 167.

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.[46] 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 [New Version], 5731-1971 (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.[47] 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.[48]

In practice, as the popularity of civil enforcement of the Antitrust Law increases in Israel, the use of experts to determine damages will also increase. In *Tower Air*,[49] for example, involving a civil claim for damages due to financial injury caused by anticompetitive behaviour, both parties presented expert evidence to the court to substantiate their damages calculations and assessments of the competitive harm that was suffered. In that case, however, while the court did rely on the expert evidence presented to it to determine several aspects of the anticompetitive conduct, such as price discrimination, the court chose to reject both parties' conclusions regarding the amount of pecuniary damage caused and instead estimated the amount of damages itself based on all the information that had been presented to it.

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.[50] Moreover, courts may even require applicants to base their claim on an expert opinion prepared especially

46 Supreme Court, Civil Appeal 3005/02 *SmithKline Beecham PLC v. Unipharm Ltd*, 30 June 2002, published in Nevo.

47 CP Regulation 129.

48 CP Regulation 130.

49 *Tower Air*, *supra*, footnote 7.

50 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 Ltd, Cellcom Israel Ltd, Pelephone Tikshoret Ltd*, 19 January 2011, published in Nevo.

for the purpose of the specific class action. In *Johanan v. Partner Tikshoret Ltd*,[51] 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 opinion but relied on reports and experts' opinions that had originally been prepared by and for the Israel Ministry of Communication (the 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/Naor* class action case.[52]

In *Tnuva-Strauss*[53] the applicant argued that Tnuva and Strauss, both declared monopolies since 1998, were abusing their monopolistic positions by charging unfair prices for dairy products and by offering different terms and discounts for similar transactions. Additionally, the applicant argued that, according to his examination, the prices of some of the defendants' products were almost identical in the largest food chains in Israel, hence, Tnuva and Strauss must have entered into a forbidden restrictive arrangement to coordinate prices.

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, *supra*.

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.

51 Civil Case 1817-08-07, ibid.

52 PCA 4778/12 *Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd v. Advocate Ophir Naor*, 19 July 2010, published in Nevo.

53 Central District Court, Class Action 3947-09-11 *Amir Jossef Brot v. Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel Ltd*, 11 March 2012, published in Nevo.

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 damages. 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*[54] 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 please refer to Section XII, *infra*). In this context, the decision by the Supreme Court in *Phoenix Insurance Company v. Amusi*[55] is relevant. In that case the Supreme Court discussed the term 'reasonable possibility that such questions will be answered in favour of the group' (from Section 8(a)). The Supreme Court 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, for that purpose, the courts should refrain from bringing the main hearing of the case into the preliminary approval stage.

As discussed below, the amount of damages awarded need not to 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.

The evidentiary significance of an expert's opinion in class action cases is discussed in Section VI, *supra*.

In May 2014, the Tel Aviv District Court partly approved an application for a class action against Bezeq the Israel Telecommunication Corp (Bezeq) for collecting payments after ceasing to provide services to its subscribers.[56]

The applicants argued, *inter alia*, that by doing so, Bezeq had abused its dominant position. The Court denied the applicant's argument, stating that since Bezeq acted according to the law (the telecommunications laws) it cannot 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.[57] The applicant alleged that Israel Railways had abused its monopolistic position by ceasing to provide

54 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.

55 PCA 2128/09 *Phoenix Insurance Company v. Amusi*, 5 July 2012, published in Nevo.

56 Tel Aviv District Court, 2519-06 *Eyal Goldenberg v. Bezeq The Israel Telecommunication Corp. Ltd.*, 15 May 2014, published in Nevo.

57 Class Action 49580-05-11 *Elgezi v. Israel Railways Ltd*, 12 January 2014, published in Nevo.

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 the *Bezeq* case,[58] 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 the *Bezeq* case, 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) have gained from the strike.

VIII CALCULATING DAMAGES

A private litigant injured monetarily by contraventions of the Antitrust 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 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 the 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 damages he or she has suffered. The court may 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.[59] In *Dan Reichart v. the Heirs of Moshe Shemesh*,[60] 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 damages 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. Of course, the advantage of the class action mechanism is usually that each member of the group is not required to prove his or her personal damages, which in light of the usually relatively small amounts of individual damages

58 Antitrust case 801/08 *Bezeq the Israeli company for communication v. the general director of the IAA*.

59 Labor Dispute Class Action 9403-08 *Meir v. Reshef Securities (1993) Ltd*, 2 August 2015, published in Nevo.

60 Supreme Court, Civil Appeal, 345/03 *Dan Reichart v. The Heirs of Moshe Shemesh*, 7 June 2007, published in Nevo.

suffered, would be inefficient to the point of being prohibitive.[61] However, as indicated above, the awarding of global damages and its division among the members of the class may have class action members only receiving a token amount as compensation, thus not truly being compensated for the damages suffered by them.

The Supreme Court in *Dan Reichart* 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.[62] 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.[63] Nevertheless, this is not common practice.

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*,[64] the Supreme Court noted that

61 Ibid.

62 Uri Goren, *Issues in the Law of Civil Procedure*, 9th edition, 2007.

63 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. Kolnoa Hadash Ltd* and subsequent procedures). 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 in order to cover their expenses in the class action proceedings.

64 Supreme Court, Permission for Civil Appeal 2616/03 *Isracard Ltd. v. Howard Rice*, 14 March 2005, published in Nevo.

even under the assumption that the plaintiff was able to prove that the fee was excessive or unfair, it will be difficult to approve the 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[65] 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.

X FOLLOW-ON LITIGATION

The Antitrust Law grants the Director General various enforcement measures, either criminal or administrative:

a search and arrest;
b submission of an indictment;
c issuance of an administrative 'determination' according to Section 43(a) of the Law;
d a consent decree;
e administrative financial sanctions;
f imposition of instructions on monopolies and concentration groups; and
g application of the Antitrust Tribunal for various orders.

While a consent decree and financial sanctions are measures that could be taken in lieu of criminal proceedings, the other administrative measures may be taken alongside criminal proceedings (in practice, however, when the IAA elects to issue a determination it abandons the criminal venue).

Private enforcement of the Antitrust Law may be carried out alongside the public enforcement, but special evidentiary significance is attributed in law only to the following:

a 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;[66] and
b a determination of the Director General of the IAA made in terms of the Antitrust Law shall constitute *prima facie* evidence in any legal proceedings.[67]

Inter alia, the Director General may determine that an arrangement or agreement constitutes a restrictive arrangement, in contravention of Section 4 of the Antitrust Law

65 Class Action 10538-02-13 *Hatzlacha The Consumers' Movement for the Promotion of a Fair Society and Economy v. Elal Israeli Airways*, 12 November 2013, published in Nevo.

66 Section 42A of the Evidence Act.

67 Section 43(e) of the Antitrust Law.

or that a monopolist has abused its market position in contravention of the provisions of Section 29A of the Antitrust 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.[68]

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, *supra*), 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.[69]

68 See *supra*, footnote 41; 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, therefore should not be allowed. Interestingly, the Court stated that in the future it may consider to sanction applicants who will file ungrounded class action and later ask for its withdrawal).

69 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, 5721-1961. 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.[70] Recently, 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.[71]

Section 23 of the Law of Commercial Wrongs, 5759-1999 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 Law, 5741-1981 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, 5758-1998. Section 9 of the Freedom of Information Law, however, sets out the circumstances in which the government authority may not disclose the information provided to it, including where: the information constitutes commercial or professional secrets or has an economic value, which would be seriously damaged by such disclosure; 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;

70 Supreme Court, Civil Appeal 327/68 *Zinger v. Beinon*, 11 October 1968, published in Nevo.

71 Supreme Court, Permission for Criminal Appeal 10573/08 T*he State of Israel v. Heinz Israel Ltd*, 2 January 2011, published in Nevo.

the information was provided to the authority on condition of confidentiality; disclosure of the information would jeopardise future receipt of information; or 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.[72]

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 in settling the dispute between the parties.[73] 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.[74] The court must substantiate its decision regarding approval of a settlement agreement by addressing the following issues: the delineation of the group subject to the settlement agreement; the legal claims, the significant questions of fact or law common to the class and the remedies requested; the main aspects of the settlement agreement; the difference between the remedies requested in the claim than those agreed to in the settlement agreement; any opposition entered to the settlement agreement; the stage of the proceedings; the recommendations contained in the expert opinion; and the risks and likelihood of success in the class action in comparison to the settlement agreement.

72 Administrative Appeal, Haifa District Court 11259-08-15 *Hatzlacha Consumer Movement for the Promotion of Equitable Economic Society v. Haifa Municipality*, 10 November 2015, published in Nevo.

73 Class Action 42756-06-13 *Nasser v. Amusement City Company Ltd*, 15 December 2015, published in Nevo.

74 Section 19(b)(1) of the Class Action Law.

As part of the settlement agreement in the 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.[75] 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.[76]

Several antitrust class actions were settled with coupons arrangements. In February 2008, the class action *Morad et Goldberg Ltd v. Aloni Group Ltd*,[77] which concerned a cartel in the tile market, was settled. The court approved this settlement after a long dispute over the appropriate compensation, which eventually was in the form of coupons for future purchases from the cartel members.

In December 2010, the class action *Adv. Nachum Oren v. Kolnoa Hadash Ltd* and follow-on procedures,[78] which concerned the dictation of fixed retail prices by the importer of Crocs shoes, was settled pursuant to the Class Action Law. The court approved the settlement, with minor changes to the original settlement submitted by the parties. Notably, the court did not adopt Attorney General's position that the settlement was unreasonable, as it would not benefit the group represented in the class action. Also the parties requested that the court forgo the examination of the settlement agreement by an external expert (as required by law), *inter alia*, due to the parties' refraining from providing agreed recommendations as to the attorneys' fees. The court rejected this request, stating that refraining from recommending attorneys' fees does not indicate that the agreement is reasonable; therefore the appointment of an expert was required.

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.[79]

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75 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.

76 Section 19(g) of the Class Action Law.

77 Tel Aviv District Court, 2020/02, 2021/02 *Morad et Goldberg Ltd v. Aloni Group Ltd*, 6 February 2008, published in Nevo.

78 Jerusalem District Court, Class Action 9227-07 *Adv. Nachum Oren v. Kolnoa Hadash Ltd* and follow-on procedures, 20 December 2012, published in Nevo. In February 2011, an appeal was submitted to the Supreme Court by the appellants regarding the attorneys' fees granted by the district court in the case. In September 2011, however, the appeal was rejected by the Supreme Court under the respondents consent to pay up to 45,000 shekels to the appellants insofar to cover their expenses in the class action proceedings and under the appellants' onus to introduce receipts of those expenses.

79 CA (Beer-Sheva) 3249-04 S *Ofir Investments Ltd v. Central Bottling Company Ltd*, published in Nevo.

According to the application to approve the action as a class action, Coca-Cola Israel allegedly abused its dominant position in the carbonated cola beverages market by charging excessive, unfair prices to vending machine operators, thus discriminating against them and enabling Coca-Cola Israel's subsidiary Mashkar to monopolise the vending machines business.

In the settlement agreement Coca-Cola Israel undertook to give the vending machines 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.

The expert (examiner) appointed by the court determined that between 1998 and 2007, the vending machines operators paid an extra amount of 34 million shekels, reflecting overcharges of 8 to 30 per cent compared with the prices charged to Mashkar. The examiner therefore argued that the settlement agreement was unreasonable, *inter alia*, since it did not compensate: (1) for the overcharging during a whole decade; (2) the dozens of operators that had exited the market as a result of Coca-Cola Israel's behaviour; and (3) for the competitive advantage gained by the respondents as a result of the abusive price and discounts policy. Nevertheless, the court approved the settlement agreement, upholding Coca-Cola Israel's expert's opinion concerning the legitimacy of Coca-Cola Israel's pricing method and rejecting the opinion of the objective expert appointed by the court.

In September 2012, the District Court of Beer-Sheva rejected a settlement agreement between Dor Alon Energy in Israel (1988) Ltd (Dor Alon), one of the leading distributors of oil distillates in Israel, and an operator of a fuel station, that contained an exclusive purchasing clause for an unlimited period of time.[80] The parties had reached the settlement in the context of a lawsuit brought by Dor Alon against the operator, for alleged breach of contract by the latter.

Dor Alon argued that the fuel station operator breached his commitment to exclusively purchase fuels and oil from it for 98 years. The fuel station operator argued that the court should not enforce the agreement – or at least the exclusivity clause – since it amounted to an illegal restrictive arrangement. As the case reached its final stage, the parties submitted a settlement agreement for the court's approval, which contained an exclusive purchasing clause for an unlimited period of time.

While rejecting the settlement agreement, the court stated that the original exclusivity clause for 98 years was a restrictive arrangement and, therefore, it could not approve it. Furthermore, the court determined that an exclusivity clause between fuel companies and operators of fuel stations may harm competition in the retail market for fuel and foreclose the market to new fuel suppliers, to the detriment of consumers. In such circumstances, the court stated that the public's interest requires judicial review of

80 CA (Beer-Sheva) 3202/09 *Dor Alon Energy in Israel (1988) Ltd v. Dahan et al*, published in Nevo.

restrictive arrangements that are being concealed from the public by bilateral settlement agreements. The settlement agreement was eventually approved, subject to the reduction of the exclusivity term to three years.

In June 2014 the Antitrust 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. In the framework of the consent decree the banks undertook to pay to the State Treasury the sum of 70 million shekels. It was also agreed that if eventually the class actions brought against the 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 which implemented the provision of the consent decree after finding that it was a proper, fair and reasonable arrangement.[81]

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 agreement between the parties in respect of the arbitrator's identity, the court may appoint the arbitrator.[82] 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.[83]

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 case 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

81 Tel Aviv District Court, Class Action 1714/08 *Einav Kaplan Basharis v. Bank Leumi*, 31 May 2015, published in Nevo.

82 Section 8(a) of the Arbitration Law, 5728-1968.

83 Section 21 of the Arbitration Law.

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 the parties. Some academics suggest that antitrust matters may not be a proper subject for arbitration because anticompetitive injury may affect a broad range of persons who may not be the direct parties to the specific court or arbitration proceeding.[84] 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*.[85] 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 applicants subsequently applied to the Tel Aviv District Court, requesting an annulment of the arbitrator's ruling. The applicants argued that the contract, in which the respondent undertook not to compete with the applicants in the publishing of newspapers in Russian, was a restrictive arrangement and as such was illegal and unenforceable. Thus, the applicants 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,[86] according to which such an argument, when brought following many years of performance of the 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 hand, seek to rely on the alleged illegality of such provision, as an illegal restrictive arrangement, to annul the arbitration ruling. The court also noted

84 Yagur, *supra*, footnote 19.

85 Tel Aviv District Court Application 474/07, 316/07 *Novosty Neidly et al v. Ma'ariv Modi'in Publishing Ltd*, 15 March 2009, published in Nevo.

86 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.

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[87] stating that the arbitration award in effect enforced a memorandum of understanding (MOU) that was illegal according to the Antitrust Law. The court determined that the MOU was an agreement between two competitors in the cement industry and 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.[88] The arbitrator rejected a petition for declaratory relief finding 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 Antitrust Law (Section 3(8) 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*).

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 new ruling further strengthens the tendency to recognise the authority of arbitrators to rule on antitrust-related questions of substance.

87 Tel Aviv District Court, Originating Summons of Arbitration 1039-08 *Ardan – Cement Industries Ltd v. Dan Tmir*, published in Nevo.

88 Central District Court, Originating Motion Arbitration 34150-09-14 *Rubin v. Hazel*, 12 February 2015, published in Nevo.

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).[89] 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 contribute to or indemnify the respondent against the damages claimed.[90] 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 against the concentrated structure of the markets in Israel and against the skyrocketing cost of living. Consequently, several laws were enacted and some were amended, aiming at improving the competitiveness of markets, and expanding substantially the (already wide) powers of the IAA's Director General. Further legislation of this type is yet to come. Some of the new 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 new Food Law (see Section II, *supra*).

During 2013, three applications to approve actions as class actions have been submitted against alleged members of international cartels: the *International Air Freight Forwarding* cartel, the *LCD* cartel and the *GIS* cartel. To date, no decision has been made as to whether or not to approve any of these applications. Note that so far no approval has been given to the very few class action applications that related to international cartels and came to an end. Therefore, it will be interesting to follow these cases and see how they develop.

89 Section 84 of the Torts Ordinance.

90 CP Regulation 216.

Chapter 16

ITALY

Luciano Di Via and Pasquale Leone[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

During 2015, the domestic courts have ruled on matters of private enforcement in line with the previous consolidated case law. However, there are two important new circumstances to be considered relating to private enforcement remedies in antitrust law.

First, in its recent decision of 4 June 2015[2] the Supreme Court of Cassation (the Supreme Court), the civil court of last instance, in connection with the implementation of Directive 104/2014/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (by Law No. 114 of 9 July 2015, the Italian parliament has delegated to the government the task of transposing this Directive and to date there have been no further developments) underlined the importance of granting an extension of the powers already set forth in the Italian Civil Procedure Code (CPC) to ensure the effective enforcement of antitrust rules in civil trials. In particular, the Supreme Court contemplated greater discovery of documents and improvements to the tools aimed at collecting and evaluating data and information related to the conduct to be ascertained (e.g., request for information and court-appointed technical advice). The Supreme Court held that 'the court is called upon to ensure effective protection for private persons who bring legal proceedings in cases involving a clear infringement of Competition Law

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2 Supreme Court, 4 June 2015, No. 11564, *Comi v. Cargest*. In this case, the judge allowed the appeal brought by a group of wholesalers involved in the agro-food sector against a decision of the Court of Appeal of Rome which considered the relevant product and geographic market non-existent and consequently found no abuse of a dominant position by the defendant.

[…], having regard to the information asymmetry between the parties in obtaining evidence, and also adopting a purposeful approach to the interpretation of the rules of civil procedure with a view to properly implementing competition laws and regulations.'

In addition, on 28 July 2015, the Court of Milan, in the case *BT Italia v. Vodafone,*[3] focused its attention on the identification of the starting day of the limitation period, stating that the latter (as explained in greater detail in Section II, *infra*) can also start to run from the date of the communication of the statement of objections.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Damages actions for breach of competition law are based, under Italian law, on the general tort law provisions of Article 2043 of the Civil Code (CC) as well as on the CPC.

Article 2043 entitled 'Compensation for unlawful acts', in particular, reads: 'Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.'

To obtain compensation for damages, therefore, the plaintiff must give evidence before the court of (1) the misconduct of the defendant, (2) the existence and the amount of damages suffered, and (3) the causal link between such misconduct and the claimed damages.

A claim for damages can be brought regardless of whether a finding of infringement has been made by the competition authorities. If a finding has been made, the damages action is called a 'follow-on action'; otherwise, it is referred to as a 'stand-alone action'.

According to Legislative Decree No. 168 of 27 June 2003, claims for damages, opposition proceedings, and petitions for interim measures relating to violations of competition rules, must be filed before the Specialised Sections of the competent court or first instance having territorial jurisdiction. Any appeal must be raised before the specialised sections of the competent court of appeal. Court of appeal judgments may be challenged before the Supreme Court – the third instance court against these decisions – only on points of law or where it is alleged that a breach of the rules concerning jurisdiction has occurred.

According to Article 2947 CC, the limitation period for bringing an action for damages is five years 'from the date of verification of the event'. On this point, the Supreme Court reaffirmed that Article 2947 'must be interpreted in the sense that the statute of limitations starts to run not from when the defendant commits a tort or from when a third party harms someone else's rights, but rather from when the tort and the damage arising there from become outwardly apparent and thus can be perceived and recognised by others'.[4]

A party who asserts that the limitation period has expired must prove the moment at which the claimant obtained (or ought reasonably to have obtained) knowledge of the infringement and/or damage suffered. However, it might be presumed that, in practice,

3 Court of Milan, 28 July 2015, No. 9109, *BT Italia v. Vodafone*.

4 Supreme Court, 9 May 2000 No. 5913, *Calvi v. Frangipane*.

the defendant acquires (or could have acquired using ordinary diligence) knowledge once a finding of infringement has been issued by a competition authority. If the action is based on a breach of contract, the applicable limitation period is 10 years from the date of the breach.[5]

Recently, however, the Court of Milan, in the case *BT Italia v. Vodafone*,[6] underlining the principle according to which the limitation period 'starts to run from the day on which the damaged party, with ordinary diligence, had reasonable and adequate knowledge of the damage and its injustice', observed that when antitrust proceedings have been opened against more than one company and concluded with the acceptance of commitments for one of the parties and with a finding of infringement for the other parties, the starting day of the limitation period (in the civil judgment for damages) relating to the company whose commitments have been accepted, may also be the date of the communication of the statement of objections. The Court affirmed, in fact, that the statement of objections, together with the final finding of the breach – even though it was not adopted in respect of the defendant – 'offer at least indicia in favour of the claimant's argument and are therefore suitable […] for providing the necessary evidentiary sub-stratum'.

III EXTRATERRITORIALITY

According to Article 3.1 of Law No. 218 of 31 May 1995, a defendant can be sued in Italy if he or she is resident or domiciled in Italy or if he or she has a legal representative in Italy authorised to appear in court. However, this general rule does not prejudice any special regime set forth by international conventions or EU regulations, the most important of which is Regulation No. 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (as modified by EU Regulation No. 1215/2012).

According to the above-mentioned Regulation, the jurisdiction of the Italian courts on antitrust private enforcement applies despite the Italian citizenship of the defendant and his or her effective presence within Italian territory, if the effects of the antitrust violation, and therefore the harmful event, occurs in Italy. The full application of such a provision has also been confirmed by the Tribunal of Milan in the judgments of 4 June 2013, *Viaggiare v. Ryanair* and *Lastminute.com v. Ryanair*.

Referring to the effects of foreign judgments in Italy, according to Article 64 of Law No. 218, such judgments are automatically recognised if:

a the judge who issued the judgment has jurisdiction over the matter in accordance with the relevant Italian procedural rules;

b the original summons or claim has been served upon the defendant in compliance with the requirements of the state in which the process took place, and the fundamental right to a defence must not have been violated;

5 Article 2946 CC.

6 Court of Milan, case *BT Italia v. Vodafone*, cit.

c the parties have appeared in the action in accordance with the local procedural law, or a default must have been properly declared in accordance with such law;

d the foreign judgment is final and binding according to the law of the jurisdiction in which it was issued;

e the foreign judgment does not conflict with any final judgment issued by an Italian court;

f there are no proceedings pending before any Italian court in relation to the same subject matter and between the same parties that were instituted prior to the commencement of the foreign proceedings; and

g the foreign judgment does not conflict with a public interest protected by Italian law.

IV STANDING

Under Italian law, any natural or legal person may bring an action for damages proving the existence of damages – depending, on a causal basis, on the violation of an antitrust rule – and the extent of the damages suffered.

In particular, according to the established case law of the Supreme Court,[7] not only can competitors be entitled to bring an action for damages, but also the consumers, taking into account that the latter can be directly harmed by the worsened economic conditions created by the undertakings when fair and open competition is not established in the market.

Consumers can also bring actions before the civil judge through their association (if registered on the list of representative national consumers' associations established by the Ministry of Productive Activities).[8]

According to Article 139 of the Consumer Code, consumers associations are qualified to act to protect the collective interests of consumers and users by applying to a court for:

a a prohibition order against actions damaging to the interests of consumers and users;

b suitable measures to remedy or eliminate the damaging effects of any breaches; and

c orders to publish measures in one or more national or local daily newspapers if publicising the measures may help to correct or eliminate the effects of any breaches.

V THE PROCESS OF DISCOVERY

In compliance with the provisions of Article 2697 CC – according to which anyone wishing to assert a right before a court must prove the factual elements on which the right

7 Supreme Court, 2 February 2007, No. 2305, *Fondiara SAI v. Nigriello*, and Supreme Court, 18 August 2011, No. 17351, *Codacons v. Allianz*.

8 Article 137 of the Consumer Code.

is based – the claimant must prove the infringement or unlawful conduct, the amount of damage actually suffered, and that the damage suffered was caused by that infringement or unlawful conduct, while the burden of disproving the plaintiff's allegations stays on the defendant.

The task of presenting evidence of the damages suffered is made more difficult by the substantial lack of investigative powers of the Italian courts, which have very limited and rarely used investigative powers, and play an ancillary role with respect to evidence submitted by the parties. Pursuant to Article 115 CPC, the judge must decide relying on the evidence proffered by the parties and the facts that were not specifically contested by the standing party. In any case, the judge, without need for evidence, can use facts that are part of common knowledge as the foundation of the decision.

The general principles applicable to the standard of proof under Italian procedural law require that the parties give evidence of the alleged facts through specific means expressly provided and regulated by the law. Usually, in the course of civil proceedings, documentary proof is the most common type of evidence, but also witnesses, presumptions and declarations under oath are admitted.

The Italian rules for civil procedure do not provide any discovery mechanism. Each party may submit any documentary evidence in support of its allegations to the court. A party may also request that the court order the other party (including third parties and, therefore, also administrative authorities, such as the Italian Competition Authority) to submit one or more specific documents. A party applying for such disclosure will need to describe the documents requested in as much detail as possible and confirm that the documents requested are not in its possession or otherwise available to it.

Although the Italian system does not provide a sanction if the documents requested by the judge are not submitted, established case law holds that if the judge orders one party to submit to the court one or more specific documents and the party, without justification, does not comply, then the judge is allowed to infer the elements of proof from their behaviour.[9]

The need to introduce a discovery system in Italy has been strongly supported by the Supreme Court in the above-mentioned decision No. 11564/2015, 'to ensure effective protection for private persons who bring legal proceedings in cases involving a clear infringement of Competition Law […] having regard to the information asymmetry between the parties in obtaining evidence'.

VI USE OF EXPERTS

According to the CPC (see Article 61), the judge can appoint an expert to resolve technical issues. The contribution of experts in antitrust judgments is occuring more frequently, especially to provide technical support in the quantification of the damages.[10]

9 Supreme Court, 13 August 2004, No.15768 and Supreme Court, 10 December 2003, No. 18833.

10 For instance, Tribunal of Milan, Order of 11 March 2010, *K-Flex v. Armacell Italia* and Supreme Court, 13 February 2009 No. 3640, *Inaz Paghe v. Associazione Nazionale Consulenti del Lavoro*.

The reports of such experts, however, do not constitute legal proof but instead can be evaluated by the judge at his discretion, taking into account that the expert's viewpoint is allowed only to clarify facts already proven by the parties. The parties may ask the judge to appoint an expert, but the decision of the matter lies with the judge.

After the judge has appointed his expert, parties have the opportunity to nominate their own experts in order to produce their viewpoint, through comments and observations on the report rendered by the judge's expert (see Article 201 CPC). Parties may also use their experts to assist with the activities carried out by the judge's expert, such as attending the hearings and meetings when the judge's expert participates.

VII CLASS ACTIONS

The collective damages action, known as a 'class action', is an alternative, rather than a substitute, to the existing judicial remedies available to individual consumers. It was introduced in Italy by Article 140-bis of the Consumer Code.

The law provides that a class action can be triggered by a class member (individually, or through associations to which they grant power or committees in which they participate), to recover damages suffered as a consequence of an undertaking's anticompetitive conduct or unfair commercial practices. In particular, the law allows any consumer or user group to initiate a class action in respect of infringements or damage that are 'homogeneous' as between the group.

A class representative can bring a class action in order to obtain (1) a declaration of liability, (2) the specific assessment of the amounts due to him, and (3) the establishment of homogeneous criteria for the computation of such amounts. However, it is impossible to bring a class action in order to obtain a declaration of invalidity, nullity or ineffectiveness of the contract, or to receive entitlement to bring a possessory action. There are no provisions for punitive damages or economic sanctions.

Class actions are subject to a preliminary admissibility assessment by the competent civil court, and can be admitted when (1) it is not clearly groundless, (2) there is no conflict of interests, (3) the individual rights being enforced are homogeneous, (4) the plaintiff appears to be fit to represent the interests of the whole class, and (5) the complainant seems able to adequately pursue the class interest throughout the whole proceeding.

Once the court accepts the case any consumers or entities entitled to participate in the class action may elect to join the class action and in doing so consent expressly to their rights being determined as part of those proceedings, while consumers that do not join the class are not bound by the outcome of the action ('opt-in' model). To date, it remains possible to join the collective claim any time before the judge delivers the final decision.

Since the introduction of the regulation, class actions have only passed the filter of admissibility in a limited number of cases.[11] To our knowledge, in just one case, the Court upheld on the merits a class action and granted damages arising out of a ruined holiday.[12]

Note that the class action regulation is currently in the process of being reformed. In particular, the draft law, which is still being scrutinised by Parliament, recognises the importance of this procedure and intends to introduce a new and separate title in the CPC dedicated to the class action, which is currently regulated by the Consumer Code.

Additionally, the draft law would modify the current 'opt-in system' to allow the possibility of joining a class action even when the court has delivered its judgment, thereby allowing a wider use of such procedural tool.

VIII CALCULATING DAMAGES

Referring to the calculation of damages deriving from tort liability and, in particular, from antitrust violation, provisions of Articles 1223, 1226 and 1227 CC on contractual liability apply.

Article 1223 CC establishes that 'Compensation for damages [...] shall include the loss sustained by the creditor and the lost profits'.

Damages consist, in other words, of both 'actual damages' and 'lost profits' which are the direct consequence of the illicit conduct. In addition, the damage suffered as a consequence of 'loss of chance' and that to reputation may also be refunded. Experts are frequently appointed to help calculate the damages. Experts' conclusions are not binding for the court, however, should the judge decide to challenge the expert's findings, the judge is supposed to provide reasons for his decision.

The method more frequently used to quantify damages involves comparing the actual situation during the period when the infringement produced effects with the situation in the same market before the infringement produced effects or after they ceased (the before and after method).

In the *Bluvacanze* case, a stand-alone case concerning a concerted refusal to deal by two leading Italian tour operators against a discount travel agent, the judge quantified the loss of income suffered by Bluvacanze taking into account the company's income registered in March 2000 with reference to products originating from the defendants and comparing it with the average monthly income registered in the same year with reference to products coming from the defendants. The Court explained that the profit lost could

11 Among recent orders on admission, Court of Appeal of Turin, Order of 11 January 2012, *Callegari and Itri v. Gruppo Torinese Trasporti*; Tribunal of Rome, Order of 20 April 2012, *Codacons v. Policlinico Gemelli*; Tribunal of Rome, Order of 2 May 2013, *Casalanguida v. Comune di Petacciato*; and Tribunal of Genoa, Order of 13 June 2014, *Comitato tutela del risparmio – Banca Carige v. Banca Carige*.

12 See Tribunal of Naples, 18 February 2013, No. 2195, *M Maggi v. Wecan Tour*.

be quantified 'by forecasting the earnings that could have been made in the absence of the unlawful behaviour and by projecting the data noted in the past and that could have reasonably been noted in the subsequent period'.[13]

In *Inaz Paghe v. Associazione Nazionale Consulenti del Lavoro* – a case following the Authority decision which ascertained the existence of an illicit agreement consisting in the collective boycott of the Inaz's software packages by the members of the National Association of Employment Consultants – the Court compared the average number of contracts with INAZ terminated by the Association's members in the two years during the collective boycott's existence with the average number of contracts terminated in the years prior to the boycott. On that basis, the Court awarded INAZ €148,200 in damages. As to the loss of chance, the Court considered that it could not be sure that the annual 10 per cent growth of INAZ's business would have continued at a similar rate but for the boycott.[14]

However, as a matter of fact, it can be difficult and complex to determine the exact quantum of damages. Therefore, the court may also appoint a technical expert to assist it on economic issues, including the quantification of damages. Pursuant to Article 1226 CC, 'if damages cannot be proved in their exact amount, they are equitably liquidated by the court'. The Supreme Court confirmed the principle in *Fondiaria SAI SpA v. Nigriello*.[15]

Moreover, recently, the Supreme Court expressly recognised the discretion of the civil judge in determining the means for quantifying the damages on an equitable basis, stating that, 'the equitable assessment of damages may be reviewed by the Supreme Court for flaws in reasoning, only if the award is totally contrary to the reasons underlying the judgment, or macroscopically differs from practice and custom or is radically adversarial.'[16]

Punitive damages are not provided in Italian law; the concept of punishing the person responsible is reserved to criminal law. The sole function of civil compensation is to put the injured party in the same position in which he or she would have been absent the tort. As a consequence, in contrast to what happens in other jurisdictions (e.g., the United States) damages that exceed loss actually suffered by the victim cannot be awarded.

IX PASS-ON DEFENCES

Article 1227 CC establishes that 'if the creditor's negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it. Compensation is not due for damages that the creditor could have avoided by using ordinary diligence.'

13 Court of Appeal of Milan, judgment 30 April 2003, *Bluvacanze*.

14 Court of Appeal of Milan, 10 December 2004, *Inaz Paghe v. Associazione Nazionale Consulenti del Lavoro*.

15 Supreme Court, *Fondiara SAI v.Nigriello*, footnote 4, *supra*.

16 Supreme Court, 22 May 2013 No. 12551, *Lloyd Adriatico v. S.P.*

According to the general principle set forth above, Italian case law established that a claimant may sue the antitrust infringers only for damages actually suffered so long as it did not consciously and negligently contribute to causing them and, therefore, when it did not pass the loss deriving from the tort to the client or consumers.

In particular, in the case *Indaba v. Juventus*,[17] the Court of Appeal of Turin established that Juventus Football Club abused its dominant position in the market for the sale of tickets for the 1997 Champions League final match, but recognised that the plaintiff (a travel agency that entered into a contract with the antitrust infringer) had actually entered into the restrictive agreement with the intention of passing on the damage to its customers. For this reason, the Court found that the plaintiff was not entitled to any damages as it had consciously contributed to causing the harm.

Moreover, in the case *Unimare v. Geasar*,[18] the Court of Appeal of Cagliari stated that there was no breach of antitrust law and only incidentally noted that the claimant would not have been entitled to recover any damages since it had passed on to customers its additional costs. In particular, the plaintiff (Unimare, former provider of handling services at Olbia Airport in Sardinia) could claim no damages because it had passed on the tariff increase in full to its client.

X FOLLOW-ON LITIGATION

A claim for damages can be brought regardless of whether a finding of infringement has been made by the competition authorities. Obviously, if a previous decision ascertaining the existence of an antitrust violation has been issued, the activity to be carried out by the plaintiff in order to demonstrate the requirements set forth in Article 2043 CC is easier, taking into account that, according to the established Italian case law, the decisions of the Competition Authority represent a 'reinforced' means of evidence. For this reason, in most cases the claims brought before the civil judge are follow-on actions. Note, however, that when deciding a private competition enforcement case the courts are not bound to follow such decisions.

For instance, the Supreme Court case law refers to 'privileged evidence', however it does not always use the expression in an unequivocal manner. In one case[19] the Court asserted that the parties have the opportunity to offer evidence in support of the Italian Competition Authority's investigation, or against it. While in other judgments[20] the Court has held that the company found responsible for anti-competitive conduct by

17 Court of Appeal of Turin, 6 July 2000, *Indaba v. Juventus*.

18 Court of Appeal of Cagliari, 23 January 1999, *Unimare v. Geasar*.

19 Supreme Court judgment No. 3640 of 13 February 2009.

20 Supreme Court judgment No. 13486 of 20 June 2011, Supreme Court judgment No. 7039 of 9 May 2012.

the Competition Authority is not entitled 'in the civil proceedings to question the facts underlying the finding of anti-competitive conduct based on the same evidentiary material or the same arguments already rejected in those proceedings'.[21]

However, any doubt on the effects of the Competition Authority decision proving the existence of an antitrust violation will be resolved by the forthcoming implementation of the Directive 2014/104/EU. Article 9 of the Directive establishes that 'an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.'

Recently, as mentioned above (see Section II), the Court of Milan focused on the standard of proof when the proceedings have been opened against more than one company before the Italian Competition Authority and concluded – with reference to one of the parties – with the acceptance of the commitments submitted by the defendant, rather than with a finding of an infringement.

In particular, on the basis of the Supreme Administrative Court No. 2438/2011 judgment – which affirms that 'the decision with commitments does not entail any immunity from a civil law point of view but makes it more difficult for compensation claims to be brought' – the Court of Milan affirmed that the decision with commitments does not impact the indicia for proving the unlawfulness of the defendant's behaviour. The statement of objections (alleging the infringement also in respect of the defendant) and the final finding of the breach (even though it was not adopted in respect of the defendant), in fact, jointly 'offer at least indicia in favour of the claimant's argument and are therefore suitable […] for providing the necessary evidentiary sub-stratum'.[22]

XI PRIVILEGES

The privilege in the communication between attorney and client covers any information made available to the lawyer in connection with their task and is set forth by both the Code of Criminal Procedure and Law No. 247 of 31 December 2012, which sets out the general rules for the legal profession.

In Italy, in-house lawyers cannot claim legal privilege and consequently the principles set out at the EU level apply.[23] According to the judgment of TAR Lazio of 3 September 2012 No. 7467, *Pfizer v. Competition Authority*, legal privilege covers internal notes only insofar as they replicate the text or content of communications with external lawyers.

21 Supreme Court, 20 May 2014 No. 12186, *Fondiaria – SAI v. S.M.* and Supreme Court, 28 May 2014 No. 11904, *Fondiaria – SAI v. P.N.*

22 Court of Milan, case *BT Italia v. Vodafone*, cit.

23 Court of Justice of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Case C-550/07 P, ECR [2010] I-08301.

XII SETTLEMENT PROCEDURES

The CPC allows parties involved in litigation to freely settle a dispute in order to reduce the length of litigation and consequently the costs for the parties involved in the trial.

The judge may also seek to reach a settlement between the parties independently of a party's request, as provided for by Article 185 CPC. The minutes of the settlement agreed to and signed before the Court are immediately enforceable against the party obliged to perform any payment or discharge any obligation.

In addition to the settlement procedure, Legislative Decree No. 28 of 4 March 2010, implementing Directive 2008/52/EC, introduced mediation, which does not preclude access to the courts, but aims to reduce the number of cases brought before the courts.

Public or private organisations that provide can apply to become delegated bodies in order to deal with the mediation procedure. These bodies must be listed on a specific register governed by decrees from the Ministry of Justice.

XIII ARBITRATION

Pursuant to Articles 806 to 832 CPC, parties can resort to arbitration in matters regarding disposable rights (Article 806), including non-contractual matters and, therefore, including tort liability depending from antitrust violation (Article 808-bis). Under Italian case law, arbitration is clearly available in competition disputes, because the right to free competition is a 'disposable right' and, therefore, is capable of resolution by private agreement.[24]

The procedural aspects of the arbitration are regulated by Articles 809 to 826 CPC. In particular, pursuant to Article 818, arbitrators do not have the power to issue seizures or other interim measures, which must instead be sought from state courts.

According to Article 824-bis, the award, as soon as it is signed by the arbitrators, has the same effect as a court judgment: it enables a party to start enforcement proceedings as soon as a court has verified its formal validity and declared its enforceability (Article 825).

Any party may seek the judicial annulment of the award, on one of the grounds set out in Article 829, before the court of appeals located in the state in which the arbitration occured.

XIV INDEMNIFICATION AND CONTRIBUTION

According to Article 2055 CC, if the act causing damage can be attributed to more than one subject, all are jointly and severally liable for the damages. The subject who has compensated the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom. In case of doubt, the degree of fault attributable to each is presumed to be equal.

24 Court of Appeal of Milan, 15 July 2006, No. 1897 *Terra Armata v. Tensacciai*.

XV FUTURE DEVELOPMENTS AND OUTLOOK

At present, the use of private enforcement in Italy is limited. However, some important steps forward have recently been taken, and its effectiveness in the Italian legal system is expected to improve in the future.

The Supreme Court decision issued on 4 June 2015 in *Comi v. Cargest* has greatly encouraged the exercise of actions before civil judges, calling for the existing procedural rules to be applied more efficiently, to remove the current obstacles that hinder access to the civil courts.

Additional significant opportunities to develop private enforcement in Italy could be, on the one hand, the approval by Parliament of the new class action, which modifies the current opt-in system, and on the other, the implementation in Italy of Directive 104/2014/EU on antitrust damages actions. This Directive, in particular, represents a very important opportunity to focus attention on private enforcement, and, therefore, to push Italian courts and the legislator towards making efforts to facilitate a wider use of private remedies and accelerate the resolution of disputes.

Chapter 17

MEXICO

Juan Pablo Estrada-Michel[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The aftermath of all the constitutional and statutory changes to the antitrust law since 2014 is that antitrust and competition enforcement activity in Mexico is still in development. That, of course, has influenced private antitrust litigation.

Since the 2013 constitutional amendment and its statutory implementation, which includes the integration of specialised federal courts and tribunals in the field as well as agencies created therein (the Federal Telecommunications Institute (IFT) and the Federal Economic Competition Commission (COFECE)), the competition and antitrust fields in Mexico have been active in some areas. Nevertheless, such movement has happened mostly through regulation, reflecting the views of specialists in two areas: on the one hand, telecommunications and broadcasting sectors; on the other, all the others.

The specialisation of the courts with jurisdiction in this subject matter, as well as the separation provided by the Constitution between the IFT (with jurisdiction for competition and antitrust enforcement in the telecommunications and broadcasting sectors) and COFECE (with jurisdiction over the remaining sectors) are established in the statutory provisions (the Federal Law on Economic Competition, the Federal Telecommunications and Broadcasting Act, the Organic Law of the Judicial Power of the Federation and the Amparo Law) and directly affect the applicable proceedings for private antitrust litigation as well as the likelihood of successfully claiming damages.

In 2012, Mexico enacted important amendments to the Federal Civil Code to include class actions, a new concept for Mexico. Class actions require a specific proceeding, which includes as one of the grounds for a collective claim seeking damages

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the effectiveness of a *res judicata* resolution rendered by the antitrust authority declaring the existence and commission of a monopolistic practice under Mexican law. Such legislation continued to produce effects during 2014 and 2015 in the form of new claims and even settlements.

Finally, the Constitution and the statutory provisions regulating the *amparo* proceeding (a federal judicial proceeding conceived to challenge acts of any authority on constitutional grounds) suffered relevant amendments in 2011 and 2013. Among other effects, such provisions include the mandatory use of *pro persona* criteria and the possibility of filing a claim against private parties that *de facto* or even *de jure* perform any conduct that could be deemed an act of authority and, thus, is subject to constitutional challenge.

Nonetheless, Mexican private antitrust litigation appears not to have evolved as much as it should. Litigation continues to focus on the following:

a the use of antitrust government proceedings before the specialised agencies to have sanctions and penalties imposed on competitors (in fact, the use of public antitrust proceedings for private interests);

b possible civil claims before the judiciary by companies that allegedly suffered damages from unlawful monopolistic practices previously sanctioned by the antitrust authority;

c class actions initiated against companies under the grounds of a *res judicata* resolution rendered by the antitrust authority declaring the existence and commission of a monopolistic practice under Mexican law; and

d *amparo* claims filed by private companies against a competitor under the concept of identifying its acts as those of an authority.

The specialised agencies and the federal courts have issued important decisions recently, either resolving on the merits, or developing and shaping what antitrust litigation will look like in the future.

In general, it has been confirmed and established that:

a even when any company is enabled by law to initiate claims against competitors before the specialised agencies in terms of their statutes, that does not give the claimant legal title to try to use such proceeding to solve its private interests;

b at least under the previous statute, damages could be sought judicially only when the resolution establishing the commission and responsibility of the unlawful antitrust practice by the defendant has become *res judicata*;

c class actions must fulfil the elements for admission provided by the statutory law in order to be certified, including the *res judicata* effect of any resolution by the antitrust authority in its case;

d class actions involving damages, even when initiated by a state authority, can be resolved through settlement agreements; and

e private parties can be deemed authorities in a specific *amparo* proceeding and their acts may be challenged as such on constitutional grounds, but it is mandatory to demonstrate that the act itself is based on a legal provision, and is equivalent to and fulfils the description of an act of a formal authority.

Considering that in Mexico agency files and judicial records are not public, and only certain resolutions and criteria are published, it is difficult to obtain recent resolutions.

Nevertheless, it is definitely worth mentioning the recent rulings by the Supreme Court of the Nation, acting in Second Chamber, upholding the existence and legal effect of compromises agreed to in 2011 between a mobile telephone company and the former antitrust authority (Federal Competition Commission (COFECO)) during a proceeding related to alleged price squeeze practices. Such decisions were challenged through *amparo* by broadcasting companies under the theory of legitimate interests. Meanwhile, the IFT confirmed the appropriate performance and execution of the compromises. Nonetheless, the IFT itself has admitted a 2010 claim filed by cable companies for the exact same facts and alleged practices, which is still pending resolution.

Also, the Supreme Court has upheld the validity of several provisions of the previous competition statute, particularly regarding the proceedings declaring an agent as dominant in its area, and those established for the proceedings to sanction monopolistic practices.

Most importantly, the Supreme Court recently rendered a resolution upholding a cartel investigation process by COFECO regarding the pharmaceutical industry, and thus upheld the imposed sanction for price fixing in public bidding proceedings. This precedent is relevant for the case itself, and because the justices created a new standard to evaluate the basis for any cartel case brought by the investigation authority. The Court allowed the authority to construct a case based on several indicia and indirect evidence and, thus, allowed presumptions as valid grounds to overcome the presumption of innocence in absolute monopolistic cases.

The specialised courts have rendered resolutions (some final, others subject to appeal) on matters such as the declaration on preponderant agents in the broadcasting and telecoms industries issued by IFT. Such courts have tended to uphold provisions of the new telecoms and antitrust statutes and issued precedent establishing that judges should lower the review standards in decisions rendered by the specialised agencies.

Recently, the courts have been questioned regarding their resolutions in several *amparo* claims filed by a famous anchorwoman, a member of the press, her former team and the alleged audience against a radio station that terminated her contract, claiming such termination was ordered by the executive branch (as a consequence for some investigations made public). All the claims were dismissed, and the Supreme Court denied attracting the case.

COFECE has been active in recent months. Along with studies and regulatory instruments (such as guides), the antitrust agency has initiated several investigations for absolute monopolistic practices and cartels in such fields as aviation, sugar production, agroindustry, corn and tortilla, and financial services. The IFT has been active as well, mostly through regulation and proceedings imposing sanctions against telecommunications and broadcasting companies for alleged misconduct.

Decisions by specialised courts and tribunals have confirmed theories developed recently and upheld a high rate of the decisions and rulings of the antitrust authorities, which are defining the legal elements regarding *amparo*. Nonetheless, private competition enforcement advances are still on hold.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Historically, legislation is the main reason for the lack of developments in private antitrust enforcement in Mexico. The previous statutory provisions adversely affected and made it practically impossible to be successful in damages actions from any unlawful antitrust conduct, either a monopolistic practice (absolute – cartels – or relative) or an unauthorised and illegal merger or acquisition.

The requirements for establishing damages under Mexican law are difficult to meet since, according to the civil law system tradition, an action for damages requires the claimant to demonstrate (beyond doubt) that (1) the defendant performed the illegal conduct, (2) the damages were suffered, and (3) there is a proportional and precise direct causal relationship between such conduct and the damages. Such elements, which should be analysed under strict standards, are mandatory in private competition enforcement, together with the specific elements also mandated under the antitrust laws.

Since its origin, Section 38 of the former Federal Law on Economic Competition (LFCE) provided that there would be no additional actions on antitrust grounds than those regulated in such statute. Such provision created a burden for private competition enforcement that was meant to be resolved in the damages rules included therein, but was not. In any case, it seemed that the legislation trusted the specialised antitrust agency more than the courts.

From 1998 to 2006, Section 38 provided that those who had demonstrated to COFECO during a government public proceeding to have suffered damages as a consequence of the anticompetitive conduct could then file an action before the judiciary to obtain those damages, and then the judge could consider the estimate of damages stated by COFECO. Such provision appears to have mandated that any judicial action for damages under antitrust conducts needed a prior government public proceeding before COFECO with an outcome against the defendant, required the plaintiff to have alleged and demonstrated the damages before such agency (being a party at the proceeding), and then to have COFECO agree. The statute was not clear, but this meant that the defendant would have knowledge of the claim even before there were grounds to file it and with a chance to challenge its grounds all the way through a complex system (appeal before COFECO, possible administrative litigation, *amparo* proceedings, etc.).

In 2006, the LFCE's Section 38 underwent changes. While it no longer considered the need to prove the damages in the government public proceeding (the judge could ask for the agency's opinion), it expressly required that before the filing of a judicial action, the prior proceeding before COFECO needed to be *res judicata*, in other words, the ruling against the defendant must have been firm and beyond any challenge.

Both provisions directly affected the chances of any person seeking damages on antitrust grounds, mostly due to the dependence on the administrative agency's conduct and proceeding, and the fact that the legislation did not consider the reality of Mexican litigation. Only three private antitrust enforcement actions appear to have been initiated before the federal courts, and none of them were successful.

As part of recent amendments, the legal framework has changed. Nowadays, the new LFCE seems to have taken the field more seriously, establishing under Section 134 that those who have suffered damages as a consequence of antitrust misconduct can bring actions before the specialised courts, but only after the corresponding agency's resolution in the public proceeding becomes *res judicata*. It expressly provides that the resolution will have collateral estoppel effect regarding the judgment about the conduct. Apparently the agencies are the only bodies entitled to jurisdiction regarding the validity or lawfulness of the conduct.

In any case, since actions for damages are in general deemed to be civil actions, the statute of limitations is established by the Federal Civil Code. Section 1934 provides a statute of limitations of two years from the date in which the damages were caused. But Section 134 of the new LFCE provides that the time limit will be suspended once the investigation for the government public proceeding is initiated.

Considering the fact that Mexican law has provided for specialised antitrust courts, the legislature should consider the possibility of filing suits for damages based on antitrust considerations regardless of whether the specialised agencies have resolved the matter in a government proceeding.

III EXTRATERRITORIALITY

While Mexico's new agencies have been more active than their predecessors regarding their collaboration, communication and relationship with foreign agencies and authorities (particularly those from the US and Canada), private competition enforcement has not been treated in Mexico as a priority. Thus, foreign and international resolutions have been treated the same as any other case or subject matter. Now, Mexican law provides for international and transnational cooperation, and antitrust foreign judgments would be enforced under general requirements, the respect of Mexican public policies being the most important.

IV STANDING

Currently, Section 134 of the LFCE does not provide for specific limits regarding who has standing to bring a private competition enforcement action. The only general guidance of the law is that plaintiffs must have suffered damages arising from wrongful or illegal conduct.

Nevertheless, there are two kinds of monopolistic practices in Mexico: absolute (agreements between competitors, collusion, and cartels) or relative (commercial conduct that is generally allowed, but when performed by a dominant entity produces anticompetitive effects). Absolute practices can be brought by anyone before COFECE or the IFT; in contrast, relative practices can only be alleged by the affected persons (mainly, competitors). Thus, it follows that if an action is based on a resolution derived from relative monopolistic practices, only those who brought the case to the corresponding agency should be allowed to bring it before a judge for damages.

V THE PROCESS OF DISCOVERY

In general, civil law procedures in Mexican law do not allow discovery. Thus, parties will have limited knowledge of proof and evidence before the trial. Now, given the above-mentioned provisions, parties will most likely have been through a public proceeding before the antitrust agency, and therefore can use such records and obtain information that can be be used at trial. The information obtained by an antitrust authority during investigation is, however, deemed confidential and protected.

VI USE OF EXPERTS

Expert witnesses and economists are frequently used in antitrust practice and are fundamental for strategic purposes before filing a writ; they are vital for damages claims as well. Therefore, the role of experts and economists in private antitrust enforcement can be determinative in any action.

A systemic concern though, is that Mexican law in general provides for the use of experts in trial, but it is very common to have the plaintiff's expert unconditionally support the claim, and the defendant's expert doing the same for the response. This outcome requires the judge to appoint an expert, and it is frequent that such third expert's opinion will act as the judgment. In other words, it is sometimes easier for the judge to follow the third expert's opinion, instead of considering all the evidence of the case at hand.

Now, specialised courts have shown some deference regarding the resolutions issued by antitrust agencies. Such deference might affect the influence of expert witnesses' opinions.

VII CLASS ACTIONS

Since class actions are mainly a common law institution, they received delayed recognition in civil law countries' statutory provisions. Mexico did so in 2012 through important amendments to the Constitution and the Federal Code of Civil Procedure (FCCP) that include three kinds of class actions, and establish that any of them could be tried in a specific and particular proceeding. The FCCP includes as one of the possible grounds for a class action to claim damages the effectiveness of a *res judicata* resolution rendered by the antitrust authority declaring the existence and commission of any monopolistic practice under Mexican law.

Probably for the same reason and notwithstanding preference for providing the day in court for the class, the claims for class actions in Mexico are subject to strict standards of admissibility before recognising a certification and, if so, at trial. The claim should (1) establish clearly the kind of action and the reasons for bringing it as a class action, (2) demonstrate at least 30 members of the class, and (3) most importantly provide for common facts and circumstances that could be deemed sufficient to relate the class to the defendant. Also, claimants should be careful about their specific claims and grounds, since some issues should not be tried in this kind of proceeding. If the

claim is admitted, the defendant will produce a response, and after a conciliation hearing, evidence is introduced in the case. The statute of limitations for class actions is three-and-a-half years from the date of the damages or misconduct.

As indicated above, the legislation has produced effects during 2014 and 2015 in the form of new claims and agreements resolving these claims. The Consumer Protection Office (PROFECO) has been actively filing lawsuits against companies, but has not been very successful in doing so.

A class action has yet to be filed based on an antitrust resolution, but the legal field expects the use of class actions to explode as new agencies start issuing rulings in new files. In any case, the main disadvantage for certainty purposes is that these kinds of actions and proceedings are not well known in Mexico and all the players involved (judges, authorities, consumers, attorneys, etc.) still need to be educated on their use.

VIII CALCULATING DAMAGES

In general, Mexican law provides for consequential damages, which to our understanding are those recognised in Section 134 of the LFCE previously mentioned. What could be seen as punitive damages would be part of the resolution by the antitrust authority in the public proceeding, as grounds for the amount of the fine or sanction imposed, where such amount will not be paid to any affected party but to the federal government. There are certain class actions that could potentially be tried to obtain punitive damages, but experience thus far has not shown that could be the case. Actually, in general the Supreme Court has been careful about the grounds for punitive damages in certain cases.

IX PASS-ON DEFENCES

Mexico has to our knowledge yet to discuss and define relevant issues in the field, such as whether the damages suffered by a purchaser of a cartelised product are reduced or mitigated if he or she 'passes on' some of the overcharge to his or her own customers. But under the current provisions, the LFCE would not provide grounds for such defence, since cartels are deemed absolute monopolistic practices and, thus, are considered illegal *per se*. At best, a pass-on argument could be tried as grounds to reduce the possible fine. Nevertheless, as mentioned before, according to the Mexican theory of damages, if some of the damage is passed on, the amount claimed should be reduced accordingly.

X FOLLOW-ON LITIGATION

The immunity programme recognised in Mexican antitrust law has sought to resolve the possible criminal charges and the amount of a fine or sanction that could result from a proceeding before the antitrust authority, specifically those regarding absolute monopolistic practices and cartels. Also, the immunity programme is supposed to be absolutely confidential, thus the informant would not be known by third parties, even after the resolution is rendered. Therefore, the programme will not affect any private action against those who would attempt to gain immunity.

If no immunity was sought for and the conduct is seen as criminal, and a case is filed before the respective criminal authorities, the affected party could try to use the criminal case in two ways: (1) by asking for damages before the criminal case judge, as they are a consequence of the criminal liability; or (2) by using the criminal records as evidence in a civil case or action.

XI PRIVILEGES

Privileges are duly recognised in general in Mexican law, forbidding attorneys from revealing information, producing evidence or declaring against their clients, and that of course is applicable to private competition enforcement. That being said, the new LFCE has given the agencies broad capacities and powers to investigate (that is one of the main points for the statute to change), and provisions are not clear about the standard of protection of the privileges, nor about the possible use of any evidence related to the litigation to follow.

XII SETTLEMENT PROCEDURES

Viewed as a civil claim, the case for damages is open for conciliation and settlement, which would only have legal effect between the parties that enter into it. If reached during a trial, the settlement will be given *res judicata* effect for purposes of enforcement.

Class actions are treated differently if and when the claim is certified and admitted: parties are given an opportunity to conciliate interests and settle the dispute, but given the nature of the proceeding and its possible reach, the law requires such agreement be sanctioned by the judge and also demands an opinion from different authorities and agencies. Such settlement would then have *res judicata* effect and could be enforced against third parties (particularly by the defendant, to avoid further claims). Any party that considers it should be part of the class has 18 months to join it and, if allowed, will benefit from the agreement.

XIII ARBITRATION

There is no statutory law forbidding the parties to arbitrate a conflict, but again it would require as a requisite a prior decision by COFECE or the IFT on the conduct.

XIV INDEMNIFICATION AND CONTRIBUTION

There are no limitations as such, but the claim would need to be filed against all the companies or persons that were considered responsible for illegal antitrust conduct in a *res judicata* resolution rendered by an agency.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Past legislation in Mexico has deterred and adversely affected private competition enforcement. With the legislative changes and the judiciary specialisation, together with the importance that antitrust in general has taken in Mexico and specifically for the leading companies and industries over the past couple of years, private competition enforcement activity should increase, and some legal institutions will develop to become useful and frequent tools.

Chapter 18

NETHERLANDS

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Netherlands is increasingly 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*,[2] *Bitumen*,[3] *Air Cargo*,[4] *Sodium Chlorate*,[5] *Candle Waxes*,[6] *Elevators and Escalators*,[7] *Paraffin Wax*[8] and *Prestressing Steel*.[9] Several judgments were published in 2015 in the *Gas-Insulated Switchgear*,[10] *Air Cargo*,[11] *Sodium Chlorate*[12] and *Prestressing Steel*[13] matters.

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2 Commission Decision, 24 January 2007, Case COMP/38899.
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 Gelderland District Court, 15 April 2015 ECLI:NL:RBGEL:2015:2621 and Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713.
11 Amsterdam District Court 7 January 2015, ECLI:NL:RBAMS:2015:94, Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1780 and Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1778.
12 Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006.
13 Limburg District Court, 25 February 2015, ECLI:NL:RBLIM:2015:1791.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal basis

The legal framework for cartel damages claims is the Dutch law of obligations;[14] the specific competition legislation prescribed in the Competition Act (CA), the Treaty on the Functioning of the European Union (TFEU) and the Code of Civil Procedure (CCP). Most cartel damages claims are, however, based on an alleged unlawful act conducted by the alleged cartelist. In order to succeed, the claimant must establish that the defendant has committed an unlawful act that is attributable to him or her, and which caused the claimant to suffer damage. Whether a breach of national or European competition legislation in itself will amount to an unlawful act against the claimant depends on whether the breached rules are aimed to prevent the damage suffered by the claimant.[15]

Most likely some of the national substantive and procedural rules (in the CC respectively the CCP) will be amended by 26 December 2016, to comply with the Directive on antitrust damages actions adopted by the Council of the European Union on 26 November 2014 (the EU Damages Directive). On 8 October 2015, the government published a draft legislative proposal (the Draft Proposal) that would transpose the EU Damages Directive into Dutch law. A public consultation was held to collect opinions on the Draft Proposal from practitioners. Anticipating these law amendments, this chapter will – non-exhaustively – discuss some of the proposed articles. It should be borne in mind, however, that the Draft Proposal (and the final amendments of Dutch law) are still subject to change.

ii Limitation

Claims for damages become time-barred five years after the claimant has become aware of the infringement and the person liable for the damages, provided that no claims can be brought 20 years after the damage-causing event.[16] For the short limitation period to start running the claimant must be aware of the damage and 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

14 Article 6:162 of the Civil Code (CC) embodies the obligation to repair damage in 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 case of an infringement of 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 place of the amount that has been paid unduly (Article 6:203). Finally, according to Article 6:74 CC – in sum – every imperfection in the compliance with an obligation is a non-performance of the debtor and makes him or her liable for the damages.

15 Article 6:163 of the CC. More on this can be found in Section IV, *infra*.

16 Article 3:310 of the CC.

there has been a breach of Article 6 of the CA or Article 101 of the TFEU. For example, in 2007 the Rotterdam District Court found that a claim for damages by CEF, a wholesale distributor of electrotechnical fittings, against the individual directors of FEG, a Dutch association in the electrotechnical fittings sector, was time-barred.[17] The court ruled as irrelevant that the European Commission had only given its decision that FEG had breached Article 101 of the TFEU in 1999:[18] 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, 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 may have participated.[19] The court ruled that the publication only stated that an investigation had started, which, 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. Furthermore, the Midden-Nederland District Court ruled that a claim to annul a maintenance contract for the service of elevators was time-barred as the three-year limitation period for such an annulment had expired; according to the claimant, the limitation period had started when the European Commission's cartel decision was published in 2007, while the claimant first brought its claim for annulment four years later, in 2011.[20]

The Draft Proposal[21] (consistent with the EU Damages Directive[22]) provides for a five-year limitation period, which will start to run the day following the day on which the infringement has ceased and the claimant knows, or can reasonably be expected to know of (1) the infringement, (2) the fact that the infringement caused harm to it and (3) the identity of the infringer.

17 Rotterdam District Court, 7 March 2007, ECLI:NL:RBROT:2007:BA0926.

18 Commission Decision, 26 October 1999, Case IV/33.884.

19 Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403.

20 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.

21 Proposed Article 6:193t CC of the Draft Proposal.

22 Article 10 of the EU Damages Directive.

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.[23] Foreign parties are not exempted and do not enjoy any immunity in that regard.

With regard to cartel damages claims arising 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 that arose after 11 January 2009, the UAA does not contain a provision enabling the claimant to choose applicability of only the law of the court seized when the distortion of competition has also considerably affected competition in that country.

In 2014, the District Court of The Hague laid down judgment in the *Paraffin Wax* case,[24] finding that the place where the damage was suffered according to the UAA (in line with the above) was the production locations of the different undertakings involved, hence leading to the applicability of Italian, Swedish, Finnish, German and Norwegian law. In order to avoid such fragmentation the court enabled the parties to make the choice of law[25] (by filing a separate motion after this judgment).

ii Jurisdiction

Main rule: defendant's domicile

As the main rule, Dutch courts have jurisdiction to hear cartel damages claims that are submitted against (legal) persons domiciled in the Netherlands.[26] A company is domiciled in the Netherlands if it has its statutory seat, central administration or principal place of business in the Netherlands.[27]

23 Article 6 of the CA.

24 The Hague District Court, 17 December 2014, ECLI:NL:RBDHA:2014:15722.

25 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.

26 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.

27 Article 63 Brussels I bis.

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 bis (anchor defendant rule). Under this rule – which is similar to Article 6(1) Brussels I (old) as well as almost similar to its Dutch equivalent Article 7(1) of the CCP[28] – a claim for cartel damages brought against a company which is not domiciled in the Netherlands may still be brought before the Dutch courts, but only if this claim is so 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 rendered a landmark decision[29] in the *Hydrogen Peroxide* (also: *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 European Court of Justice 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 a '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. A few of these cases will be discussed below as well.

On 1 May 2013, the District Court of The Hague found the damages claims against the various defendants in the *Paraffin Wax* cartel to be sufficiently connected.[30] The anchor defendant – Shell Petroleum NV, the only defendant company domiciled in the Netherlands – had not participated directly in the cartel, but was held jointly and severally liable by the European Commission as the parent company of its 100 per cent subsidiary. The District Court held that this did not preclude assuming a sufficiently close connection with the damages claims against the other defendants (who had directly participated in the cartel) and that all the European Commission decision addressees could have reasonably foreseen that they might be summoned to appear before the court of one of the other cartel participants. Similarly, the Amsterdam District Court decided that it had jurisdiction to hear a claim against various defendants in the *Sodium Chlorate* cartel. The District Court found the damages claims closely connected, given the fact that the defendants were all involved in the same market forgery and all knew that the other cartel members were equally involved in these practices.[31] On 26 October 2011,

28 The Hague Court of Appeal decided that the case law of the European Court of Justice with regard to Article 6(1) Brussels I (old) is also relevant for the application of Article 7(1) CCP, which applies when the defendant is not domiciled in an EU or EEA country.

29 European Court of Justice 21 May 2015, C-352/13 (*Hydrogen Peroxide*; or: *CDC*).

30 The Hague District Court, 1 May 2013, ECLI:NL:RBDHA:2013:CA1870.

31 Amsterdam District Court, 4 June 2014, ECLI:NL:RBAMS:2014:3190. This judgment of the Amsterdam District Court was upheld by the Amsterdam Court of Appeal. See Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006.

the Arnhem District Court decided that it had jurisdiction to hear a claim brought against a number of producers of gas-insulated switchgears, including the Alstom group, even though none of the defendants was domiciled in the Netherlands. The court decided that, with regard to one of the defendants, Cogelex, jurisdiction could be based on Article 5(3) of Council Regulation (EC) 44/2001 because both the wrongful act and the place where damages were suffered was in Arnhem (see more on this alternative ground below). The District Court then applied Article 6(1) of Council Regulation (EC) 44/2001 – even though this rule only applies if jurisdiction with regard to the anchor defendant is based on domicile[32] – to justify jurisdiction over the other defendants because the claim against all defendants would have to be decided on the same factual and legal grounds and otherwise there would be a risk of contradictory decisions.[33] 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 *Escalator* cartel.[34] 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 which should each be assessed in accordance with the various national laws.[35] Contrary to the aforementioned case, the Midden-Nederland District Court found the damages claims against various other defendants based on the *Escalator* 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 manufactures, and was based on Article 6:166 CC (group liability arising from a wrongful act).[36] On 25 February 2014, the Limburg District Court declared in a follow-on action on cartel damages that it had jurisdiction to hear the dispute on the basis of Article 6(1) of Council Regulation EC 44/2001 even though neither the claimants nor the majority of defendants were based in the Netherlands. [37] The court ruled that the defendants could have foreseen that a follow-on action would be launched in the Netherlands, given the fact that several meetings of the cartel were held in the Netherlands.

On 7 January 2015, the District Court of Amsterdam[38] even 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.

32 See the wording of Article 6(1) Brussels I (old), in which 'domicile' is mentioned and also the Opinion of A-G Trstenjak, Nos. 87-90, to European Court of Justice 1 December 2011, C-145/10 (*Painer*).

33 Arnhem District Court, 26 October 2011, ECLI:NL:RBARN:2011:BU3546 and 3548.

34 Commission Decision, 21 February 2007, Case COMP/38823.

35 Rotterdam District Court, 17 July 2013, ECLI:NL:RBROT:2013:5504.

36 Midden-Nederland District Court, 27 November 2013, ECLI:NL:RBMNE:2013:5978.

37 Limburg District Court, 25 February 2015, ECLI:NL:RBLIM:2015:1791.

38 Amsterdam District Court 7 January 2015, ECLI:NL:RBAMS:2015:94.

Finally, the Amsterdam District Court ruled[39] recently 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 (1) claims of shippers (claiming that surcharges were passed on to them) and (2) freight forwarders claiming they suffered damage (claiming that surcharges were not passed on by them). Thus, KLM would run the risk of being obliged to pay the same damages twice.

Alternative jurisdiction ground: place where the harmful event occurred

Claimants sometimes also invoke another alternative jurisdiction ground: according to Article 7(2) Brussels I (old) a tort claim can be brought before the courts of the place where the harmful event occurred.[40] In the same *Hydrogen Peroxide* [41]case as discussed above, the European Court of Justice 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 (1) the courts of the place in which the cartel was definitively concluded, (2) 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 (3) 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, although they are not obliged to follow the European Court of Justice case law when applying this Dutch national rule.[42]

Jurisdiction and arbitration clauses

The European Court of Justice decided in the *Hydrogen Peroxide* case that in cartel damages cases, account should be taken of jurisdiction clauses[43] 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) and/or Article 6(1) 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,[44] the

39 Amsterdam District Court, 22 July 2015, ECLI:NL:RBAMS:2015:4408.

40 See also Article 6(e) of the CCP and Article 5(3) of Brussels I (old).

41 European Court of Justice 21 May 2015, C-352/13 (*Hydrogen Peroxide*; or: *CDC*).

42 See J A Pontier, *Onrechtmatige daad en andere niet-contractuele verbintenissen*, Maklu 2015, p. 151.

43 Article 23 Brussels I (old) and Article 25 Brussels I bis.

44 Amsterdam Court of Appeal, 21 July 2015, ECLI:NL:GHAMS:2015:3006.

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.[45]

IV STANDING

To bring a claim for cartel damages in the Netherlands the claimant must be a natural or legal person. Associations and foundations which, according to their articles of association, promote and protect the interests of others affected by a cartel may start proceedings as well, but may not claim damages.[46] In practice, several (follow-on) cartel damages claims in the Netherlands have been initiated by vehicles (in the form of Dutch or foreign legal entities, such as limited companies or foundations). In general, this is possible under Dutch law if the actual victims have assigned their claims to such vehicles in a legally valid way or have mandated such a vehicle. In general it is inferred from the *Manfredi* and *Kone* decisions of the European Court of Justice that, indirect purchasers have standing to claim cartel damages.

V THE PROCESS OF DISCOVERY

There is no pretrial discovery system in Dutch law. Parties can, however, request for disclosure of information judicially and extrajudicially. In addition, it is possible for a party to assess its case upfront 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 shall be discussed hereafter.

The Dutch courts have general discretionary power to order disclosure from either or both of the parties,[47] including the disclosure of books and records.[48] This power covers both a demand for clarification of certain statements and the submission of specific documents. Parties may refuse to cooperate with such a demand, but the court may draw adverse inferences from such a refusal, unless parties can show they have sufficiently compelling reasons for their refusal. In principle, parties also have the possibility to request documents under Dutch administrative law (see subsection i, *infra*).

i Parties' options to obtain disclosure

While parties may request the court to apply its above-mentioned discretionary powers to order another party to disclose certain information or documents, the court is not

45 Even though the Brussels I Regulation does not apply to arbitration clauses (Article 1(2)(d) Brussels I). Pursuant to Articles 1074 (arbitration beyond the Netherlands) and Article 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.

46 More on this can be found in Section VII, *infra*.

47 Article 22 of the CCP.

48 Article 162 of the CCP.

obliged to grant such a request. Instead, Article 843a of the CCP provides parties a special right to obtain disclosure. By way of a claim under Article 843a of the 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.

In order for a claim under Article 843a of the CCP to be successful, the claimant must first establish 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 in order to enable both the court and the other party to be able to identify the requested information and to prevent 'fishing expeditions'.

A claim under Article 843a of the 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).[49] Following Article 5 of the EU Damages Directive, the Draft Proposal contains a specific subsection regarding the disclosure of information in the context of competition law infringements. Most likely one of most significant proposed changes will be that only sufficiently compelling reasons can prevent the granting of access to transcripts or extracts of documents.

In several proceedings regarding the *Air Cargo* cartel, both claimants and defendants requested the disclosure of documents, such as the unredacted 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.[50] 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 field of the 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 Rotterdam District Court has now held in a recent judgment that the Act establishing the ACM (of 28 February 2013) has priority over the working of the PAA.[51] This seems to imply that the ACM has additional grounds

49 For more on this aspect regarding privilege, see Section XI, *infra*.

50 Amsterdam District Court, 25 March 2015, ECLI:NL:2015:1780 and Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1778.

51 Rotterdam District Court, 13 May 2015, ECLI:NL:RBROT:2015:3381.

to refuse access to documents. Second, the Trade and Industry Appeals Tribunal[52] held that the right to 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.

ii Parties' right to witness testimony

Dutch procedural law gives parties the 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.[53] (Opposing) parties can also be brought to the witness stand, but their testimony only has limited strength in proving their own statements. Witnesses will be examined by a judge and Dutch law does not contain a right to cross-examination. If a(n opposing) party called as a witness refuses to answer questions, the court may draw adverse inferences of such refusal.[54]

Finally, it is also possible to request a preliminary examination of a witness.[55] 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 *Air Cargo* cases) by claimant SCC for a preliminary examination of certain witnessess – 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.[56]

VI USE OF EXPERTS

The Dutch civil law of evidence 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.[57] 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

52 Trade and Industry Appeals Tribunal, 2 December 2015, ECLI:NL:CBB:2015:388.

53 Article 165 of the CCP.

54 Article 164 of the CCP.

55 Articles 186-193 of the CCP.

56 Amsterdam District Court, 25 September 2014, ECLI:NL:RBAMS:2014:6258.

57 Article 152 of the CCP.

appoint an independent expert. Courts are not obliged to appoint experts. It is at the court's discretion whether or not it deems such an appointment necessary for its decision on the case.[58]

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.[59]

VII CLASS ACTIONS

Since July 1994, an association (*Vereniging*) or foundation (*Stichting*) 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, or even specific performance. They do not, however, have standing to claim damages.[60] The interests that the association or foundation aims to promote and protect must be sufficiently similar and thereby suitable to be represented and decided upon collectively. Therefore, the court is not able to order the defendant in a Dutch collective redress action to pay damages. Rather, only those individuals who have suffered a loss may start follow-on proceedings to obtain damages. Usually class actions are aimed at obtaining a declaration under law that the defendant has, through certain actions, acted wrongfully. 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 wrongfulness of certain actions, as their point of departure.[61] In addition, such a decision also can be a stepping stone for a collective settlement that can be declared binding internationally (see Section XII, *infra*).

Probably due to the inability under Dutch law to claim damages through class actions, the collective redress action claiming injunctive or declaratory relief or specific performance has not yet been used in antitrust cases. Instead, the most popular model thus far in the Netherlands entails the assignment of individual claims to a foundation acting as a 'claim vehicle'. Dutch courts generally accept standing of such *ad hoc* claim vehicles. Third-party funding generally is available and permitted in the Netherlands.

VIII CALCULATING DAMAGES

i Cognisable damages

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

58 Supreme Court, 6 December 2002, NJ 2003, 63 (*Goedel/Mr Arts q.q.*).

59 Supreme Court, 5 December 2003, NJ 2004, 74 (*Vredenburgh/NHL*).

60 Article 3:305a of the CC.

61 Supreme Court, 27 November 2009, ECLI:NL:HR:2009:BH2162 (*VEB c.s./World Online c.s.*).

suffered.[62] 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.

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.[63] 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 of there having been no wrongful act, all possible relevant circumstances of the case are to be taken into account in this 'actual damage calculation'. Alternatively, the court may calculate damages abstractly, thereby not taking certain actual circumstances of the 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 *Air Cargo* cartel related claims) in order 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.[64]

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.[65] To date, this power has been used only sparingly, mainly in intellectual property disputes. Interestingly, however, the Gelderland District Court decided in a recent case that the objection, that a substantial price increase between an offer during the cartel and the agreement after the termination of the cartel could be attributed to a decrease of the cost price, was sufficiently rebutted by the claimant (TenneT in the case against Alstom).[66]

iii Legal interest

A claimant is entitled to compound legal interest annually over the amount of damages claimed (in cases of wrongful acts, to be calculated from the day the loss is suffered

62 Article 6:96 of the CC.

63 Article 6:97 of the CC.

64 Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1780 and Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1778.

65 Article 6:104 of the CC.

66 Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713.

until the damages have been paid).[67] 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 specified interest rate for the delay in receiving monetary compensation.[68] The legal interest percentage is determined by the Dutch government. Since 2002 this interest has fluctuated between the current rate of 3 per cent and a 7 per cent rate in 2002.

iv Legal costs

Unlike in, for example, the United Kingdom, awards for legal costs in the Netherlands are 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.[69] Awards for legal costs will cover the full amount of court fees,[70] 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.[71] Only in intellectual property law cases and exceptional circumstances (e.g., abuse of proceedings) do courts award actual compensation for attorneys' fees.

IX PASS-ON DEFENCES

In response to the European Commission's 2005 Green Paper on Damages Actions for breach of the European Commission antitrust rules[72] the Dutch government has indicated that the pass-on defence is available in the Netherlands. Nevertheless, there has been considerable debate in legal literature about whether the pass-on defence is, or should be, 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 should in principle be able to raise this defence. A judgment of the Arnhem-Leeuwarden Court of Appeal in 2014 (which will be discussed below) supports this approach. The implementation of Article 13 of the EU Damages Directive (possibly through Article 6:193q CC of the Draft Proposal) should (explicitly) end this debate in the near future.

Yet, in one of the Dutch Gas-Insulated Switchgear cartel damages cases, the Oost-Nederland District Court included some preliminary thoughts on the pass-on defence that had been raised, suggesting that it might not be reasonable to deduct the

67 Article 6:119 of the CC.

68 Supreme Court, 14 January 2005, NJ 2007, 481 (*Ahold c.s./the Netherlands*) and NJ 2007, 482 (*Van Rossum/Fortis*).

69 Article 237 of the CCP.

70 Currently, the highest court fee at first instance is €3,529.

71 Currently, the maximum fee is €3,211 per point with no maximum number of points for claims exceeding €1 million.

72 COM(2005) 672, 19 December 2005.

overcharge that was passed on to the claimant's buyers, based on the assumption that the 'extra' damages the claimant would receive would be passed on to its buyers in the future.[73] In an interlocutory judgment, the Arnhem-Leeuwarden Court of Appeal judged that the Oost-Nederland District Court had misapplied the principle of *audi alteram partem*, which resulted in the determination that the debate about the pass-on defence had not yet taken place. The execution of the judgment of the Oost-Nederland District Court in the follow-on proceeding for the determination of damages was suspended.[74] Finally, on appeal the Arnhem-Leeuwarden Court of Appeal principally accepted the pass-on defence as a legitimate defence under Dutch law.[75] The defendant complained that the Oost-Nederland District Court had rejected its pass-on defence with regard to damages claimed by the claimant. In sum, the Court of Appeal reasoned that it is not paramount to deprive the surplus gained by the cartel, but rather that the damage suffered be compensated. The Court of Appeal indicated that by applying the pass-on defence in this way, it would be prevented from compensating the claimant for damages which it has already reverse-charged. Also, by accepting the pass-on defence, the Court of Appeal explicitly indicated that – in doing so – the defendant having to pay multiple times for the same damage was avoided. The Court of Appeal did not deal with the exact amount of the damages and the burden of proof in this regard; this was left to a specialist court in different proceedings. Notwithstanding this judgment the Gelderland District Court took another approach in a more recent judgment (involving the same claimant as well), in which the defendant raised a pass-on defence.[76] The court held that the framework in Dutch damages law, which is the most suitable for assessing a pass-on defence, is Article 6:100 CC (the deduction of collateral benefits). Based on this article, the court indicated that possible benefits may only be deducted from damages, as far as this is reasonable and under the condition of a causal link between the benefits and the cartel. Eventually, the court indicated that it was not unreasonable to conclude that the claimant would be overcompensated to a certain extent, given that – according to the court – it was highly unlikely that customers of the claimant would ever start proceedings against the defendant and that it was likely that any damages would accrue to these customers to an important extent This judgment seems at odds with the EU Damages Directive (as Article 3(3)) stipulates that damages may not lead to overcompensation) and the 2014 Arnhem-Leeuwarden Court of Appeal's judgment. It remains to be seen, therefore, whether this judgment will be upheld.

X FOLLOW-ON LITIGATION

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,

73 Oost-Nederland District Court, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403.

74 Arnhem-Leeuwarden Court of Appeal, 10 September 2013, ECLI:NL:GHARL:2013:6653.

75 Arnhem-Leeuwarden Court of Appeal, 2 September 2014, ECLI:NL:GHARL:2014:6766.

76 Gelderland District Court, 10 June 2015, ECLI:NL:RBGEL:2015:3713.

decisions or concerted practices under Article 101 of the 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 of the TFEU found by the European Commission as a fact. For example, in the *Gas-Insulated Switchgear* case, 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.[77] 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) in 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.[78] 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 *Elevator* 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.

In 2011, in a claim for damages in connection with the *Bitumen* cartel, the Rotterdam District Court decided – for the first time in the Netherlands – a request for a stay of the civil claim proceedings pending an appeal by the defendants against the European Commission's decision.[79] According to the court, the decision whether to grant an (immediate and full) stay hinges upon the demands of fair proceedings, whereby unnecessary and unreasonable delays should be avoided. The court took a nuanced view. Because one of the defendants had not appealed against the European Commission decision, the court decided that, as regards that defendant, at the very least questions involving the legitimacy of assignments and statute of limitations could be dealt with already and without delay. These issues would, according to the Rotterdam District Court, have to be decided according to Dutch law and their decision would not depend on the validity of the contested European Commission decision. Similarly, the District Court of The Hague rejected a request for stay of the proceedings pending an appeal by a number of the defendants against the European Commission's decision arguing that it could be assumed that a number of issues might be debated and decided

77 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.

78 Arnhem-Leeuwarden Court of Appeal, 2 September 2014, ECLI:NL:GHARL:2014:6766.

79 Rotterdam District Court, 9 February 2011, ECLI:NL:RBROT:2011:BP7518.

independently of the contested European Commission decision, particularly given that not all the defendants had appealed the European Commission's decision. Furthermore, the court found that it would be contrary to due process – in particular the prevention of unnecessary and unreasonable delays – to stay the proceedings at this time until (likely many years later) all appeals had been finally decided.

In 2013, the Amsterdam Court of Appeal decided an appeal of a decision to stay the proceedings in one of the *Air Cargo* cartel claim cases pending the outcome of the European appeals of the airlines against the European Commission decision.[80] 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 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. 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.[81] 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 *Air Cargo* cartel related claim initiated by SCC). According to the court, at this 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.[82] As defendants already had submitted a statement of defence in the proceedings against claimant Equilib, the court ordered that Equilib had to provide specific information about what damages the shippers suffered in connection with what activities of the shippers and why these damages were caused by the carriers. Now the European Commission decision has been annulled by the General Court, it remains to be seen how the District Court will decide upon possible futher requests for a stay of proceedings.

As regards the status of ACM decisions in follow-on civil litigation, there is no provision similar to Article 16 of Council Regulation (EC) 1/2003. According to Part

80 Amsterdam Court of Appeal, 24 September 2013, ECLI:NL:GHAMS:2013:3013. The appealed case regarded: Amsterdam District Court, 7 March 2012, ECLI:NL:RBAMS:2012:BV8444.

81 Amsterdam Court of Appeal, 24 September 2013, ECLI:NL:GHAMS:2013:3013.

82 Amsterdam District Court, 25 March 2015 ECLI:NL:2015:1780.

B[83] of the Draft Proposal, however, an infringement of competition law established by a final decision of the ACM will be deemed irrefutable evidence of the established infringement in proceedings in which damages are claimed because of an infringement of competition law in the sense of the proposed Article 6:193k(a) CC.

Currently, Dutch competition and civil law impose no restrictions on the damages claims in civil proceedings on the basis that the defendant has already been subject to a competition law enforcement action and been fined, or towards defendants that have been granted leniency or immunity.

XI PRIVILEGES

Lawyers must refuse to testify as witnesses regarding what they know through their professional relationship with their client. 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.[84] 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, *inter alia*, registered in the Netherlands as an attorney (*advocaat*), except with regard to (possible) infringements of EU competition law investigated by the European Commission. The latter exception follows from the *Akzo* judgment of the European Court of Justice.[85] A 2013 judgment of the Dutch Supreme Court confirmed that the lack of legal privilege in the *Akzo* case does not mean that legal privilege of in-house counsel does not exist generally under Dutch law.[86]

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, *inter alia*, they are registered in the Netherlands as an attorney, except with regard to (possible) infringements of EU competition law investigated by the European Commission.

XII SETTLEMENT PROCEDURES

Except for the specific collective settlement mechanism described below, there are no particular means for a Dutch court to adopt or impose for settlements. Aside from some specific rules on settlement agreements, the general rules of contract law apply. Settlement negotiations between lawyers enjoy legal privilege, meaning that to disclose the contents of such negotiations in proceedings may result in a disciplinary complaint.

Only rarely are settlement agreements embodied in a court order. In certain circumstances parties to a settlement agreement, however, may choose to request the

83 Proposed Article 161a of the CCP.

84 See Section V.ii, *supra*.

85 Court of Justice, 14 September 2010, Case C-550/07 P.

86 Supreme Court, 15 March 2013, ECLI:NL:HR:2013:BY6101.

Amsterdam Court of Appeal to declare its terms binding under the Collective Settlement of Mass Claims Act. Under this Act, 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. Basically it is required that one or more associations (*Verenigingen*) or foundations (*Stichtingen*) who, according to their articles of association, protect and promote the interests of persons who have suffered damage due to the acts of another party, who 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 declares the settlement agreement generally binding. The court must consider a number of aspects, such as whether (1) the compensation is reasonable and (2) 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. 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.[87]

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.[88] 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.[89]

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 interest associations 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.[90] 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.[91] Both settlements covered shareholder claims for damages; however, there are no legal grounds for not applying these principles to antitrust settlements, particularly given that a decision by the court to

87 Article 7:907 of the CC.

88 Article 7:908 of the CC.

89 Article 1017 of the CCP.

90 Amsterdam Court of Appeal, 29 May 2009, ECLI:NL:GHAMS:2009:BI5744.

91 Amsterdam Court of Appeal, 12 November 2010, ECLI:NL:GHAMS:2010:BO3908.

declare a settlement generally binding should in principle also have effect against foreign claimants, at least insofar as they are domiciled in the European Union and the European Free Trade Association.[92]

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 1077 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 takes less time as compared to civil proceedings given the caseload of Dutch courts.

Pursuant to the European Court of Justice's judgment in *Eco Swiss v. Benetton*,[93] a decision by arbitrators that is contrary to Article 101 of the 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 failure to observe national rules of public policy; according to the European Court of Justice, Article 101 of the 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.[94] In that case, 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 of the 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 of the 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 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 European Court of Justice in the *Van Schijndel* case, 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 the parties themselves and the facts and circumstances upon which parties have based their claims and defences.[95] 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.

92 Article 33 of Council Regulation (EC) 44/2001 and EVEX Convention.

93 European Court of Justice, 1 June 1999, C-126/97.

94 The Hague Court of Appeal, 24 March 2005, NJF 2005, 239 (MDI/VR).

95 European Court of Justice, 14 December 1995, C-430/93 and C-431/93.

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.[96] Article 6:193n paragraphs 2 and 4 of the Draft Proposal aim to stipulate exemptions to this principle, following Article 11 paragraphs 2 and 4 of the EU Damages Directive (facilitating certain exemptions for small or medium-sized enterprises respectively immunity recipients). 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.[97] Each party's 'share' in the damages is determined proportionately to their 'contribution' to the damages.[98] 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.[99] 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 have binding legal effect against the parties in those proceedings.[100] 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[101] or can – in exceptional circumstances – be forced to join the main proceeding.[102]

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.[103]

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Netherlands is increasingly being chosen as forum for the private enforcement of European competition law. More than 10 follow-on cartel damages claims have recently

96 Article 6:102 of the CC.

97 Articles 6:10 and 6:12 of the CC.

98 Article 6:102 of the CC.

99 Article 210 of the CCP.

100 Article 220 of the CCP.

101 Article 214 of the CCP.

102 Article 118 of the CCP.

103 Supreme Court, 6 April 2012, ECLI:NL:HR:2012:BU3784.

been submitted to the Dutch courts and the Netherlands is increasingly 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 (1) (relatively) low costs of the proceedings and external counsel; (2) the expert and pragmatic approach of the judiciary; (3) extensive legal possibilities for disclosure; (4) efficiency of the proceedings; and (5) the fact that claim vehicles (and its funding) as such are not regulated, and – hence – generally face few barriers in starting proceedings.

Chapter 19

NIGERIA

Ebenezer Odubule and Babatunde Abiodun Adedeji[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Although there is no general substantive law in Nigeria that provides the policy and legal framework for public or private challenge of antitrust infringements, significant effort was made in 2002 to promulgate a generic national antitrust law;[2] however, this effort – and subsequent endeavours – were largely unsuccessful until 11 February 2015 when the Federal Competition and Consumer Protection Bill 2013[3] was re-presented and approved by the immediate past Federal Executive Council (FEC). This bill has now been forwarded to the National Assembly as an executive bill. Despite this acknowledged shortcoming, there exists a small body of fragmented antitrust laws in the following

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2 Reflecting the failed efforts of the National Council on Privatisation on the draft Federal Competition Bill 2002 laid before the National Assembly that was never passed into law despite huge financial and professional expenditure incurred, the motive for the non-passage of the law was suspicious and may not be unrelated to corrupt tendencies.

3 The Federal Competition and Consumer Protection Bill 2013 seeks for an Act to repeal the Consumer Protection Act, CAP C25, LFN, 2004; and to establish the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal for the development and promotion of fair, efficient and competitive markets in the Nigerian economy, to facilitate access by all citizens to safe products, to secure the protection of rights for all consumers in Nigeria, and for other related matters.

sectors of the Nigerian economy: telecommunications, aviation,[4] and the electric power sector.[5] The telecommunications sector has the most advanced antitrust provisions in Nigeria and the sector regulator – the Nigerian Communications Commission (NCC) – has carried out two antitrust market reviews since 2003, with the most recent findings leading to a determination of dominance against the largest mobile network operator in the country, MTN.[6]

Given the non-coherent state of antitrust policy and law in Nigeria, private enforcement is rare. Currently, there is only one[7] significant private antitrust enforcement lawsuit in the telecoms sector, *Adewole Abiodun Enitan & Anor v. Nigerian Communications Commission & 2 Ors*,[8] now pending before the Court of Appeal, Lagos. The substantive question before the court is a determination whether the exclusive tying of the MTN Mobile services to the phone-in access service to the television game show 'Who Wants to Be a Millionaire?' raises a *per se* antitrust violation entitling the plaintiffs to damages. The court has yet to determine the substantive questions at issue and has been constrained to date by the pre-emptory challenge to the court's jurisdiction by the defendants, which includes the regulator who faces allegations of regulatory capture. The High Court upheld the defendants' challenge to jurisdiction and dismissed the case on 13 December 2013; the plaintiffs have appealed against the decision to the Lagos Court of Appeal. There have been no consequential legislative changes in the antitrust provisions of the Nigerian Communications Act 2003 (NCA)[9] and the Competition Practices Regulations 2007.[10]

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Sections 90 to 94 of the NCA contain the antitrust provisions regulating anticompetitive conduct in the telecommunications sector in Nigeria. The relevant sections laying the foundation for private enforcement may be found in Section 91, which provides:

4 See Nigerian Civil Aviation Act 2006, Section 30(4)(i) and (r).

5 See Electric Power Sector Reform Act 2005, Sections 25 to 30, 32(2)(a) and (c), 32(3), 80 and 82.

6 NCC's Determination of Dominance in Selected Communications Markets in Nigeria dated 26 March 2010 and 25 April 2013 respectively.

7 The author is unaware of any published private antitrust enforcement lawsuit pending before any court of law in Nigeria or any that was already decided on the merit by any court other than the case referred to in this chapter.

8 Unreported, Suit No: FHC/IKJ/CS/215/2011 – Ruling of C J Aneke J, dated 13 December 2013.

9 CAP N97 Laws of Federation of Nigeria 2004.

10 S I No. 39 published in the Official Gazette of the Federal Republic of Nigeria No. 101 Vol. 94 of 7 December 2007.

> *91(1) A licensee shall not engage in any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market […]*
>
> *(4) A licensee shall not, at any time or in any circumstance, make it a condition for the provision or supply of a product or service in a communications market that the person acquiring such product or service in the communications market is also required to acquire or not to acquire any other product or service either from himself or from another person.*

The Competition Practices Regulation 2007 (CPR) also provides in part, in Regulations 11, 12(2) and 33 and the procedures contained in paragraph 17(b) and (d) of the Schedule to the CPR, the following:

> *11. The provision of section 91(3) of the Act prohibits Licensees from entering into agreements or arrangements which provide for rate fixing, market sharing, or any boycotting of a competitor, supplier or Licensee, while section 91(4), prohibits Licensees from requiring any person that acquires communications products or services, to acquire any other product or service, either from the Licensee or another person, or directing them not to acquire any other product or service either from the Licensee or another person.*
>
> *12(2) The agreements and practices identified in sections 91(3) and 91(4) of the Act are prohibited without the requirement of assessing their practical effects.*
>
> *33. Any person who contravenes any of the provisions of these Regulations, is in breach thereof and is liable to such fines, sanctions or penalties, including any penalties determined under the Enforcement Processes Regulations, 2005 or as may be determined by the Commission from time to time.*

Paragraph 17(b) and (d) of the Schedule to the CPR provides, *inter alia*:

> *On completion of a proceeding under these Regulations, the Commission may:*
> *[…]*
> *(b) issue a direction, making specific determinations, regarding specific circumstances or issues relevant to the proceeding, including the payment of any applicable compensation;*
> *[…]*
> *(d) refer any outstanding matters, to the Federal High Court or other identified authority that is competent to resolve the outstanding matters.*

Enforcement actions, therefore, can only arise following an established administrative determination of infringement of the above-mentioned antitrust provisions. Only in the rare situation where a regulator abdicates its statutory obligations to challenge antitrust violations would an aggrieved private person have a right to initiate declaratory private enforcement.

In the *Adewole* case, the plaintiffs alleged a violation of Section 91(3) and (4) of the NCA whereby the dominant mobile network operator in Nigeria, MTN, via the sponsorship of the renowned global television franchise show 'Who Wants to Be a Millionaire?' excluded other mobile network operators and their subscribers from

participating in the phone-in access service to the life-television show. The plaintiffs alleged they suffered *per se* antitrust harm from the deprivation of a normal opportunity to participate through a mobile phone operator of their own choice and to win money (prizes of up to 10 million naira) on the television show. The plaintiffs further alleged that this exclusionary practice, as agreed between MTN and the Franchisee Ultima (Nigeria) Limited, constituted a tying of the phone-in access service – an essential element of the television show – and reserved it exclusively to MTN, thereby constituting an exclusive dealing, boycott or market-sharing agreement between the sponsor and the franchisee. This practice continued for over nine years and still continues, with the regulator, the NCC, allegedly turning a blind eye by not initiating an investigation of its own accord. Plaintiffs further allege that, following a request by the plaintiffs to investigate the alleged conduct, the NCC ultimately found, against all empirical norms and antitrust convention, that the alleged conduct did not violate antitrust law. Given the absence of procedural fairness and transparency in the conduct of the regulator's investigation of the alleged conduct, coupled with outright violations of its own Regulations (CPR) and the long duration that it tolerated the alleged *per se* violations, the regulator was consequently sued for regulatory capture, having ostensibly ignored the alleged practice for so long.

Nigeria is a common law jurisdiction whose legal system applies the common law doctrines, principles of equity, and statutes of general application as applicable in England before 1900. Hence, the notion of justice and the adversarial modes of obtaining justice in regular superior courts are similar to those in England and other common law jurisdictions. By necessary implication, common law principles and case law precedents derived from it have persuasive forces applicable in Nigerian courts, and have to a large extent become parts of Nigerian jurisprudence in a variety of cases.[11]

There is an interplay between the regulatory and statutory antitrust framework described above and the common law in Nigeria. Every person is vested with a constitutional right of access to a court of law. The Constitution provides:

> *In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.*[12]

The most relevant common law principle for private enforcement of antitrust laws derives from the principles that (1) where there is law, there is a remedy (*ubi jus ibi remedium*) and (2) a person is entitled to reparation for any harm done to him by the one who caused the harm (*damni injuriae actio*). Generally, this common law right to damages is available in tort or contract. The right to recover compensation may also arise from statute or regulation. Therefore a violation of antitrust law resulting in harm constitutes a statutory tort. The ability to claim damages will depend on the type of harm

11 A demonstration of the application of the common law was featured in the case of *Shodeinde v. Trustees of Ahmaddiyya Movement In-Islam* (1980) 1–2 SC 163.

12 See Section 36(1) Constitution of Federal Republic of Nigeria 1999 (as amended).

suffered: a claimant may recover damages for actual loss (*damnum emergens*) or for loss of opportunity or profit (*lucrum cessans*).

The right to initiate private enforcement of antitrust infringement in Nigeria is limited by the statute of limitations.[13] In *Popoola Elabanjo v. Ganiat Dawodu*,[14] for example, the plaintiffs appealed to the Supreme Court against the decision of the Court of Appeal Lagos Division, delivered on 21 March 2001, in which the Court of Appeal set aside the ruling of the trial High Court on the basis that the plaintiffs' suit was statutorily time-barred.

Also the draft and adopted Federal Competition and Consumer Protection Bill contain antitrust provisions regulating anti-competitive conduct in the Nigerian markets. The relevant sections laying the foundation for private enforcement may be found in Part XVII, Sections 147 and 152, which provide:

> *Part XVII, S(147) Enforcement of rights by a consumer – A consumer may seek to enforce any right under this Act, a transaction or agreement, or otherwise resolve any dispute with an undertaking that supplied goods or services to the consumer by:*
> *(a) referring the matter directly to the undertaking that supplied the goods or services;*
> *(b) referring the matter to the applicable industry sector regulator with jurisdiction, if the undertaking is subject to the jurisdiction of any such sector regulator;*
> *(c) filing a complaint directly with the Commission; or*
> *(d) approaching a court with jurisdiction over the matter.*
>
> *Part XVII, S(152) Redress by Civil Society Groups – An accredited consumer protection group may:*
> *(a) commence or undertake any act to protect the interests of a consumer individually, or of consumers collectively, in any matter or before any forum contemplated in this Act; and*
> *(b) intervene in any matter before any forum contemplated in this Act, if the interests of consumers represented by that group are not otherwise adequately represented in that forum.*
> *(3) In addition to any other authority set out in this Act, an accredited consumer protection group may direct a generally stated concern or complaint to the Commission in respect of any matter within the purpose of this Act.*

III EXTRATERRITORIALITY

Extraterritorial application of antitrust laws in Nigeria is non-existent due to the absence of a national substantive antitrust law in Nigeria. Without a designated national antitrust authority, international cooperation to effectively address cross-border antitrust

13 Specific statutes may also limit the rights of action of a person, for example, the limitation of a right of action without one month's written notice to the Authority and the enforcement action to be taken within one year of accrual under the Nigerian Civil Aviation Act 2006 at Section 24(1) and (2).

14 (2006) 15 NWLR (Pt. 1001) 76; see also *Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd* (1992) 5 NWLR (Pt. 244) 675.

violations is not feasible. This remains one of the weak links in the fragmented sectoral antitrust laws applicable in Nigeria. For instance, despite the price-fixing findings of the UK Office of Fair Trading[15] against BA and Virgin Airways on the Lagos-London route,[16] which affected competitors but due to the Nigerian Civil Aviation Act lacking any provision dealing with extraterritorial application of the aviation antitrust provisions and the absence of any national antitrust statutes, Nigerian competitors such as Arik Airline remained without effective means to obtain redress in Nigeria. Statutory or common law exemptions for conduct by foreign parties or sovereigns occurring outside Nigeria is not cognisable by law.[17]

IV STANDING

The right or standing (*locus standi*) to institute a private enforcement of antitrust action in Nigeria as with most types of civil cases is governed by adjectival,[18] substantive[19] or the common law.

The Nigerian Supreme Court defined the term *locus standi* and its procedural consequences in denying the court of jurisdiction in *Emezi v. Osuagwu*.[20]

The standing or the legal right of the plaintiffs to institute an antitrust action was also challenged by defendants in *Adewole Abiodun Enitan & Anor v. Nigerian Communications Commission & 2 Ors (supra)*. The defendants in this case challenged the rights of the plaintiffs to bring the lawsuit. The court reasoned:

15 Now the Competition and Markets Authority.

16 On 17 November 2011 a BBC online news headline read: 'BA and Virgin faces fine by Nigeria's aviation authority'. In the online news item under reference, the Nigerian Civil Aviation Authority (the Authority) purportedly fined BA and VAA a combined sum of US$235 million for price collusion and exclusionary treatment (the Heathrow landing row) against Arik Airline, which allegedly infringed the Bilateral Air Services Agreement (BASA) between the United Kingdom and Nigeria. However, both BA and VAA rigorously denied the allegation on the basis that they did not break any Nigerian law and it was unclear to the public how the dispute was eventually concluded or resolved. Online searches conducted at the official website of the Nigerian Civil Aviation Authority (www.ncaa.gov.ng) reveal nothing in respect of the alleged case featured only by a foreign medium, BBC News. See also 'British Airways fined £58.5m for fuel price-fixing' at www.telegraph.co.uk/finance/newsbysector/transport retrieved on 23 June 2014.

17 The only way around to this is to institute an enforcement action in the country where the infringement took place; this sharply contrasts with the ability of the US DoJ to impose a larger fine on BA following the findings of the UK Office of Fair Trading in 2007.

18 See Order 3 Rule 2(a)–(c), 6 and 7 Federal High Court (Civil Procedure) Rules 2009.

19 See the Constitution of Federal Republic of Nigeria 1999 (as amended) at Section 36. While the substantive basis for initiating a telecommunication antitrust violations by private persons may be located at Sections 4(1)(b), 90, 94 NCA and paragraph 1 of the Schedule to the CPR

20 (2005) 12 NWLR (Pt.939) 340 at 367.

> *In plain terms, the Plaintiffs simply seek the Court determination of the extent of their rights with respect to the telecommunication competition laws of the Nigerian Communications Act 2003 and the Competition Practices Regulation 2007. Strictly, in my respectful view, the Plaintiffs are merely seeking the construction of the relevant provisions of the Nigerian Communication Act as have been set out above in this judgment and nothing more. I do not see what issues in controversy that will arise in the course of the Court's interpretation of the said provisions of the NCA. Accordingly, I hold that the Plaintiffs are persons claiming to be interested under a written contract,[21] i.e., the NCA and that they are entitled to apply by originating summons for the determination of any question of construction arising under the said NCA for a declaration of their rights and obligations.[22]*

Any person who is in imminent danger of coming into conflict with the law or whose business or other activities have been directly interfered with, by, or under a law has a sufficient interest to maintain an action in law.[23] In the context of enforcement of telecommunications antitrust infringement in Nigeria, there are two statutory limitations to bringing an action in court.[24] First, a person cannot apply to the court for a judicial review unless the mandatory pre-action requirements of the NCA are strictly followed. These requirements consist of requesting that the regulator provide in writing its statement of reason, which the regulator then provides to the aggrieved person, who shall request the regulator to review its decision. Where the aggrieved person is not satisfied with the review, he or she may apply to the court for a judicial review of the regulator's decision.[25] The application of these limitations will depend on the status of the defendant and the nature of the claim. Not all claims depend on the existence of stand-alone regulatory decisions (for instance cases calling only for the interpretation of any provision of the NCA for purposes of obtaining judicial clarity and/or relief); there

21 The insertion of the phrase 'written contract' here by the judge appears to be a slip, since no contract was between the parties, the action was neither founded in contract, the correct wording ought to have been 'an enactment or other written instrument' as contemplated at Order 3 Rules 6 and 7 of the Federal High Court (Civil Procedure) Rules 2009.

22 See p. 14 of Ruling of C.J. Aneke J, dated 13 December 2013 cited at footnote 6, *supra*.

23 See *Olawoyin v. A.G., Northern Region* (1961) 2 SCNLR 5.

24 These are contained in Sections 86 to 88 and 94(2) NCA.

25 This is because the NCA, in deserving cases, contemplates a full administrative decision-making process that must be exhausted up to the final review mechanism of the regulator before any aggrieved person shall have a right of access to a court of law over any given decision by the regulator. Non-compliance with the strict provisions of Sections 86 to 88 NCA has led to the courts striking out the plaintiff's cases. See the following cases: *Orakul Resources Limited v. Nigerian Communications Commission* (2007) 16 NWLR (pt. 1060) 270; *Nigerian Communications Commission v. MTN (Nigeria) Communications Limited* (2008) 7 NWLR (pt. 1086) 229 and *Blue-Chip Communications Company Limited v. Nigerian Communications Commission (Unreported)* Appeal No. CA/A/108/04 Lead Judgment delivered on 26 February 2008 by Oyebisi F Omoleye, JCA.

may be unique cases that stand on their own merit, peculiar facts and circumstances as was the case in *Adewole, supra.*

Second, NCA Section 94(2) requires the consent of the regulator for the private enforcement of the antitrust violation of the NCA; failure to comply may be deemed non-compliance with the pre-action condition for enforcing Part I of Chapter VI of the NCA, which may raise the issue of jurisdiction.

V THE PROCESS OF DISCOVERY

Parties have the right to obtain documents, written responses and testimony from each other and third parties in certain cases. The discovery process is governed by rules of evidence and rules of court. Some of the key aspects of the discovery process include notice to produce documents, front-loading of documents to be relied upon at the trial, and sometimes the common law doctrine of estoppel may also be applicable to the processes. The general limitation pertaining to privileges and confidentiality is also applicable.

VI USE OF EXPERTS

The use of experts, including economists, is allowed in civil proceedings in Nigeria. Whether an expert will be allowed to testify will depend on the pleadings of the party relying on the expert and whether the economic principles, documents or models to be explained in court are promptly front-loaded before the trial of the suit.[26]

VII CLASS ACTIONS

The rules of court applicable in the Federal High Court contain simple provisions as to how class actions are constituted,[27] but are restricted to three areas of substantive litigation: trademarks, copyright or patents, and design. It remains contestable whether class actions are permissive in cases not expressly listed by the rules of court. Class actions do have the benefit of saving time and the cost of repetitive litigation. The main requirements in Nigeria are: (1) the persons or members of the class must be ascertainable; (2) the need for the class be found; and (3) where these persons or class can neither be ascertained nor found, a finding that it is expedient for purposes of efficient proceedings that one or more persons be appointed to represent that person or class or members of the class, the judge may make the appointment. This is, however, subject to the right of any person to opt in or out of the class action.

26 Order 20 Rule 3 Federal High Court (Civil Procedure) Rules 2009 provides that, 'No document, plan, photograph or model shall be receivable in evidence at the trial of an action unless it has been filed along with the pleadings of the parties under these Rules, except the Judge in the interest of justice otherwise orders or directs.'

27 See Order 9 Rules 1, 4(1) (a)–(c) Federal High Court (Civil Procedure) Rules 2009.

VIII CALCULATING DAMAGES

In all damages cases in Nigerian courts, the court has unfettered discretion to determine the right to, and quantum of, damages based on the successful discharge of evidentiary burden, and on equity and reasonableness. Further taxonomy of damages applicable in Nigeria includes: general damages, special damages, and exemplary or punitive damages.[28] Attorneys' fees are subject to pleadings and judicial taxation and may be awarded at the discretion of the judge.

IX PASS-ON DEFENCES

Pass-on defences should be applicable in cases of price overcharges or undercharges that resulted in antitrust harm. Under the defence, the member of the distributive chain who was overcharged or undercharged passed on the allegedly excessive price adjustment and thereby suffered no damage. This defence would ordinarily be available to a defendant in antitrust proceedings in Nigeria as a common law defence. To date, however, pass-on defences have yet to be considered by any sectoral antitrust authority or court of law in Nigeria; due to the absence of any stand-alone proceedings to clarify or establish a substantive violation of antitrust laws.

X FOLLOW-ON LITIGATION

In addition, to date there has not been any follow-on litigation, which by definition must follow from a previous administrative or court determination. Sector regulators have yet to exercise their statutory responsibilities to rigorously monitor their respective markets and conduct rigorous competitive assessments that may lead to decisions from which subsequent private enforcement action may follow. There are no provisions in the Nigerian Constitution or any Nigerian law prohibiting follow-on litigation. Therefore, the right to bring a follow-on lawsuit appears to exist so long as there is no pending appeal on the stand-alone decision being relied upon by a claimant in a follow-on proceeding.

Notwithstanding the absence of Nigerian case law to demonstrate the nature and dynamics of follow-on litigation in Nigeria, the legal system allows recourse to the common law jurisdictions such as England for persuasive purposes and further guidance to the Nigerian courts. The case of *Enron Coal Services Limited v. English Welsh & Scottish Railway Limited*[29] (ESCL and EWS respectively), a follow-on suit from a decision by the Office of Rail Regulation (ORR), offers such a guidance. In that case, the ORR, as regulator for the rail industry in Great Britain, published a decision on 17 November 2006 which found that EWS was in breach of Article 82 of the EC Treaty (now Article 102 TFEU) and the Chapter II prohibition contained in Section 18 of the Competition Act 1998 (the Act). The ORR imposed a penalty of £4.1 million on EWS for the various infringements it committed. EWS did not appeal the decision and

28 See *Odiba v. Muemue* [1999] 10 NWLR (Pt. 622) 174 at 190.

29 [2009] CAT 36.

the fine having been paid, the ORR's decision is final. In the decision, the ORR found, *inter alia*, that EWS engaged in unlawful price discrimination against ECSL from May to October 2000. In particular, the ORR decided that EWS's discriminatory treatment placed ECSL at a competitive disadvantage in its contractual negotiations with EME relating to coal haulage supply to Fiddler's Ferry and Ferrybridge C power stations. ECSL sued on its own behalf and as assignee of a related company, Enron Capital and Trade Resources Limited. No issue arose in relation to ECSL's entitlement to sue. ECSL's case essentially was that it had been deprived of a real or substantial chance of winning a contract for the supply of coal to one of EME's power stations from 2001 to 2004 as a result of the infringement found by the ORR. ECSL estimated the value of that contract – and thus the amount of damages claimed – to be £19.1 million. EWS admitted (as it must) the infringement found by the ORR, but denied ECSL's monetary claim, stating that ECSL failed to prove that it was more likely than not that the abuse caused it to lose the chance of winning such an end-to-end contract. The issue of causation was, therefore, the focus of this litigation. The Competition Appeal Tribunal held that ECSL's claim against EWS for the loss of an opportunity to supply coal to EME's Ferrybridge C power station failed and was dismissed. The CAT further stated:

> *We are aware that is the first follow-on claim for damages to reach trial in this Tribunal and that it has been unsuccessful. We caution against any attempts to prejudge its importance or implications for the outcome of monetary claims in the future. It is axiomatic that each case must be assessed on its own facts. The burden of proving that the defendant's unlawful conduct caused the claimed loss rests on the claimant. On this occasion ECSL has simply failed to prove that the breach of statutory duty by EWS caused any claimed loss.*

Further appeal in the case to the English Court of Appeal[30] was also unsuccessful.

XI PRIVILEGES

Complementary to the previous discussions herein on discoveries, privileges in appropriate cases may be determined by a variety of circumstances including the status of the litigants (diplomatic or sovereign), nature of documents (confidentiality), or the relationships between the parties (such as raising a fiduciary relationship) all of which derive generally from the doctrines of the common law. It is therefore possible for Nigerian courts to accommodate attorney-client, attorney-work product or joint-work product defences on the ground of being privileged. However, it may be difficult to see how these privileges could be raised and upheld in substantive antitrust proceedings on the merit. This is because antitrust laws are prescribed by statute and it is elementary that the principles of common law cannot override statutory provisions dealing with the same subject matter in a legal proceeding.

30 See *Enron Coal Services Limited v. English Welsh & Scottish Railway Limited* [2011] EWCA Civ 2.

In context of telecommunications competition laws: the NCC has information-gathering powers pursuant to its enforcement functions as provided in Sections 64 to 67 NCA. It would appear from these provisions that no privileges may be raised to documentary or other evidential requirements in an enforcement proceeding commenced by the NCC (public enforcement). It is therefore doubtful whether a properly constituted court of law in a private enforcement lawsuit could preclude a defendant from raising any form of privileges to documentary and other forms of disclosure except such disclosures that have first been acted upon by the NCC.

XII SETTLEMENT PROCEDURES

The courts encourage parties to settle their disputes amicably out of court where the circumstance is appropriate.[31] In the Federal High Court, when the matter comes up in court for the first time, the judge may grant the parties up to 30 days to explore options for settlement, failing which the matter proceeds to trial. In jurisdictions such as Nigeria where the courts are often congested, voluntary settlement of disputes by parties helps to relieve the burden on the courts and saves the costs of litigation.

XIII ARBITRATION

Arbitration and alternative dispute resolution are voluntary dispute resolution processes that are now fast gaining prominence in Nigeria, particularly due to the long time taken to and expense of litigating cases in regular courts. Most commercial disputes as a matter of practice are now being expeditiously dealt with by arbitration rather than regular courts.[32]

XIV INDEMNIFICATION AND CONTRIBUTION

Although the principle of indemnity or contribution has yet to be considered in the context of antitrust law in Nigeria, the right to seek indemnification or contribution is likely to be recommended in the private enforcement of antitrust law against third parties, co-defendants or cross-defendants. Indemnification and contribution may be established where there are two or more defendants in the distribution chain or where there are more defendants with causative links to the antitrust harm. The probable practical limitation in the absence of existing case law precedent relates mainly to pleadings and evidentiary onus. In other words, a defendant cannot claim a right to contribution or indemnity from a third party, unless that party is first joined in the lawsuit. Similarly, where there are co-defendants and liability is established to be jointly the right to contribute or indemnify arises. By the same token, where the interests of

31 See Order 18 Rule 1, Federal High Court (Civil Procedure) Rules 2009.

32 The Lagos Court of Arbitration is a private sector independent centre for the resolution of disputes. Arbitration processes is governed by statutes – the Arbitration and Conciliation Act, CAP A18 LFN 2004 and the Lagos Arbitration Law 2009 as examples.

defendants are counter to one another and one settled pleadings or a counterclaim that established the liability of the other in the final judgment, the situation would warrant the right to contribution or indemnity subject to pleadings and the inclusion of the right to indemnity or contribution in the relief sought and the discharge of the evidential burden by the defendant claiming to be entitled to indemnification or contribution.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The future of antitrust development and enforcement is somewhat bleak in Nigeria due to the current weak capacity of sector regulators, low-level professional awareness, low-level public awareness, and the absence of a national substantive antitrust law or policy. Although the Federal Competition and Consumer Protection Bill 2013 has been transmitted to the National Assembly as an executive bill, until the law is passed the development of private antitrust enforcement in Nigeria remains no more than a mirage.

Chapter 20

PHILIPPINES

Patricia-Ann T Prodigalidad and Filemon Ray L Javier[1]

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.[2] Indeed, despite the clear state policy against combinations in restraint of trade or unfair competition[3] and the mandate to 'protect Filipino enterprises against unfair competition and trade practices'[4] 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 (the 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 Philippine President as a priority bill and finally signed into law on 21 July 2015.[5]

Like other models of antitrust legislation, the Competition Act covers not only acts of any person or entity engaged in any trade, industry and commerce in the Philippines but explicitly authorises its extraterritorial application. Thus, the Competition Act will be

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2 Act No. 3815, Article 185 (penalised 'Machinations in Public Auctions') and Article 186 (penalised 'Monopolies and Combinations in Restraint of Trade').

3 1987 Philippine Constitution, Article XII, Section 19.

4 Ibid., Article XII, Section 1.

5 Republic Act No. 10667.

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.[6] Proscribed as illegal are agreements, between and among competitors, (1) restricting competition as to price or components thereof, or other terms of trade and (2) fixing prices at auctions or in any form of bidding.[7] 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'.[8] All other agreements between or among competitors, which 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'.[9]

The Competition Act also prohibits an abuse of a market player's dominant position[10] as well as mergers and acquisitions,[11] where they substantially prevent, restrict or lessen competition.

To implement this legislation, the Competition Act creates a Philippine Competition Commission (PCC), an independent quasi-judicial body attached to the Office of the President of the Philippines.[12] The PCC, once established, 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[13] and is, thus, empowered to investigate violations thereof and other existing competition laws *motu proprio* or upon receipt of a verified complaint.[14] Significantly, included among its various powers is the authority of the PCC to conduct administrative proceedings[15] as well as institute appropriate civil or criminal proceedings.[16] To give teeth to the PCC's authority, the Competition Act expressly empowers the PCC to issue *subpoena duces tecum* and *subpoena ad testificandum* requiring the production of books, records or other documents or data; to summon witnesses; to issue interim orders such as show cause and cease and desist orders; and to deputise any and all government enforcement agencies or enlist the aid and support of any private institution, corporation, entity or association. In addition, the Competition Act recognises the continued existence of the

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(e).
16 Id., at Section 12(a).

Office for Competition under the Department of Justice (DOJ-OFC),[17] albeit with the limited power and jurisdiction of conducting preliminary investigation and undertaking the prosecution of all criminal offences arising under the Competition Act and other competition related laws.[18]

In relation to its power to conduct administrative proceedings and institute civil or criminal suits arising from the 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.[19] 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.[20] After due notice and hearing and on the basis of facts and evidence presented, the PCC may issue a cease and desist order against the respondent entity.[21]

Ultimately, the PCC will conclude its inquiry by either issuing a resolution (a) ordering the closure of the inquiry if no violation or infringement is found or (b) proceeding, on the basis of reasonable grounds, to the full administrative investigation.[22] Where warranted by the evidence, the PCC may also file a criminal complaint with the Department of Justice (DOJ).[23]

The law requires the PCC to complete its preliminary inquiry, in all cases, within 90 days reckoned from submission of the verified complaint, referral or date of initiation by the PCC.[24] Though drafted in mandatory terms, the Competition Act does not prescribe the consequences for the PCC's failure to complete the preliminary inquiry stage within the stated period.

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.[25] 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.[26] Unfortunately, the law does not prescribe the requirements for, as well as the procedure leading to, such civil

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 Id., at Section 45.

26 Id., at Section 12(a).

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.

In addition to administrative fines, the PCC may, upon finding that an entity has entered into an anticompetitive agreement or has 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.[27]

Violation of the Competition Act may also expose the erring persons to civil liability to private persons injured by reason thereof.[28] 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 the said section 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 laws'[29] and 'other competition related laws',[30] 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 will result in an increase in antitrust litigation – both public and private. However, it is only when the provisions of the Competition Act are clarified through more specific and detailed implementing rules and regulations[31] and interpreted by the courts, particularly the Supreme Court, that the parameters of private enforcement suits within the Competition Act will 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, though 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

27 Id., at Section 12(d) in relation to Section 12(h).

28 Id., at Section 45.

29 Id., at Section 12(a).

30 Id., at Sections 13 and 44.

31 Id., at Section 50.

contract law as provided in the Civil Code of the Philippines (the Civil Code)[32] (including the freedom of the parties to enter into contractual stipulations that are not contrary to law, morals, good customs, public order or public policy)[33] and basic fairness.

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.'[34] To be able to recover damages under Article 28 of the Civil Code, the following requirements must be met: (1) 'it must involve an injury to a competitor or trade rival', and (2) 'it must involve acts which are characterised as "contrary to good conscience", or "shocking to judicial sensibilities", or otherwise unlawful.'[35] Faced with the following conduct – the defendant suddenly shifting his business from manufacturing kitchenware to plastic-made automotive parts, the plaintiff's line of business; luring plaintiff's employees to transfer to his employ; trying to discover plaintiff's trade secrets; deliberately copying plaintiff's products; and even selling those products to plaintiff's customers – the Supreme Court, in 2014, affirmed that the defendant engaged in unfair competition for which the plaintiff was entitled to recover damages and attorneys' fees.[36]

As such, in the absence of an antitrust statute, Article 28 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, the civil case may generally be brought under Articles 19,[37] 20[38] and 21[39] 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.

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32 Act No. 386 (1950).

33 Civil Code, Article 1306.

34 *Willaware Products Corporaton v. Jesichris Manufacturing Corporation*, G.R. No. 195549, 3 September 2014.

35 Ibid.

36 Id.

37 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.'

38 Ibid., 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.'

39 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.'

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 in trade.[40] 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.[41]

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.[42] With respect to administrative and civil actions, the five-year prescriptive period runs from the time the cause of action accrues,[43] 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 Philippine legal system, prescribes within four years from the time the cause of action accrues.[44]

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

40 Competition Act, Section 55.

41 Ibid.

42 Id., at Section 46(a).

43 Id., at Section 46(b).

44 Civil Code, Article 1146.

conducting a preliminary inquiry into whether the acts of the allegedly erring person are anticompetitive and, thus, constitute unfair competition. In *GMA Network, Inc v. ABS-CBN Broadcasting Corporation, et al.*,[45] 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 complaint of GMA Network, Inc (GMA) alleges that the defendants took advantage of their common control and ownership and thereby arbitrarily re-channelled 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.[46] 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 (NTC), before which a similar complaint, also filed by GMA, was pending.[47] 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.[48] Thus, though regular courts have jurisdiction over actions for damages, per the Supreme Court, it would nonetheless be proper for the courts to yield its jurisdiction in favour of an administrative body with specialised expertise.[49]

The doctrine laid down in *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.

45 G.R. No. 160703, 23 September 2005.

46 Ibid.

47 Id.

48 Id.

49 Id.

III EXTRATERRITORIALITY

From a criminal law perspective, the Philippines adheres to the territoriality principle[50] such that its penal laws are generally enforced only within its territory.[51] 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 has a right, such right was violated by the defendant, and he incurred damages 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 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'.[52] Accordingly, wrongful 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 signed into law only 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. It is hoped that the implementing rules and regulations of the Competition Act will provide the much-needed elaboration of the extraterritorial scope of the Competition Act, a concept that deviates from the general territorial concept of Philippine penal laws.

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50 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.

51 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.'

52 Competition Act, Section 3.

IV STANDING

For private enforcement action 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.[53] 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.[54] 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'.[55] 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.'[56] A case that is not prosecuted by a real party in interest is dismissible.[57]

The requirement of *locus standi* of a party plaintiff has been relaxed by the Supreme Court[58] 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 which 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 of 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.

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:

i Deposition pending action[59]

Provided there is leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the 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.[60] The attendance of such witnesses at the deposition may be

53 Ibid., at Section 45.

54 Rules of Court, Rule 3, Section 2.

55 Ibid.

56 *Goco, et al. v. Court of Appeals, et al.*, G.R. No. 157449, 6 April 2010.

57 Ibid.

58 *Velarde v. Social Justice Society*, G.R. No. 159357, 28 April 2004.

59 Rules of Court, Rule 23.

60 Ibid., at Section 1.

compelled by the use of a subpoena.[61] As to the scope of examination, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject of the pending action.[62]

ii Interrogatories to parties[63]

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.[64] The scope of written interrogatories is the same as depositions pending action.[65]

iii Written request for admission[66]

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 (1) the genuineness of any material and relevant document described in and exhibited with the request, or (2) the truth of any material and relevant matter of fact set forth in the request.[67] 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.'[68]

iv Production or inspection of documents or things[69]

Upon motion of any party showing good cause therefor, the court in which an action is pending may (1) 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, 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 possession, custody or control, or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon.[70]

61 Id.
62 Id., at Section 2.
63 Id., at Rule 25.
64 Id., at Rule 25, Section 1.
65 Id., at Section 5.
66 Id., at Rule 26.
67 Id., at Section 1.
68 Id., at Section 5.
69 Id., at Rule 27.
70 Id., at Section 1.

v Deposition before action[71]

Even before a court case is commenced, a person who wishes to perpetuate his 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.[72] In such petition, which shall be served on all identified potential adverse parties, the petitioning party must state, among others, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it.[73]

The foregoing modes of discovery are devices (1) to narrow and clarify the basic issues between the parties, and (2) for ascertaining the facts relative to those issues,[74] 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,[75] 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.[76] 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 procedures.[77]

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 damages. 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.[78]

The Rules of Court authorises the admission of expert opinions – that is, opinions of a witness on a matter requiring special knowledge, skill, experience or training, which he is shown to possess.[79] And, courts have 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, persons with personal knowledge of the plaintiff's business and the defendant's unlawful conduct. For private

71 Id., at Rule 24.

72 Id., at Section 1.

73 Id., at Section 2.

74 *Security Bank Corporation v. Court of Appeals*, G.R. No. 135874, 25 January 2000.

75 Ibid.

76 *Ong v. Mazo, et al.*, G.R. No. 145542, 4 June 2004.

77 Ibid.

78 Competition Act, Section 33.

79 Rules of Court, Rule 130, Section 49.

enforcement under the Competition Act, it is highly likely that experts and economists will have to be engaged to provide, among others, 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.

VII CLASS ACTIONS

In the Philippines, when the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, 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.[80] In class actions, any party in interest shall have the right to intervene to protect his individual interest.

A class action is beneficial as it creates an impression that the effects of defendant's anticompetitive conduct are pervasive, impacting more than just one individual, which may influence the quasi-judicial officer or the judge hearing the case to rule against the defendant. Moreover, this may give the plaintiffs the opportunity to claim substantial, if not the maximum, amount of actual damages including exemplary damages as a matter of public good. Finally, prosecuting a damage 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, thus, would not create the required common or general interest in the subject matter.[81] 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 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.[82]

80 Ibid., at Rule 3, Section 12.

81 *Mathay, et al. v. The Consolidated Bank and Trust Company, et al.*, G.R. No. L-23136, 26 August 1974.

82 *Banda, et al. v. Ermita, et al.*, G.R. No. 166620, April 2010.

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.[83] 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, find application.

Under the Civil Code, among the damages recoverable, if proven by sufficient evidence, are actual, moral, nominal, temperate or moderate, or exemplary or corrective. Actual damages, which are awarded only when duly proved,[84] comprehend not only the value of the pecuniary loss suffered but also the profits that the plaintiff failed to obtain.[85] Attorneys' fees and litigation expenses are recoverable as actual damages and may be awarded in reasonable amounts[86] under certain circumstances including when the case is a separate civil action to recover civil liability arising from a crime.[87]

On the other hand, for moral, nominal, temperate, or exemplary damages, no proof of pecuniary loss is necessary for these to be awarded. The assessment of such damages is left to the discretion of the court, according to the circumstances of each case.[88]

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[89] that are the proximate result of the defendant's wrongful act or omission.[90] Moral damages are expressly recoverable in Article 28 unfair competition litigation.

Nominal damages are awarded to vindicate or recognise a right of the injured party, which has been violated, and not to indemnify him for any loss suffered.[91] 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 plaintiff's rights and in view of his failure to quantify its losses arising from defendant's acts of unfair competition (initially alleged as around US$44,000).[92] Temperate damages may be granted when the court finds that

83 Civil Code, Article 2202.

84 Ibid., at Article 2199.

85 Id., at Article 2200.

86 Id., at Article 2208.

87 Id., at Article 2208(9).

88 Id., at Article 2216.

89 Id., at Article 2217.

90 *Yutuk v. Manila Electric Co.*, G.R. No. L-13016, 31 May 1961.

91 Civil Code, Article 2221.

92 *Willaware Products Corporaton v. Jesichris Manufacturing Corporation*, G.R. No. 195549, 3 September 2014.

some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty.[93] An award of nominal damages precludes the recovery of temperate damages.[94]

Lastly, the Civil Code 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.[95] Exemplary damages are not a matter of right but left to the discretion of the court.[96]

Significantly, in 1917, the Philippine Legislature enacted Act No. 3247, entitled '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[97] 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.[98] 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.[99] 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 damages suffered by a purchaser, and thereby the damages he is entitled to claim, by reason of an overprice of a cartelised product are reduced or mitigated if he 'passes on' some of the overcharge to his own customers. Notably, however, an award of actual damages is intended to compensate the plaintiff for pecuniary loss actually suffered by

93 Civil Code, Article 2224.

94 *Ventanilla v. Centeno*, G.R. No. L-14333, 28 January 1961.

95 Civil Code, Article 2229.

96 Ibid., at Article 2233.

97 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.'

98 Revised Penal Code, Article 367.

99 See Competition Act, Sections 14 and 15.

him as he has duly proved[100] and covers any profits that he had failed to obtain.[101] 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 the damages resulting from the act complained of.[102] 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.

X FOLLOW-ON LITIGATION

With the Competition Act having just been signed into law and considering the PCC has yet to be organised, follow-on antitrust litigation is yet to materialise. Instead, private damage suits arising from anticompetitive conduct have heretofore 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,[103] it is highly likely that there will be a surge in follow-on litigation especially where the PCC has, after the termination of the preliminary inquiry or the completion of an administrative proceeding, determined that there is substantial evidence to conclude that the defendant has engaged in prohibited, if not criminal, anticompetitive conduct that violates the Competition Act. Significantly, the said competition law does not expressly bar the filing of a private damage 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, 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. With 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 terminate its preliminary inquiry, the 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.

XI PRIVILEGES

The Philippines strictly enforces the attorney–client privilege, particularly the lawyer's duty to maintain inviolate client confidences, which is mandated in the Code of

100 Civil Code, Article 2199.

101 Ibid., at Article 2200.

102 Id., at Article 2203.

103 Competition Act, Section 45.

Professional Responsibility.[104] Recognising this duty, the Rules of Court provide that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his 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 employer, concerning any fact the knowledge of which has been acquired in such capacity.[105] In the Philippines, an attorney who divulges the secrets of his clients may be subjected to disciplinary sanctions and possibly criminal penalties. The attorney–client privilege extends to any work product that the lawyer has provided his client and which the client and lawyer intended to remain confidential. The privilege, however, applies only to communication between the client and his counsel concerning a crime already committed and not one which the client intends to commit in the future.[106] This privilege may be raised to oppose 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 the 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.[107] Thus, it should necessarily follow that the ethical obligations in the Code of Professional Responsibility are similarly imposed on in-house lawyers.

Insofar as confidential documents and/or 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, the document or information is mandatorily required to be disclosed by law or by a valid order of a court or of a government or regulatory agency.[108] 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. Significantly, facts, data and information supplied in connection with a binding ruling, show cause order or a 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 binding ruling, show cause order of consent order.[109] 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.[110]

104 Canon 21.

105 Rules of Court, Rule 130, Section 24(b)

106 *People of the Philippines v. Hon. Sandiganbayan, et al.*, G.R. Nos. 115439-41, 16 July 1997.

107 *Cayetano v. Monsod, et al.*, G.R. No. 100113, 3 September 1991.

108 Competition Act, Section 34.

109 Ibid., at Section 37.

110 Id., at Section 36.

XII SETTLEMENT PROCEDURES

Private actions for damages, whether for antitrust claims or otherwise, are generally allowed to be settled.[111] 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.[112] 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 (CAM) as part of the pretrial process.[113] Should mediation fail, then 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.[114] 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[115] and, if not performed, may be enforced like a court judgment.[116] Under the provisions of Republic Act No. 9285 (or the ADR Act)[117] and Supreme Court issuances, the mediation proceedings are considered strictly confidential and, 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 their submission in the mediation).[118]

Though 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

111 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.

112 Ibid., Article 2034.

113 Supreme Court (SC) Resolution in A.M. No. 01-10-5-SC-PHILJA dated 16 October 2001.

114 SC Resolution in A.M. No. 04-1-12-SC dated 20 January 2004.

115 *Pasco, et al. v. Heirs of Filomena de Guzman, et al.*, G.R. No. 165554, July 26, 2010.

116 Civil Code, Article 2037.

117 ADR Act, Chapter 2 (Mediation), Section 9.

118 Ibid., at, Section 9(c). Note, however, exceptions to the confidentiality rule are found in Section 11 of the ADR Act.

shall summarily hear the petition and, where warranted, enforce the mediated settlement agreement.[119]

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.[120] Subject to the requirement of consent, therefore, such claims may be resolved through binding arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof.[121]

Arbitration of private antitrust suits with a seat in the Philippines may be domestic or international commercial arbitration. International commercial arbitration is governed by Chapter 4 of the ADR Act, which expressly adopts the UNCITRAL Model Law. On the other hand, 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 be vacated. Following the UNCITRAL Model Law, the grounds to vacate an international commercial award rendered in the Philippines are limited but include the so-called public policy exception.[122] Although domestic awards may be vacated on more grounds, the same does not specifically include a public policy exception.[123] This is significant because awards in antitrust suits may impact the state policy against anticompetitive conduct.

To date, the Supreme Court has not had the 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.[124] 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.

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119 Id., at Section 17.

120 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.'

121 Id., at Section 18.

122 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),

123 Id., at Sections 32 and 41 in relation to Republic Act No. 876, Section 24.

124 Civil Code, Article 2194.

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.[125] 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.[126]

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, called the third (fourth, etc.) party defendant for contribution, indemnity, subrogation or any other relief, in respect of his opponent's claim.[127]

Per the Supreme Court, a defendant may implead a third-party defendant (1) on an allegation of liability of the latter to the defendant for contribution, indemnity, subrogation or any other relief; (2) on the ground of direct liability of the third-party defendant to the plaintiff; or (3) the liability of the third-party defendant to both the plaintiff and the defendant.[128] In all cases, there must be a causal connection between the claim of the plaintiff in his complaint and a claim for contribution, indemnity or other relief of the defendant against the third-party defendant.[129] Thus, the Supreme Court prescribed the following tests to determine the propriety of a third-party complaint: (1) 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; (2) 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 (3) whether the third-party defendant may assert any defences which the third-party plaintiff has or may have to the plaintiff's claim.[130] Where there is no connection between the third-party claim and the plaintiff's claim (such as where the plaintiff's claim is defendant's non-payment of rentals for equipment leased under a contract and defendant's third-party claim is the third-party defendant's non-payment of its billings for construction work rendered using of the leased equipment), the third-party complaint may be dismissed.[131]

125 Rules of Court, Rule 6, Section 8.

126 Ibid.

127 Id., at Section 11.

128 *Asian Construction and Development Corporation v. Court of Appeals, et al.*, G.R. No. 160242, 17 May 2005.

129 Ibid.

130 Id.

131 Id.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In view of the recent enactment of the Competition Act, the anticipated developments in the area of antitrust will be related to the effective and expeditious implementation thereof. By express mandate, the PCC shall be organised within 60 days after the law's effectivity. Thus, the Chairperson and four Commissioners will necessarily have to be appointed by the President of the Republic of the Philippines by no later than the first week of October 2015.[132] Moreover, within 180 days from the Competition Act's effectivity, or by the start of February 2016, the PCC, in consultation with the DOJ-OFC and sector regulators shall promulgate the necessary rules and regulations (IRRs) to implement said law. Typically, these IRRs provide clarity, spell out the details and lay down the rules and procedures for the proper implementation, interpretation and application of the statute.

Moreover, the legal and compliance landscape of the Philippines is expected to be busy as the new law provides affected parties two years from the law's effectivity to renegotiate agreements or restructure their businesses to achieve compliance,[133] unless proceedings assailing the same have already been previously initiated. An existing business structure, conduct, practice or any act that is violative of the Competition Act, which is not cured or which continues upon the expiration of the two-year period, shall be subjected to administrative, civil, and criminal penalties.[134]

Further, with the recent enactment of the Competition Act, the field of Philippine antitrust litigation, both private and public, is expected to experience exponential growth. It must be noted that 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 alleged collusion among the distributor and suppliers in the wholesale electricity spot market aimed at artificially increasing the spot prices, to the disadvantage of the consumer. Although tainted with procedural defects, the Supreme Court has taken cognisance of the case and the DOJ-OFC was reported to have commenced investigating the allegations of collusion. With the Competition Act as law, these NGOs will likely initiate more suits for the protection of the consumers, even before any PCC inquiry can be commenced. In addition, with the information programme that the PCC is required to aggressively conduct, consumers may become more aware of their rights and may, considering the litigious nature of the Filipino people, initiate complaints with the PCC.

Lastly, 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.

132 The Competition Act was published on 24 July 2015 and became effective on 8 August 2015.

133 Competition Act, Section 53.

134 Ibid.

Chapter 21

PORTUGAL

Gonçalo Anastácio[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In Portugal there are limited public records of civil court cases dealing with competition law matters, which makes it difficult to either determine the number of pending or closed private enforcement cases, or assess information on the evolution of the importance of private enforcement within the overall system of competition enforcement. Nevertheless, there is some data and some empirical awareness indicating that private enforcement in Portugal is already a reality, comprising a sound number of precedents and gaining in significance. For example, two major follow-on cases are currently pending before the Portuguese courts, both based on recent decisions by the Portuguese Competition Authority (PCA) confirming abuses of dominant position.

The first case involves the members of the Portugal Telecom (PT) group, who were found by the PCA to have abused their dominant position in the wholesale and retail broadband access markets by means of a margin squeeze and a discriminatory rebate policy, and following which PT's clients launched two damages actions against the group in 2011.

The second case involves Sport TV, a Portuguese sports-oriented premium cable and satellite television network operating in the market for premium pay-TV sports channels, which were found by the PCA to have abused their dominant positon for several years by having imposed discriminatory conditions on operators, and concurrently

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having limited development and investment in the market. Following the decision, two separate damages actions were filed with the court, one of which is a class action, and representing the first of its kind in competition matters to be adjudicated in Portugal.

While the above cases remain pending, there have been no clear-cut[2] awards of damages on the grounds of competition law infringements to date.[3] There are, nevertheless, already many private enforcement precedents (even if competition law is typically only one of the legal angles in question) and the number is consistently increasing. In most cases, the competition rules were brought into litigation as a means of defence; most of the precedents have a vertical restraints' nature;[4] and often the validity of agreements or of particular clauses thereof is the leitmotif to call in competition law.

In addition, the work that the European Commission has carried out in this matter over recent years – culminating with Directive 104/2014 – has undoubtedly given greater visibility to the issue of private enforcement.

On a final note, the impact of the recent dramatic rise in state courts' fees in Portugal on potential claims for damages for competition infringements remains to be duly assessed.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

There is no specific Portuguese legislation (or rules) with regard to actions for damages arising from a breach of competition rules. The legislative framework for private antitrust enforcement in Portugal includes, besides the substantive rules on competition (laid down in the Portuguese Competition Law (PCL, approved by Law No. 19/2010, of 8 May)), the general rules on civil liability provided for in the Civil Code (CC)[5] and the procedural rules of the Code of Civil Procedure (CCP).[6]

Private actions may be brought on the basis of an infringement either of the PCL, or of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). Examples of such infringements may include: cartels (Article 9 of PCL and/or Article 101 TFEU); abuse of a dominant position (Article 11 of PCL and/or Article 102 TFEU); or abuse of economic dependence (Article 12 of the PCL).

An infringement of competition rules may lead to a civil action based either on the request for compensation for damages or on the request for the declaration of nullity

2 Leonor Rossi and Miguel Ferro refer to the existence of one precedent, with the caveat that it can be argued as essentially an unjustified enrichment case (*Revista de Concorrência e Regulação/Competition and Regulation*, No. 10, April–June 2012, p. 113).

3 There is already one very recent first instance precedent, specifically for damages, as regards the unfair competition regime, the so-called PIRC, under Decree-Law No. 370/93, of 29 October.

4 On these and other conclusions, see the above-mentioned paper.

5 The Portuguese Civil Code enacted by Decree No. 47344, of 25 November 1966, as amended.

6 The new Portuguese Code of Civil Procedure was enacted by Law No. 41/2013, of 26 June.

of an agreement or contractual clause deemed anti-competitive. Preliminary or definitive judicial declarations that a particular conduct or agreement is anti-competitive may also be requested. In any event, civil courts will have jurisdiction.[7]

The substantive law regarding actions for damages is set out in the CC, namely Article 483 et seq. (regarding the rules on liability for illicit acts) and 562 (on the calculation of awards of damages). In a claim for damages, the plaintiff will have to prove:[8] (1) the defendant's unlawful conduct including his or her fault or negligence; (2) the extent of the damage suffered; and (3) the causal link between the conduct and the damage. The burden of proof lies with the claimant/plaintiff and the burden of disproving the plaintiff's allegation lies with the defendant.[9] The judge bases his or her decision on the evidence produced and, when in doubt, decides against the party who bears the burden of proof.[10]

As regards limitation periods, there is a three-year time limit to bring an action for damages.[11] The time limit begins when the plaintiff becomes aware of his or her alleged right to a claim, regardless of his or her knowledge of the identity of the person liable or of the exact amount of harm suffered. Irrespective of the acknowledgment of the right to a claim, there is a 20-year absolute time limit to bring the action for contractual damages, starting from the date upon which the damage took place.[12]

The declaration of nullity of an agreement for breach of competition law is admissible according to Articles 280 and 294 of the CC and Article 9(2) of the PCL. The declaration of nullity will result in the return of what each party has provided to the other in the context of the invalid agreement, or the corresponding amount if such return is not possible.[13]

The applicable procedural rules for actions for damages as well as a declaration of nullity of an agreement or contractual clause are laid out in the CCP.

There is no specialised court for damages claims arising from competition infringements. A specialised Competition, Regulation and Supervision Court has recently been created in Portugal,[14] hearing appeals of PCA decisions at first instance.[15] It does not, however, decide on civil matters.

In the absence of a specialised court for private competition litigation, the competence to decide such matters lies with the judicial (general) courts. For actions relating to contractual issues, the court that has jurisdiction will be that which is located at the place where the defendant is domiciled, and in cases relating to actions for damages, the court that has jurisdiction will be located where the infringement of competition

7 Articles 61 and 62 of the CCP.

8 Articles 483, 487 and 563 of the CC.

9 Article 342 of the CC.

10 Articles 414 of the CCP and 346 of the CC.

11 Article 498 of the CC.

12 Article 309 of the CC.

13 Article 289 of the CC.

14 Decree Law No. 67/2012, of 20 March.

15 Article 84(3) of the PCL.

rules occurred.[16] Decisions of the judicial courts are reviewed by the relevant court of appeals, and decisions of the court of appeals can be reviewed by the Supreme Court of Justice, but on matters of law only.[17]

III EXTRATERRITORIALITY

The PCL applies to all anti-competitive practices that take place on Portuguese territory or that have, or may have, an anti-competitive effect in Portugal.[18]

The applicability of Portuguese law in cases of private enforcement concerning non-contractual obligations is regulated by Regulation (EC) No. 864/2007 (the Rome II Regulation) and concerning contractual obligations by Regulation (EC) No. 593/2008 (the Rome I Regulation).

As concerns damages actions, the law applicable to extracontractual civil liability, pursuant to the Portuguese CC,[19] 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 his or her act or omission could result in damage in that state.

Contractual liability cases are, according to the Portuguese CC,[20] ruled by the law agreed to 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, if they do not reside in the same state, the law of the state where the contract was signed.

Regarding the territorial jurisdiction of national courts, Regulation (EC) No. 44/2001 (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Lugano Convention[21] 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. The general grounds for the attribution of international jurisdiction to Portuguese courts are: (1) the possibility of bringing the action in Portugal, according to the Portuguese rules on territorial jurisdiction;[22] (2) the fact that the main ground of the action, or any of the facts substantiating it, occurred in Portugal; and (3) the fact that the right claimed cannot be effectively enforced in courts other than the Portuguese courts, provided there is a relevant link, of objective or

16 Article 71 of the CCP.

17 Articles 68, 69 and 671(1) of the CCP.

18 Article 2(2) of the PCL.

19 Article 45 of the CC.

20 Articles 41 and 42 of the CC.

21 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007).

22 Territorial jurisdiction is regulated in Articles 70 through 84 of the CCP.

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.[23]

IV STANDING

There are no special rules in relation to the standing requirement in order to bring competition law actions. According to the general rules on liability,[24] any legal entity or natural person who suffered harm within the Portuguese territory as a result of an unlawful act has the right to be compensated for the harm suffered. Therefore, to have standing to bring an action for damages in relation to breach of competition law, a plaintiff must allege to have suffered harm as a consequence of an anti-competitive conduct within the Portuguese territory.[25]

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 having suffered harm as a result of an infringement of competition law.

V THE PROCESS OF DISCOVERY

Under Portuguese law, there is no discovery procedure as it is understood in common-law systems.

The courts have a discretionary power to request from any of the parties or third persons the disclosure of information which the court may consider important to the final decision of a given case.

On a request by any party to the proceedings, the court may order the opposing party or any third person to present any kind of document necessary to prove the alleged facts.[26] The requesting party has to identify, as accurately as possible, the document required and the facts he or she intends to prove with such document. The court may refuse the request if it considers that the document is not relevant to the decision.

The court may also, *ex officio*, order other documents to be submitted, if it considers them necessary to uncover the truth or to prove facts relevant to the case.[27] Documents may be requested from the parties, or from third parties such as the PCA.

Unless it is considered justifiable on the grounds provided for in the law (including so as to avoid a violation of privacy or professional secrecy),[28] a refusal to comply with

23 Articles 59 and 94 of the CCP.

24 Article 483 of the CC.

25 Articles 11 and 30 of the CCP.

26 Articles 429 and 432 of the CCP.

27 Article 436 of the CCP.

28 Article 417(3) of the CCP.

the court's order will result in the sanction of a fine.[29] If one of the parties refuses to cooperate, the court will freely assess the meaning of such refusal and may reverse the burden of proof.[30]

In case of follow-up litigation, access to the PCA's files may be deemed necessary or useful by the parties to prepare either their action for damages or their defence. Such access is regulated in Articles 32 and 33 of the PCL. According to those rules, private parties may claim access to the PCA's file so long as the file is not protected by judicial secrecy.

If the proceedings are not covered by judicial secrecy (which is the general rule according to the principle of publicity), any person with a legitimate interest may request access to the file. The accessibility of a file involves the right to peruse, and obtain copies, extracts and certified copies of any part of the file, excluding documents or extracts that have been declared confidential by the PCA.

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.[31] A defence hearing with the party to whom it is opposed is required.[32]

Expert evidence is admissible[33] and can be very useful when dealing with specific matters. 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. The court may request, for example, the expertise of an institution, laboratory or appropriate official service or, if this is not possible, the expertise of a sole expert appointed on the grounds of competence and recognition of the matter on which the expertise has been requested. The probative value of the expert evidence is left to the appreciation of the judge.[34]

Despite the lack of experience in Portugal concerning the use of experts in the context of an action for damages 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.

29 Articles 417(2), 430, 433 and 437 of the CCP.

30 Articles 417(2) of the CCP and 344(2) of the CC.

31 Article 411 of the CCP.

32 Article 415 of the CCP.

33 Article 467 et seq. of the CCP and Article 388 of the CC.

34 Article 389 of the CC.

VII CLASS ACTIONS

The form of class action available for damages claims is the 'popular action' (*ação popular*) established in Article 52 of the Constitution of the Portuguese Republic (CPR) and regulated by Law No. 83/95, of 31 August. According to that law, any citizens (companies and professionals being excluded) or any associations or foundations promoting certain general interests have the right to file a popular action in order 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 promotion and the respect of competition can be considered to be a general interest and therefore can constitute grounds for a popular action and the claim for a compensation for harm suffered as a consequence of the infringement of competition rules.

The system provided for in the above-mentioned law may be considered to be an opt-out. The 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 or not they accept representation in that action.

This type of action continues to be very rare, but, in March 2015, a landmark follow-on class action for damages was filed in civil court, based on a June 2013 decision by the PCA. In this decision, the PCA imposed a fine of €3.7 million on Sport TV, having found that the Portuguese television network 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.

The class action was the first to be brought by the *Observatório da Concorrência*, an association that represents consumers in class actions related to competition infringements, and was initiated under the 'popular action' law, utilising the applicable procedural rules provided for in the Code of Civil Procedure. The damages being claimed equate to the extra price that was paid by consumers for acquiring the services of the retail pay-TV market, as well as for injuries suffered by all subscribers of pay-TV in Portugal, due to Sport TV's practices limiting competition, innovation and development in the market, to the detriment of consumers.

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.

VIII CALCULATING DAMAGES

According to Portuguese law,[35] natural restoration or monetary compensation can be awarded following a successful claim for breach of competition law. Monetary compensation is available whenever the natural reconstitution of the claimant's situation as it was before the illicit act occurred is impossible, insufficient or too expensive.

35 Article 562 et seq. of the CC.

Damages awarded are thus 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 which 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, which provides a relevant degree of uncertainty as to the calculation of damages. 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 such an event, the judge may decide in accordance with equity, within the limits of the evidence produced.

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.

Interest is calculated from the moment the harm occurred until the moment the indemnity is paid[36] and the interest rate is fixed by law.

Contingency fees are not allowed, as the by-laws of the Bar Association[37] 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: importance and complexity of the cause, urgency of the matter, time spent and, to a certain extent, results obtained.[38]

IX PASS-ON DEFENCES

Under Portuguese law, there is no express provision allowing for or prohibiting the defendant from arguing that the harm allegedly suffered by the plaintiff has been passed on to a third party.

However, the passing-on defence may be deemed admissible as a defence before national courts in a competition law dispute under the rules on the calculation of damages and unjustified enrichment.

36 Articles 805(2) and 806(1) of the CC.

37 Law No. 15/2005, of 26 January.

38 Article 101 of the by-laws of the Bar Association.

The objective underlying damages awards, under Portuguese law, is to compensate the injured party only for harm suffered. When calculating an award for damages to the plaintiff, the judge shall take into account the exact extent of harm suffered. Provided that the defendant is able to prove that the plaintiff transferred the damage, or part thereof, to a third person, (the pass-on defence), the judge shall not award the plaintiff 'passed-on' damages. Furthermore, if the plaintiff is awarded a sum of damages which goes beyond the harm actually suffered, there will be a situation of unjust enrichment, which is prohibited under Portuguese law.[39]

X FOLLOW-ON LITIGATION

Judicial proceedings and administrative proceedings before the PCA are completely independent from each other, according to the constitutional principle of the separation of powers.

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 competition rules irrespective of any previous decision already issued by the PCA on the same matter and relating to any other pending proceedings.

Also, there are 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.

When a decision by the PCA has already been issued, it is not binding on the civil courts deciding on the same matter. Even if the finding of an infringement by the PCA may be regarded as *prima facie* proof, and even if it can be said that the courts tend to follow the technical rationale of that finding, the plaintiff (with whom the burden of proof lies) must still prove the existence of an anti-competitive practice before the court.

If a defendant has, within a previous administrative proceeding, applied for immunity or a reduction of fines in the scope of the PCA's leniency programme,[40] he or she is not exempt from paying compensation for the harm caused within the scope of a private follow-on action for damages. The leniency applicant is also not exempt from the applicable rules on joint and several liability.

The judicial limitation period is different from the administrative limitation period (i.e., for the PCA to initiate proceedings), which can make it more difficult in practice for the plaintiff to usefully conciliate both 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 years.[41] There are no special rules on the beginning, duration, suspension or interruption of limitation periods to allow for conciliation

39 Article 473 of the CC.

40 Article 75 et seq. of the PCL.

41 Article 74 of the PCL.

between judicial and administrative proceedings, however, there may be a judicial notice served. It is therefore possible that the limitation period for claims for damages will have already started or even run out before the PCA decides on the same matter.

The possibility for a Portuguese civil court to delay its proceedings until a decision is issued by the competition authority on the same matter is not provided for in Portuguese law. Courts may decide to delay the proceedings for a certain period of time, but the limitation period remains an important obstacle to long stay periods.

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.

The Lisbon Court of Commerce (which was competent to judge the appeals from the PCA's decisions before the recent creation of the Court of Competition, Regulation and Supervision) declared, when deciding on an appeal from a PCA's decision, that external lawyers and in-house counsel should be treated equally for legal privilege purposes.

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 have declared some documents as confidential on the grounds of its obligation to protect business secrets[42] or otherwise confidential information, including professional secrets[43] (attorneys, medical doctors, bank secrecy, etc.).

Also, documents submitted within the scope of a leniency application are protected during the administrative proceedings.[44] The PCA shall declare the 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. The access to those documents and information is granted to 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.

In general terms, the protection of leniency documents provided for in Directive 104/2014 is already contemplated in the Portuguese legal system and does not need transposition measures. As regards joint and several liability, the rule is set out in the

42 Article 195 of the Criminal Code.

43 Article 195 of the Criminal Code and Article 87 of the Bar Association by-laws.

44 Article 81 of the PCL. Here it will surely be very relevant the *Pfleiderer* doctrine. For a Portuguese language review and comment on the 2011 *Pfleiderer* ruling by the ECJ see Catarina Anastácio in C&R – Revista de Concorrência e Regulação, No. 10, April–June 2012, pp. 291–314.

Civil Code for infringements in which multiple companies take part and therefore the rule provided in Article 11/1 of the Directive already exists. The same is, however, not true for the two exceptions provided for in Article 11/2 and 11/4 of the Directive: at this point in time there is no limitation to the joint and several liability of the immunity recipient; and this will be a rather challenging and interesting point to follow as the Directive is applied in Portugal (notably as the exceptions create conflicts with classic rules and principles of extracontractual liability).

No protection exists in relation to documents issued in a proceeding before the PCA which has ended in a settlement decision.[45]

Note that the entire file may have been declared to be under judicial secrecy by the PCA.[46] In that case, third parties (namely plaintiffs in an action for damages) may only be allowed to access the file after the final decision has been issued.[47]

XII SETTLEMENT PROCEDURES

Unlike public enforcement by the PCA,[48] there is no specific judicial settlement procedure available within the scope of a damages action.

According to the Portuguese CCP, parties can reach a settlement both before and during a court proceeding,[49] provided that no non-disposable rights are involved.[50] 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).[51]

Any settlement between the parties during a court proceeding shall be subject to confirmation (*homologação*) by the court in order to have the value of a judicial ruling.

XIII ARBITRATION

Competition law issues can be resolved through private arbitration[52] and, despite the fact that arbitration is in principle not public, there seems to be a number of precedents[53] and

45 Outside the leniency regime, protection for documents follows the general rule, as established in Article 30, 32 and 33 of the PCL.

46 Article 32(1) of the PCL.

47 Article 32(2) of the PCL.

48 See Articles 22 and 27 of the PCL and respective commentaries by Gonçalo Anastácio/Marta Flores and Gonçalo Anastácio/Diana Alfafar respectively, in Lei da Concorrência Anotada, Comentário Conimbricense, Almedina, 2013.

49 Article 283 of the CCP.

50 Article 289 of the CCP.

51 Article 594 of the CCP.

52 See Law No. 63/2011, of 14 December – the Arbitration Law.

53 See Leonor Rossi and Miguel Ferro (Revista de Concorrência e Regulação/Competition and Regulation, No. 10, April–June 2012, p. 93 and note 4).

at least one significant arbitral decision – appealed to 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 agreement) or to events that may occur in the future whether arising from a contractual or non-contractual relationship (arbitration clause).[54]

Arbitrators shall decide in accordance with the law, unless the parties have authorised them to decide according to equity (*ex aequo et bono*).[55] 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.[56]

Arbitration procedures are confidential unless otherwise decided by the parties;[57] appealed to the state courts;[58] or subject to enforcement actions[59] by a state court (as state proceedings are public by nature).[60]

XIV INDEMNIFICATION AND CONTRIBUTION

Under Portuguese law, there is joint and several liability in relation to actions for damages.[61] Therefore, if the damage was caused by several persons, the plaintiff may recover the full amount of damages from any one of them. One defendant shall pay the full award and then retains a right of redress against the other defendants, claiming the corresponding parts from them. The contribution of each infringer is determined by the court on the basis of its individual guilt (which is presumed equal for all the defendants) and the effects arising from it.

54 Article 1(3) of the Arbitration Law.

55 Article 39 of the Arbitration Law.

56 Article 39(4) of the Arbitration Law.

57 Article 30(5) of the Arbitration Law.

58 Article 46 of the Arbitration Law.

59 Article 47 and 48 of the Arbitration Law.

60 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 & 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/Competition and Regulation, No. 11/12, July–December 2012, pp. 196–213.

61 Article 497 of the CC.

XV FUTURE DEVELOPMENTS AND OUTLOOK

To date, no legal rules have been adopted in order to facilitate private antitrust enforcement in Portugal.

Instead, the general legal framework applicable to civil liability and invalidity of contracts in principle provides sufficient tools for private antitrust enforcement in Portugal. However, some relevant cultural and technical obstacles remain, although they are by no means exclusive to Portugal.

As the European Commission concluded after years of assessment, specific legislation would be the most appropriate instrument to foster private antitrust enforcement, in particular in relation to actions for damages arising from competition law infringements.

The approval of Directive 104/2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, and its implementation by the Member States, will therefore surely represent a major step towards a more robust system of antitrust private enforcement.

However, several challenges connected to the transposition of the Directive 104/2014 still exist in Portugal. The major remaining structural issues concern whether (1) the scope of Directive 104/2014 should include infringements that do not have an effect on trade between Member States and, therefore, do not fall within the scope of Articles 101 and 102 of the Treaty; and (2) competence to judge damages actions related to competition infringements should be left with the civil courts, or given to the specialised Competition, Regulation and Supervision Court created in 2012.

In addition, several innovative provisions in the legal system are particularly challenging for Portugal due to the specific procedures contained in Articles 12/1 and 15/1. These include the provision on the binding effect of the competition authority's decisions; the provision on joint and several liability in derogations; the provision on limitation periods; and additional provisions on the burden of proof.

There are also leniency concerns related to Article 6/6 of Directive 104/2014. Although the protection of leniency documents provided for in Directive 104/2014 is already contemplated in the Portuguese legal system, the Portuguese Competition Act leniency programme covers all types of cartels, while the protection afforded to leniency statements by the Directive is confined to an application by a participant in a secret cartel. Also, Portuguese competition law extends protection to all documentation and information submitted in the scope of a leniency application, which is broader than the protection provided for in the Directive (which only covers the leniency statement itself). And finally, Directive 104/2014 does not allow for the disclosure of leniency documents, which is permitted under Portuguese competition law if authorised by the leniency applicant.

Additionally, the dramatic increase of court fees in Portugal – as a consequence of the financial crises of the country and respective international bail-out – poses a serious constraint to actions for damages as it very much increases the financial risk in bringing such actions. Such increased risk (the extent of which is yet to be determined), together

with the uncertainty of outcome due to factors such as the lack of precedents and the passing-on defence, may indeed act as a powerful deterrent to the development of actions for damages in the country.

Considering the above and that there is only so much public enforcement any competition authority can do and the importance of private enforcement for the overall level of compliance with 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 consistently increasing and its leniency programme is starting to bear fruit (and 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, supporting private enforcement[62] as a key complementary dimension of its mission.

62 This could, *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 *amicus curiae*; quantification of damages within the public enforcement cases (already done in limited cases); and development of the training for judges and other magistrates that has been done in the last decade.

Chapter 22

ROMANIA

Silviu Stoica, Mihaela Ion and Laura (Bercaru) Ambrozie[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The basis for private enforcement of competition law in Romania is Act No. 21/1996 (the Competition Act). Currently, the Competition Act is primarily enforced by the Romanian Competition Council (the Council). Even after the major amendments to the competition legal framework in 2011 and continuous attempts of the Council and other public authorities to increase awareness among consumers, there is still not much private antitrust litigation in Romania, mainly because consumers harmed by anti-competitive practices are still reluctant to file such actions.

In fact, the national courts have dealt with only two private litigation cases on antitrust matters (i.e., stand-alone actions).[2] In both cases the first instance court stated that the claimants did not prove the breaches of the Competition Act and the actions were dismissed for being ungrounded. Currently, one of the cases is pending before the High Court of Cassation and Justice. In the other case, the Bucharest Court of Appeal allowed the appeal and obliged the defendant to pay the plaintiff approximately €930,000 as indemnification, but this decision can be further appealed before the High Court of Cassation and Justice. At the time of writing, we are eagerly awaiting the reasoning of the court, since it will be the first one of this kind.

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2 According to OECD's Working Party No. 3 on Co-operation and Enforcement – 'Relationship between public and private antitrust enforcement' – Romania, 15 June 2015.

The past few years have not brought any significant amendments to domestic legislation on private enforcement of competition. Nevertheless, the new Directive[3] is expected to substantially amend our national legal framework.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The Competition Act prohibits:

a any express or tacit agreement between undertakings or associations of undertakings, any decisions taken by the associations of undertakings and any concerted practices that have as subject matter or effect the restriction, prevention or distortion of competition on the Romanian market or on part of it; and

b 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 anti-competitive deeds, may harm the business activity or consumers.[4]

The national basis for private competition law litigation is represented by the Competition Act and the Council Regulation on the analysis of and solving complaints regarding the breach of Articles 5, 6 and 9 of the Competition Act and Articles 101 and 102 of the TFEU[5] (the Regulation).

Article 64 provides the general framework for the private enforcement of the Competition Act, stating that both legal and natural persons harmed as a result of anti-competitive practices are entitled to seek relief in court. This principle is further developed in Article 10 of the Regulation,[6] which states that claims for damages may be filed by persons affected by an anti-competitive behaviour both directly and indirectly (for instance, persons who purchase goods and services from directly affected persons).

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3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance as it was published in Official Journal No. L 349 of 5 December 2014.

4 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.

5 Approved by Council's President Order No. 499/2010.

6 The courts are also competent to defend the rights of natural and legal persons regarding complaints resulting from the violation of Articles 5 and 6 of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Considering European Commission recommendations, the Competition Council encourages claims filed by persons affected by anti-competitive actions and behaviours, in view of rectifying the suffered damages. The courts may decide upon the validity or nullity of the concluded agreements and solely may grant compensations to natural and legal persons if

Regarding the date on which these claims may be filed, according to the Regulation, claims may be filed both before (stand-alone actions) and after the issuance of a sanctioning decision by the Council (follow-on actions). The Competition Act does not expressly provide that the follow-on actions may be based on a European Commission decision.

While, based on the prioritisation principle, the Council may decide which of the matters submitted is more urgent and important, the courts have the obligation to rule on all matters submitted to them. In particular, the courts can rule on the validity or voidance of agreements and have exclusive subject matter jurisdiction over the awarding of damages to individuals in cases of violations of Articles 5 and 6 of the Competition Act and Articles 101 and 102 of the TFEU.

The courts can award damages for losses caused by the infringement of the above-mentioned articles and can order protective actions and award costs of private competition litigation; they can also rule on matters concerning payment or fulfilment of contractual obligations on the basis of an agreement reviewed under Article 5 of the Competition Act and Article 101 of the TFEU.

The competition legislation also establishes the deadline for filing claims for follow-on actions, the removal of the joint and several liability of companies that enjoyed immunity from fines and the courts' right to request the Council the investigation file based on which the sanctioning decision was issued.

The specific validity conditions of the relevant legal actions and applicable procedural rules are found in the Romanian Civil Code (the Civil Code)[7] and the Romanian Civil Procedural Code (CPC).[8]

According to the CPC's general rules, jurisdiction will belong to first-tier courts (local courts) or second-tier courts (district courts), depending on the value of the claim. More precisely, where the value exceeds 200,000 lei, the district court will be competent and lower values go to the local courts.

As regards territorial jurisdiction, lawsuits should be filed with the local courts corresponding to the defendant's address or main place of business, or the place where the damage was caused or where the anti-competitive practice took place. Moreover, we must consider the provisions of Council Regulation (EC) No. 44/2001 (on jurisdiction, the recognition and enforcement of judgments in civil and commercial law) under which claimants can bring an action in the courts of the state where the defendants are domiciled or in the courts of the state where the harmful event occurred.

Articles 5 and 6 of the Competition Act and Articles 101 and 102 of the TFEU are infringed. In order to ensure the complete effectiveness of the rules in competition matters, any person may request compensations for the prejudices caused by an agreement or behaviour likely to distort the competition.

7 The current Civil Code entered into force on 1 October 2011.

8 The current Civil Procedural Code entered into force on 15 February 2013.

Private competition law actions have the nature of tort actions, being subject to the following principles:

a any person responsible for any conduct (practice, act or deed) that caused damage to another person has the obligation to repair the damage;

b 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; and

c the losses caused by the infringement are to be recovered in full, including the effective loss (*damnum emergens*), lost profits (*lucrum cessans*) and expenses incurred for avoiding or limiting the prejudice.

In order to be compensated for the damage, the victim of an illegal conduct (including anti-competitive practices) will have to prove that all of the following conditions triggering tort liability are met:

a an infringement has occurred (including an act or practice prohibited by the national or EU competition rules);

b the defendant's fault, regardless of its form (negligence, wilfulness);

c the damage caused to the claimant; and

d the link between the infringement and the damage caused to the claimant.

In case of stand-alone actions, the burden of proof for the infringement of the competition legislation and the harm caused to a person lies with the plaintiff. On the other hand, with respect to follow-on actions, the infringement of the competition legislation which has been established by a definitive decision of the competition authority no longer needs to be proved. This distinction has also been adopted by the new Directive, which establishes that finding of an infringement by a competition authority or court should not be subject to litigation in a subsequent damages action. Moreover, if the claim is brought in the same state where the authority or court made the finding, such finding will be full proof of an infringement. Therefore, where a definitive decision of the competition authority states that an infringement has occurred, the first condition is met and the claimant only has to demonstrate points (b) to (d).

According to the general limitation rules, damage claims must be brought within three years in case of stand-alone actions, starting from when the plaintiff knew or should have known of both the damage and the person responsible for it. For follow-on actions, the statute of limitation is different, namely actions must be brought within two years 'as of the date when the Council's sanctioning decision becomes final'. Given that the Council commonly sanctions more undertakings through one decision, there are discussions regarding the commencement of the limitation period. The Council's decision may become final for each undertaking at different times depending on whether the undertaking challenges the decision in court or files for appeal and according to the duration of each court proceeding corresponding to each undertaking.

III EXTRATERRITORIALITY

The Competition Act is clear on its extraterritoriality effects, applying to anti-competitive acts and practices committed by Romanian or foreign undertakings in Romania, or

committed abroad but having effects in Romania; therefore, nationality or location has no relevance as long as the infringement has effects in Romania. Based on the aforementioned 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.[9] In all cases, the Council imposed the fine directly on the foreign undertakings.

In practice, although the Council has the power to apply the Romanian competition law to foreign undertakings, obtaining evidence from them was a challenge. The Council's efforts to obtain cooperation[10] from the competition authorities from the countries where the parties originated were thwarted because the cooperation conditions are not met when the infringements affect only Romania. The Council, therefore, must seek information from the defendants through diplomatic channels, sending them requests for information through the Romanian Foreign Ministry and the Ministry's foreign counterparts. A serious question remains, as to whether the sanctioned foreign undertakings can eventually be forced to pay the fine imposed on them.[11] The same issues are likely to cause uncertainty in connection with private enforcement of competition law involving a foreign undertaking.

IV STANDING

The claim of relief in courts is governed by Article 64 of the Competition Act and Article 10 of the Regulation, according to which both the persons directly and indirectly affected by an anti-competitive behaviour may bring a private antitrust action in order to seek compensation for any damages incurred due to a prohibited practice according to the provisions of the Competition Act or of Articles 101 or 102 of the TFEU.

In 2010 and 2011, amendments of the Competition Act provided the Council the role of *amicus curiae*, giving it the power to issue observations to courts in particular in cases where national and European competition rules are applied. These observations may be issued by the Council *ex officio* or at the courts' requests.

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 the judge considers that it is necessary to involve third parties in the case, he or she will bring up this issue to the parties. In case the parties do not request the intervention of such third parties and the judge considers that the case cannot be solved without their participation, he or she will dismiss the case without giving any ruling on the substance.

The Competition Act expressly provides the Council's right to intervene in competition cases before national courts. Nevertheless, the Council lacks the tools to

9 Council's Decision No. 51/2011, Council's Decision No. 99/2011, Council's Decision No. 44/2013, Council's Decision No. 58/2013.

10 The OECD Peer-Review on Competition law and policy in Romania issued in 2014 expressly mentions only the Council's gathering of evidence in the investigations finalised through Council's Decision No. 99/2011 and Council's Decision No. 44/2013.

11 According to OECD Peer-Review on Competition Law and Policy in Romania issued in 2014.

gather information about pending cases. Oddly, domestic legislation obliges national courts to report cases involving European competition law to the Council (which forwards the information to the European Commission), but it does not provide for an equivalent obligation to inform the Council about cases involving Romanian competition law.[12]

V THE PROCESS OF DISCOVERY

Under the Romanian legal system, unless otherwise provided by law, evidence is submitted by the parties in courts under strict judicial control. The evidence may be also exchanged between them by lawyers, including legal counsel, if agreed by the parties, in a fast-track procedure within a recommended legal time limit of six months, depending on the complexity of the case.

The CPC provides that if a document necessary to the proceeding is in a party's possession and cannot be brought before the court because it is too costly, there are too many documents or they too sizeable, a judge, who shall assist the parties while examining the documents, can be delegated at the scene (however, this is a very rare practice).

As a rule, all evidence must be submitted before the facts of the case are discussed. By way of exception, evidence can also be produced before trial if there is risk of its loss or if future difficulties might arise in relation to its submission and under the condition that the occurrence of such risk is proven. The task of providing evidence of the damages incurred is difficult considering the substantial lack of investigative powers of the Romanian courts. Among the relevant discovery means are: the appointment of experts or specialists, interrogatory, witnesses, requests for information to the public authorities (including the Council) in order to obtain official documents and information related to the case and other written documents submitted by the involved parties.

The need for disclosure of information or documents (in possession of one of the parties, an authority or a third party) will be assessed and decided by the court on a case-by-case basis, considering the confidential nature of certain documents. Documents and information that were granted a confidential nature during the administrative procedure should be considered as such by the court when ruling on a claim for damages. Moreover, the disclosing party is entitled to refuse such disclosure if the documents could expose personal issues or if such disclosure could trigger criminal prosecution against the party, its spouse or its relatives or in-laws until the third degree. According to the Competition Act and the relevant secondary national legislation, the court vested with a follow-on action may ask the Council to grant access to the documents that the latter relied on when issuing the sanctioning decision. Of course, the court shall be bound to ensure that the confidentiality of business secrets and other confidential information contained in such documents is not breached. The reasons based on which the Council granted confidentiality for certain documents or information may not subsist in the

12 According to OECD Peer-Review on Competition Law and Policy in Romania issued in 2014.

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.

If the opposing party refuses to disclose the requested document without justification, or it can be proved that the respective party has destroyed it, the court may consider the facts and allegations for which such document was requested as proven, fine the party or even consider such action a criminal offence under the Romanian Criminal Code.[13]

Upon request by one of the parties, the court may order a third party to produce documents on condition that the relevant documents are in the third party's possession. The third party may refuse to produce documents on the same grounds that would entitle a witness to refuse to make a witness statement (i.e., specific personal reasons, risk of self-incrimination, risk of incriminating a close relative, risk of subsequent public prosecution, etc.).

VI USE OF EXPERTS

During the hearings at the administrative stage, the President of the Council may appoint experts whenever their presence is deemed necessary in the case under investigation. However, the members of the Competition Council Plenum may not be appointed as experts or arbitrators by the parties, the court or any other institution.

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. 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 in order to support their allegations in court. Nevertheless, to date, 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 point of view of one or more personalities or specialists in such field.

As per the general rules, the court may also order an appraisal of the damages, in which experts appointed by the parties may also participate. 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 in order to obtain a specific opinion on competition aspects (e.g., relevant market definition).

VII CLASS ACTIONS

Since 2011, 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

13 The current Criminal Code entered into force on 1 February 2014.

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 Competition Act does not contain any specific provisions on how damages caused by infringing competition laws are to be determined. It is hoped that the legislator will clarify the matter when implementing the Directive. However, the fines imposed by the competition authorities do not represent a criterion for settling damages in private enforcement claims.

Based on the foregoing, the general rules governing the tort regime apply. One of the main principles of tort law is the full reparation of damage by removing all damaging consequences of the illegal conduct so as to put the victim in the situation prior to the infringement. In line with this principle, the victim is entitled to recover both the effective damage incurred, any lost profits and the expenses incurred for avoiding or limiting the prejudice. Moreover, the Civil Code contains a provision according to which if the 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. In such cases the indemnification shall be established proportionally with the likelihood to obtain the advantage or to avoid the damage, bearing in mind the circumstances and the actual situation of the victim. The Directive sets out the same principle, stating that a person may request both the reparation of the actual damages incurred, any lost profits, as well as interest. Hopefully, this aspect will be clarified when implementing the Directive, as the Civil Code does not mention interest as a way of compensating the damage occurred.

Punitive damages are not allowed under Romanian law. The CPC provides for the general possibility of recovering attorneys' fees. In general, legal costs are incumbent on the losing party upon the request of the winning party. The CPC details what legal costs are included (judicial stamp fees, attorneys' and experts' fees, amounts due to witnesses and, if the case may be, transport and accommodation expenses for witnesses and experts, as well as any other costs necessary for the process). To qualify for recovery, damages have to be able to be proven and they should not have been already recovered (e.g., based on an insurance policy). Future damages, if certain to occur, can also give rise to compensation. Moreover, the 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.

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 in the case of class actions, a representative consumer should be found and the principles applying to him should apply to a broader range of

14 Article 29(f) of the Government Emergency Ordinance No. 80/2013.

plaintiffs, including undertakings subject to exclusionary practices. Thus, the damage incurred by this consumer shall be used as a reference when computing compensation for a whole class of plaintiffs. In this manner, plaintiffs shall have to show that they incurred damages, without being required to quantify the exact value of the damages, which most of the time implies a costly analysis.[15]

IX PASS-ON DEFENCES

The Competition Act includes specific provisions on passing on overcharges, which may be altered with the implementation of the Directive. Now, according to Article 64, Paragraph 2 of the Competition Act, 'If an asset or a service is purchased at an excessive price, it cannot be considered that no damage was caused due to the fact that the respective good or asset was resold.'

It appears that there is no legal impediment preventing an indirect buyer from filing a claim for damages on grounds that the overcharges were passed on down the distribution chain, thus damaging the buyer.

At first view, Article 64 prevents the defendants from arguing that the claimant did not suffer a loss because the products or the services were sold. The courts have not yet ruled on this issue. It is to be further clarified whether the law has indeed introduced a total ban on the defendants' invoking of the passing-on defence or not.

X FOLLOW-ON LITIGATION

Private actions do not need to rely on a prior finding of an infringement by the Council or the European Commission.[16] The Competition Act establishes a special regime regarding follow-on actions. In such cases, since liability arises from the prior infringement decision, the burden on the claimant in such cases is to establish that they have suffered loss as a result of the infringement. As previously mentioned, the two-year term in which interested persons may introduce court action starts from the date when the Council's sanctioning decision becomes final. The decision of the Council becomes final if: (1) the term during which the Council decision may be challenged expires and no interested party challenged it; or (2) after being challenged, the decision is upheld (totally or partially) or annulled and declared by the court as being final. It is worth mentioning that our national legislation does not make a distinction between the court actions through which one challenges: (1) the existence of the anti-competitive deed itself; and (2) the imposition of a penalty and the amount thereof. In case no appeal is filed against the decision or in case the decision is upheld by the courts, the Council decision will enjoy all the effects of a court judgment, including the *res judicata* effect.

15 The Council's standpoint on quantification of harm suffered because of an infringement of Article 101 or Article 102 of the TFEU.

16 For further information regarding this issue please refer to Section II, *supra*.

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

The Competition Act took over most of the recommendations made by the European Commission in its White Paper on Damages actions for breach of the EC antitrust rules.[17] As such, when ruling on follow-on claims for damages, the courts may request the Council to provide the documents used for issuing the decision. After receiving such documents, the courts must ensure that any information considered as a business secret, as well as other information qualified as sensitive, is kept confidential, even if it is not clear by what means.

The Competition Act expressly acknowledges the privilege of confidentiality between the lawyer and the client, stating that the following two categories of documents may not be collected or used as evidence during the investigation procedure carried out by the Council:

a communications between the undertaking or association and their lawyers (belonging to a bar association, not legal counsel) made exclusively for the purpose of exercising the right of defence (before or after the initiation of investigation); and

b preparatory documents drafted by the undertaking or association exclusively for the purpose of exercising the right of defence.

In addition, according to the lawyers' legislation, any professional attorney–client communication or correspondence, regardless of its form, is confidential.

They cannot be used as evidence in court and cannot be stripped of their confidential nature. This privilege is acknowledged by civil as well as by criminal and administrative courts.

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 the access to the file to be totally or partly restricted.

17 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0165&from=EN.

XII SETTLEMENT PROCEDURES

Given the nature of claims for damages, parties are allowed to use settlement negotiations either before or even during litigation proceedings.

The 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 as such the settlement without analysing the merits. Furthermore, the parties are able, at any time during the trial, even without being summoned, to go to court and request a judgment acknowledging their settlement. Such settlement must be submitted in writing to the court, which will include it in the operative part of the judgment.

XIII ARBITRATION

The parties may agree for arbitration to be conducted by a permanent arbitration institution or even by a third party. However, no practice has been yet developed with regard to the private enforcement of competition, neither by the ordinary courts nor by arbitration tribunals.

The parties, natural or legal persons, may voluntarily refer their dispute to mediation, including after filing a lawsuit in court. In such cases, legally the parties are bound to prove that they have participated in the informative meeting regarding the mediation's advantages. In 2014, the Romanian Constitutional Court ruled that the sanction is unconstitutional and its application has been suspended starting 25 June 2014. We are still expecting amendments that clarify the legal regime of the mediation procedure.

XIV INDEMNIFICATION AND CONTRIBUTION

The rule established by the Civil Code is that the defaulting party must repair any damages caused to another party. Where an infringing act 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. Excepted are the successful applicants for leniency, which cannot be held jointly and severally liable for their participation in anti-competitive practices prohibited by Article 5 of the Competition Act or by Article 101 of the TFEU. In a strict interpretation of the law, only the defendants having benefited from full leniency are exempted from joint and several liability, not the defendants who only benefited from a reduction of the fine according to the leniency procedure or the mitigating circumstance of recognising the deed. 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.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Competition Act is in line with the material aspects of EU competition law and encourages private competition enforcement.

Nevertheless, the new Directive is expected to substantially amend our national legal framework, especially with regard to:

a documents that may be requested in court and the possibility of the person submitting the documents to be examined prior to the document's disclosure, as well as the impact and the proportionality of such disclosure;

b the document categories that are excepted from disclosure before the courts;

c the fact that a definitive decision of the competition authority is considered irrefutably established for the purposes of an action for damages brought before their national courts;

d limitation periods, which ought to be at least five years, and the way they can be suspended; and

e the fact that cartels are presumed to cause damage.

Although Romania must transpose and implement the Directive by 27 December 2016, no actions have been taken in this regard. However, the Council stated that the Directive shall be transposed in a dedicated law on private enforcement of competition law and not by reviewing the private enforcement provisions already laid down in competition law provisions.[18] We believe that these developments will encourage the customers to file actions and will help overcome the current deadlock of private enforcement in Romania.

18 According to the OECD's Working Party mentioned in footnote 2.

Chapter 23

SOUTH AFRICA

Heather Irvine and Candice Upfold[1]

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,[2] arising from anticompetitive agreements it entered into with South African travel agents. More recently, however, several municipalities and other government organisations have publicly indicated their intention to claim damages arising from arguably the most famous cartel case to date in South Africa: the rigging of bids by construction companies for the 2010 FIFA World Cup stadiums and other major infrastructure projects.

Private actions are expected to increase following a decision by the Supreme Court of Appeal (SCA) in the Pioneer bread cartel case,[3] 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.[4] 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 High Court for reconsideration.

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2 This case was ultimately settled by means of a confidential out of court settlement.

3 *Children's Resource Centre Trust v. Pioneer Foods* (50/2012) [2012] ZASCA 182 (29 November 2012).

4 *Competition Commission v. Pioneer Foods (Pty) Ltd* (91/CAC/Feb) [2010] ZACAC 2 (15 October 2010).

The High Court has yet to decide whether a class should be certified. This case is still pending, but if successful will be the first class action 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 (the Competition Act), which regulates prohibited practices.[5] 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.

The substantive requirements for instituting civil action are set out in Section 65 of the Competition Act.

A finding by the competition authorities of a prohibited practice is a prerequisite for a civil claim for damages and cannot be considered by the civil court.

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.[6] 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.[7] 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 claim for damages have been met.

In a 2015 SCA decision, the SCA considered the 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 actions could not be pursued against bread manufacturer Premier (although it

5 Section 62(1) and (2) of the Competition Act.

6 Section 65(6)(b) of the Competition Act.

7 Section 65(7) of the Competition Act.

was granted leniency) because the Competition Commission had failed to cite it as a respondent.[8] In December 2015, the Competition Commission announced it would appeal to the Constitutional Court, which has yet to decide whether to hear the case.

ii Limitation to bringing a claim for damages

Any action for a civil claim for damage must be instituted within three years from the date on which the action arose.[9]

A person's right to bring a claim for damages arising out of a prohibited practice comes into existence:

a 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

b in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.[10]

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 which is designed to achieve a non-commercial socio-economic objective or similar purpose.[11]

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.

The Competition Appeal Court, and then the SCA in the *ANSAC* decision,[12] 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 (Botash) 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.[13]

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8 *Premier Foods (Pty) Ltd v. Norman Manoim NO*. (20147/2014) [2015] ZASCA 159 (4 November 2015).

9 Section 11 of the Prescription Act, 1969.

10 Section 65(9) of the Competition Act.

11 Section 3 of the Competition Act.

12 *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa and Others* (12/CAC/Dec01) [2003] ZACAC 6 (30 October 2003), *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa* (554/2003) [2005] ZASCA 42 (13 May 2005).

13 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

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 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).[14] The SCA quoted the Competition Appeal Court, which pointed out that Section 3(1):

> *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.*[15]

Accordingly the territorial scope of application of the Competition Act is extremely wide in the South African context.

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.

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.

14 *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa* (554/2003) [2005] ZASCA 42 (13 May 2005) at paragraphs 24 to 29.

15 *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa and Others* (12/CAC/Dec01) [2003] ZACAC 6 (30 October 2003) at paragraph 18.

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 on 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.[16]

In principle, it would appear that the Competition Act affords an indirect purchaser the right to institute a claim for damages if the plaintiff can prove they suffered a loss or damage as a result of a prohibited practice. It is noteworthy that in the Pioneer bread class action case, the High Court did not make a ruling on whether or not an indirect purchaser claim is available, however, the High Court did recognise that Section 38 of the Constitution of the Republic of South Africa, 1996 (the Constitution) identifies the following persons that may approach a court to institute a class action:

a anyone acting in their own interest;
b anyone acting on behalf of another person who cannot act in their own name;
c anyone acting as a member of, or in the interest of, a group or class of persons;
d anyone acting in the public interest; and
e an association acting in the interests of its members.[17]

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.

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 (the Tribunal Rules)[18] 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.[19] In practice, strict

16 Section 65 of the Competition Act.

17 *The Trustees for the Time Being for the Children's Resource Centre Trust and Others v. Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v. Pioneer Foods (Pty) Ltd and Others* (25302/10, 25353/10) [2011] ZAWCHC 102 (7 April 2011) at paragraph 24.

18 Published under GG 22025 of 1 February 2001.

19 Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.

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*,[20] the Competition Tribunal confirmed that Rule 55 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.[21]

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 appropriate times during the course of the proceedings.

Furthermore, 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 the person claims to be confidential. In practice, legal representatives generally sign confidentiality undertakings, which then allows them to access these confidential documents for the purpose of advising their clients in the Competition Tribunal or Competition Appeal Court proceedings.

ii 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[22] and Magistrate Court Rules[23] respectively. Parties to a civil action are obliged to disclose to the other party all documents, tapes or recordings in their possession or under their control that either serve to advance their case or adversely affect their case, or advance the case of the other party to the proceedings.[24] A party's failure to discover any document will result in that party not being able to rely upon such document in the action.[25] Furthermore, there are procedures in place which permit an application to compel the discovery of documents that have a bearing on the action.[26]

A party can also request the other party to make further and better discovery of any documentation that they have discovered.[27] Either party can call on the other to

20 *Allens Meshco (Pty) Ltd and Others v. Competition Commission and Others*, *Cape Gate (Pty) Ltd v. Competition Commission and Others* (63/CR/Sep09) [2010] ZACT 37 (28 May 2010).

21 Ibid. at paragraph 6.

22 *Supra*, note 18.

23 Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

24 Rule 35(1) of the High Court Rules and 23(1) of the Magistrate Court Rules.

25 35(4) of the High Court Rules and 23(4) of the Magistrate Court Rules.

26 35(3) of the High Court Rules and 23(3) of the Magistrate Court Rules.

27 35(3) of the High Court Rules and 23(3) of the Magistrate Court Rules.

provide copies of its discovered documents or to make same available for inspection.[28] Any documentation that is subject to legal privilege is not discoverable but a list of these documents must nonetheless be produced.[29]

In a 2015 case, *City of Cape Town v. South African National Roads Authority Limited & Others*,[30] 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.[31]

When providing the confidential information, the parties agreed that the appellant would provide a confidentiality undertaking which 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 a breach of the agreement between the parties, the appellant filed an affidavit which 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.*[32]

VI USE OF EXPERTS

Experts play a key role in prohibited practices cases and damages actions before the competition authorities and 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

28 35(6) of the High Court Rules and 23(6) of the Magistrate Court Rules.

29 35(10) of the High Court Rules and 23(11) of the Magistrate Court Rules.

30 (20786/2014) [2015] ZASCA 58 (30 March 2015).

31 Rule 35 of the High Court Rules.

32 *Supra*, note 30 at paragraph 47.

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.[33]

In the United States, the courts have narrowed down the instances where expert testimony may be utilised in competition cases to the following cases:

a when the expert has sufficient specialist knowledge and expertise with respect to the field in question;

b when the methodology and data used to reach the expert's conclusions are sufficiently reliable; and

c when the expert's testimony is sufficiently relevant to assist the tester of fact.[34]

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.[35]

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. A panel member of the Competition Tribunal recently stated that it is time for both the Competition Tribunal and the Competition Commission to issue guidelines on the submission of economic evidence and to amend their rules to provide for compulsory pretrial conference in which experts are required to narrow the issues before them.[36] It seems that this was motivated by concern about the delays occasioned by making use of what can be complicated economic evidence in Competition Tribunal hearings to adjudicate complaints.

In the absence of specific rules in relation to the calling of expert witnesses, and in particular economists in 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 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:

a not less than 15 days before the hearing, have delivered notice of his or her intention so to do; and

b not less than 10 days before the trial, have delivered a summary of such expert's opinions and his or her reasons therefor.

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33 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 44, quoting CPR 35.7(1); CAT Guide to Proceedings, paragraph 3.4(iv).

34 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 188, quoting *City of Tuscaloosa v. Hacros Chemicals Inc*, 158 F3d 548, 562-63 (11th Cir 1998); FRCP 702; *Daubert v. Merrell Dow Pharmaceuticals* 509 US 579, 593-94 (1993).

35 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 188, quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 US at 593-94.

36 See www.compcom.co.za/wp-content/uploads/2015/11/Role-of-economic-evidenc e-economists-in-SA-jurisprudence-%E2%80%93-Yasmin-Carrim.pdf.

In a 2015 decision,[37] 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'.[38] The SCA made reference to a passage from the judgment of Justice Marie St-Pierre in *Widdrington (Estate of) v. Wightman*,[39] 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;*
> *advocates 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.

37 *PricewaterhouseCoopers Inc v. National Potato Co-Operative Ltd* (451/12) [2015] ZASCA 2 (4 March 2015).

38 Ibid.

39 2011 QCCS 1788 (CanLII).

As mentioned above, the competition authorities have discretion in applying these rules. In a claim for damages before the civil courts, these rules would apply. Until there is more case law dealing with a competition damages claim specifically, it is not clear how the rules will be applied by the High Court in antitrust damages actions.

It will, however, be 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 in jurisdictions such as England and Wales, the Competition Act does not provide for class actions in antitrust cases. However, the Constitution does, in Section 38(c), which relates to class actions for an infringement of any fundamental right in the Bill of Rights.

The Pioneer bread class action was the first of its kind in South Africa and confirmed that class actions are possible in South Africa. In this case, the High Court 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.[40]

At the time of writing, this case was ongoing and a decision has yet to be made about whether a class could be certified in the bread cartel case.

VIII CALCULATING DAMAGES

Section 65(6)(a) excludes a civil claim for damages by persons who have already been compensated for damages 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.

40 *Supra*, note 17.

While the plaintiff will not need to prove the cause of action (that is, that the Competition Act has been contravened), they will be required to prove the damages they allege were suffered as a result of the prohibited practice. The general common law principles relating to civil damages claims apply.

In South African common law, in order to sustain a civil claim for damages, the plaintiff must show that the prohibited practice caused the plaintiff to suffer a loss.

The amount claimed as damages must be capable of being quantified in monetary terms, 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.[41]

The 'once and for all' rule has the effect that a complainant may generally only claim damages based on a single cause of action once.[42] 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.[43] Prospective loss is accepted as part of the concept of damage in South African law.[44] The following forms of prospective damages, are recognised in South African law:

a future expenses on account of a damage-causing event;
b loss of future income (or loss of earning capacity);
c loss of prospective business and professional profit;
d loss of prospective support;
e loss of a chance; and
f future non-patrimonial loss (injury to personality).[45]

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.[46] South African law accepts that compensation may be awarded for non-patrimonial damage.[47] Such damages are, however, less likely to arise as a result of a contravention of the Competition Act.

41 JR Midgley and JC Vand Der Walt, *Law of South Africa*, Delict volume 8(1), second edition.

42 Visser and Potgieter, *Law of Damages*, second edition, 135–163; Van der Walt Sommeskadeleer 425–485.

43 *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); *Gijzen v. Verrinder* 1965 (1) SA 806 (D). Claims for delictual damages and subsidence are based on different causes of action.

44 HJ Erasmus and JJ Gauntlett, *Law of South Africa*, Damages volume 7, second edition.

45 Ibid.

46 See Visser and Potgieter, *Law of Damages*, second edition, 96.

47 Ibid. at 196.

The primary object of an award for damages is to compensate the person who has suffered harm. Plaintiffs may not to profit from defendants' wrongdoing.[48] 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 includes legal fees. There is, however, a tariff at which the legal fees are taxed and the court has the discretion of whether or not to order costs.

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:

a pre-existing, fixed quantity, cost-plus contracts;[49]

b claims where the direct purchaser is owned or controlled by either the defendant or the indirect purchaser;[50] and

c claims where the intermediary is a direct participant in a conspiracy with the defendant.[51]

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 which 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[52] 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.

48 JR Midgley and JC Vand Der Walt, *supra* note 43.

49 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 193, quoting *Illinois Brick*, at 735-36; *Mid-West Paper Prods Co v. Continental Group Inc*, 596 F2d 573, 577 (3d Cir 1979).

50 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 193, quoting *Jewish Hospital Assocoiation of Louisville v. Stewart Mechanical Enterprises Inc*, 628 F2d 971, 974-75 (6th Cir 1980).

51 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 193, quoting *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F3d 599, 604 (7th Cir 1997).

52 See www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf.

XI PRIVILEGES

Legal professional privileged is a fundamental right that protects communication between a legal representative and their client from being disclosed.[53] Communication is privileged if it is made to (1) a legal adviser acting within a professional capacity, (2) in confidence, (3) for the purpose of obtaining professional advice, and (4) the client claims the privilege.[54]

i Legal adviser acting within a professional capacity

South African courts have held that there is no distinction drawn between salaried legal advisers and attorneys acting within private practice for the purposes of legal privilege.[55] The High Court in *Mohamed*[56] concluded that in the circumstances, confidential communication made between the government and its salaried 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 as confidential where it is proven that the legal adviser was consulted in their professional capacity to obtain legal advice.[57] Nevertheless in *Bank of Lisbon* the Court held that 'the basis of privilege is confidentiality. When confidence ceases, privilege ceases.'[58]

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.[59]

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.[60] 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 their client or is bound by the waiver depending on the client's decision.

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53 *S v. Safatsa 1988* (1) SA 868 (A) 886.

54 Schwikkard and Van der Merwe, *Principles of Evidence*, third edition, p. 147.

55 *Van der Heever v. Die Meester* and *Mohamed v. President of the RSA* 2001 (2) SA 1145 (C) 1151.

56 Ibid.

57 *R v. Fouche* 1953 (1) SA 440 (W).

58 *Bank of Lisbon and South Africa Ltd v. Tandrien Beleggings (Pty) Ltd and others (2)* 1983 (2) SA 621 (W) at 629G.

59 *Savides v. Varsamopolus* 1942 WLD 49.

60 *Lane and Another NO v. Magistrate, Wynberg* 1997 (2) SA 869 (C).

v Waiver

Privilege can be waived either expressly, impliedly or through imputation. The courts may impute waiver where the client discloses privileged information. In the *Wagner* case 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'.[61]

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 the leniency application and the documents produced in support of it are protected by legal privilege and also constitute 'restricted information' in terms of Section 14 of the Competition Commission's rules.[62] 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 Tribunal in contested complaint proceedings and have been placed before its legal advisors for advice in respect of such litigation.[63]

However, in a 2013 judgment,[64] the SCA held that although leniency applications are protected from disclosure by a claim of by 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.

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.[65]

It is important to note that 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 may determine whether or not 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.[66]

'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.'

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61 *Ex parte Minister of Justice: In re S v. Wagner* 1965 (4) SA 507 (A) 514.

62 Rules for the conduct of proceedings in the Competition Commission published under GG 22025 of 1 February 2001.

63 *Arcelomittal South Africa Limited and Another v. Competition Commission and Others* (103/CAC/Sep10) [2012] ZACAC 1 (2 April 2012).

64 Ibid.

65 Section 44 of the Competition Act.

66 Section 45(1) of the Competition Act.

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, the defendant may at any time, unconditionally or without prejudice, make a written offer to settle the plaintiff's claim, which must be signed by the defendant him or herself or his or her attorney, authorised in writing to do so.

Where a settlement proposal is made off the record and the proposal is not accepted, then the proposal may not be used or referred to in court or in arbitration proceedings. In the case of an on-the-record settlement agreement, should the proposal not be accepted, either party is entitled to refer to the proposal in proceedings.[67]

An example of this in a civil action for damages in an antitrust case is the claim brought by South African airline Nationwide against national carrier South African Airways, which was ultimately settled by means of a confidential out-of-court settlement.

XIII ARBITRATION

There is nothing preventing parties from agreeing to arbitration or other alternative dispute resolution (ADR) mechanisms as a means of addressing a complaint relating to anticompetitive conduct in South Africa. However, arbitration and ADR are relatively uncommon here because they are expensive dispute resolution mechanisms.

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.

In contrast to the South African position, 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.[68] 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 that Congress had not conferred any authority on the US federal courts to create a Common law right to contribution in favour of an antitrust defendant.[69] There are no clear rules in US antitrust law in relation to the right of a defendant to indemnification.[70]

67 Peté, S, *Civil Procedure: A Practical Guide*, second edition, p. 365.

68 *Texas Industries v. Radcliff Materials* 451 US 630, 639-46 (1981).

69 Ibid.

70 Knable Gotts, I, *The Private Competition Enforcement Review*, second edition, p. 199.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The Competition Amendment Act[71] is likely to introduce 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. Individuals will face administrative penalties of up to 500,000 rand and prison sentences of up to 10 years if found guilty and firms will be prohibited from paying these penalties on behalf of their employees. The Competition Amendment Act has been on the statute book for some time, but it is not clear when it will be signed into effect by the President.

With continued public enforcement of high-profile cartel cases, and with further clarity arising in respect of civil claims, private enforcement is likely to rise in South Africa, albeit slowly.

71 Act No. 1 of 2009.

Chapter 24

SPAIN

Evelyne Ameye[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In February 2015, a Special Commission was set up under the auspices of the Ministry of Justice in order to transpose Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Directive 2014/104/EU) into Spanish law by 27 December 2016.[2] At the time of writing, the draft Transposition Act of the Special Commission had not yet been published.

The transposition will trigger three legislative changes: (1) a Transposition Act that will contain private antitrust principles and definitions; (2) a new Chapter (VI) will be added to Competition Act 15/2007 of 3 July 2007 (CA) to transpose matters of substance; and (3) a new Chapter (V) will be added to Title I of Book II of Act 1/2000 of 7 January on Civil Procedure (CP) to amend civil procedure matters. We will briefly tackle the expected changes in each of the sections below (the expected 2014/104/EU transposition). We note that these changes are expected changes and that definitive legislative changes will only be known at the end of the full legislative process.

In the course of 2015, antitrust enforcement has mainly been driven by hybrid follow-on or stand-alone damages claims, namely cases that do not technically qualify as follow-on cases because the facts at issue are essentially different, but where the parties heavily rely upon previous decisions of the Spanish Competition Authority (NCA) – or,

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2 Sección Especial de la Comisión General de Codificación del Ministerio de Justicia, composed of law professors (A Bercovitz Rodriguez-Cano, R Alonso Soto, A Calvo Caravaca, I Díez-Picazo and F Gascón Inchausti), an official of the Ministry of Justice acting as secretary and an official of the Ministry of Economy.

less frequently, of the European Commission (EC) – which seemingly have played a decisive role in triggering their action. The vast majority of these cases are damages claims by petrol stations alleging that the exclusive supply agreements with their petrol suppliers are null and void due to anti-competitive clauses (essentially price resale maintenance and excessively long non-compete commitments). These petrol stations, moreover, commonly allege discrimination and invoke other petrol stations' purchase prices as a benchmark to quantify their damages. In these hybrid stand-alone cases, appeal courts do not consider themselves bound by previous NCA decisions, hammering on the distinction between the decision-making powers of judges and administrative bodies (NCA, EC)[3] in antitrust stand-alone cases that possibly entail retroactive contractual nullity. While the NCA may rule that contracts are null and void from a competition law perspective, it essentially rules as an economic watchdog, whereas judges duly apply the principles of legal certainty, good faith and conservation of contracts,[4] (e.g., they consider the often vexatious nature of such claims, such as when damages are claimed two years before the expiry of a 25-year supply contract after 23 years of due contractual implementation[5]).

After years of consistently rejecting damages to petrol stations – so far, petrol station cases represent around half of all private antitrust enforcement cases in Spain (see Section II, *infra*) – the Supreme Court's recent case law makes a U-turn by awarding damages in such hybrid cases. In doing so, it stresses that anti-competitive clauses in a single contract may negatively affect the validity of the entire contractual package between petrol stations and petrol providers and that damages therefore have to provide an economically well-balanced redress to both parties, not only taking into account the overcharge paid by the petrol station but also the investments made by the petrol supplier.[6]

The Supreme Court also clarifies that the causal link for successful private antitrust enforcement claims requires a conduct to be indispensable to cause damages (*conditio sine quā non*). If various conducts concur, the causal link of each of them needs to be equally assessed, taking into account the protection that the law aims to achieve and the reason why an infringement of the law renders a conduct illegal.[7] It also sets out that the defendant bears the full burden of proof to demonstrate that the claimant broke this causal link by failing to contain the damages[8] (see Section VIII, *infra*).

Finally, in the hybrid stand-alone or follow-on cases, the Supreme Court stresses the absence of an equivalent provision to Article 16.1 of Regulation (EC) 1/2003

3 Madrid Provincial Appeals Court Case 314/2014, *Hernández Tejada v. CEPSA*, 11 November 2014; Madrid Provincial Appeals Court Case 19/2015 *Eulalio v. Repsol*, 26 January 2015.

4 *Hernández Tejada v. CEPSA*; *Eulalio v. Repsol*; Madrid Provincial Appeals Court Case 116/2015 *Área de Servicios Francás v. Repsol*, 27 April 2015.

5 Madrid Provincial Appeals Court Case 106/2015 *Hugo & Prourbal v. Repsol*, 10 April 2015.

6 Supreme Court Case 763/2014 *Repsol v. Ribeira Baixa and Ribera Alta*, 12 January 2015; Supreme Court Case 102/2015 *Repsol v. Vinholan*, 10 March 2015; Supreme Court Case 162/2015 *Servei Pineda y Olma v. Repsol*, 31 March 2015.

7 Supreme Court Case 260/2014 *Centrica(Energya) v. Endesa*, 4 June 2014.

8 Supreme Court Case 123/2015 *Hidrocantábrico v. Iberdrola*, 18 February 2015.

(rendering EC decisions binding on courts) regarding NCA decisions and reiterates the general principle that civil and commercial courts are not bound by NCA decisions, even though the latter constitute highly valued pieces of evidence.[9] In 2013, in the sugar cartel case,[10] the Supreme Court ruled that final NCA decisions (*res judicata*, once judicial review has been exhausted) were binding upon courts in follow-on actions as regards their facts. The appeal courts' 2015 case law merely highlights that this does not apply to stand-alone cases.[11]

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

To date, the majority of antitrust damages claims have been stand-alone actions, as opposed to follow-on actions (see Section X, *infra*). Claims have generally been unsuccessful, even though the success rate has been higher for the relatively small number of follow-on actions.

i Competent courts

In Spain, damages claims can be brought before civil courts or commercial courts.[12] Their judgments are appealed before provincial appeal courts and, in last instance, before the Supreme Court.

Commercial courts are competent to directly apply both Spanish competition law (Article 1 and 2 CA) and EU competition law (when trade between EU Member States is affected, Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)), irrespective of whether damages are claimed or not. Hence, stand-alone cases – where claimants ask judges to decide upon competition law infringements and to grant damages – are brought before commercial courts, whereas follow-on cases – where claimants solely seek damages on the basis of a prior NCA or EC decision – are generally brought before civil courts[13] (even though commercial courts are equally competent to hear follow-on cases[14]).

9 Supreme Court Case 420/2013 *EC Copecelt v. Cepsa*, 28 June 2013; *Repsol v. Ribeira Baixa and Ribera Alta*; *Eulalio v. Repsol*.

10 Supreme Court Case 651/2013 *Nestlé & Others v. Ebro Foods*, 7 November 2013.

11 *Hugo & Prourbal v. Repsol*; *Área de Servicio Francás v. Repsol*.

12 Since 2004, according to Article 86ter2(f) of Act 6/1985, of 1 July.

13 However, defendants sometimes invoke competition rules to oppose a plaintiff's request before a civil court, which will generally not refuse to hear such claim, unless it amounts to a genuine antitrust counterclaim (in the latter case, the civil court lacks jurisdiction (Article 406 CP) and a direct antitrust claim has to be filed before a commercial court).

14 E.g., Barcelona Commercial Court Nr. 2 Case 45/2010 *Centrica(Energya) v. Endesa*, 20 January 2011, appealed in first instance before the Barcelona Provincial Appeals Court and further appealed before the Supreme Court (Supreme Court Case 260/2014 *Centrica(Energya) v. Endesa*, 4 June 2014).

ii Tort liability

Damages claims usually qualify as tort liability.[15]

Tort claims are governed by Article 1902 of the Civil Code (CC): 'Any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused.'

If a claim exceptionally qualifies as contractual liability because of the contractual entanglement prevailing in the antitrust infringement, it is governed by Article 1303 CC et seq., setting a principle of reciprocal redress in case of nullity, with the exceptions of *turpis causa* and unjust enrichment.

iii Time bar

There is a short, one-year tort law time bar (Article 1,968(2) CC) which starts as soon as the victim is fully aware of all damages.[16] As of that moment, victims only have a single year to prepare often complex damage quantifications. The starting point is the moment when the claimant becomes fully aware of all suffered damages, which does not necessarily coincide with the NCA or EC decision. There are precedents of follow-on claims where courts ruled that the one-year time bar started prior to the NCA decision. In the *Centrica v. Iberdrola* case,[17] in which Iberdrola was condemned for abusing its dominant position because it had denied essential information to allow Centrica to operate in the retail electricity market,[18] the Supreme Court ruled that the one-year time bar started on 2 June 2008, when Centrica accessed the information and became aware of its damages.

The time bar is neither suspended by NCA proceedings nor by ensuing judicial review. Importantly, the one-year period is interrupted by any judicial or extrajudicial claim by the claimant or acknowledgment by the defendant (Article 1,973 CC). This explains why victims considering damages claims frequently send out official correspondence to the infringing company in order to suspend the one-year time bar and keep potential damages claims alive.

According to the CA, NCA decisions need not be final (*res judicata*) for claimants to claim damages. In practice, however, claimants frequently wait until the decision is final before bringing damages claims.

If a claim exceptionally qualifies as contractual liability, Article 1,964 CC provides for a five-year time bar to bring a claim (recently decreased from 15 years to five years[19]).

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15 See sugar cartel case, *Nestlé & Others v. Ebro Foods* and Supreme Court Case 344/2012 *Acor v. Galletas Gullón, SA, Mazapanes Donaire, SL, Nestlé España, SA, Zahor, SA, Galletas Coral, SA, Productos Alimenticios la Bella Easo, SA, Lacasa, SAU, Chocolates del Norte, SA and Bombonera Vallisoletana*, 8 June 2012.

16 See Supreme Court Case 528/2013 *Centrica(Energya) v. Iberdrola*, 4 September 2013.

17 *Centrica(Energya) v. Iberdrola*.

18 By NCA Decision of 2 April 2009.

19 Act 42/2015, of 5 October 2015, modifying Civil Procedural Act 1/2000, of 7 January.

iv Legal fees and costs

Except when litigation is vexatious, court and lawyers' fees in first instance are borne by the losing party (with a cap of one-third of total value of the action), unless the judge identifies legal or factual complexities (Article 394 CP). If a damages claim is only partially awarded, then each party bears its own costs and common costs are shared fifty-fifty.

v Expected 2014/104/EU transposition

The main change is the time bar, which will be increased to five years from the date on which the victim is aware of the conduct, the damages and the infringer. This time bar will be suspended during NCA proceedings and ensuing judicial review.

III EXTRATERRITORIALITY

There are no special rules on extraterritoriality. Spanish antitrust law applies to conduct on Spanish territory, irrespective of the nationality of the infringer.

The determination of the competent court to hear private antitrust enforcement claims when the antitrust infringement involves parties of different nationalities in the EU is governed by the Brussels Regulation (BR).[20] Under this regulation, by default, any defendant may be sued in the court of his or her domicile (Article 4(1) BR). In addition, given the tortious character of antitrust damages, claims may also be brought in a jurisdiction where the harmful event occurred (Article 7(2) BR), that is, either the place of the event giving rise to the damage or the place where the damage occurred.[21] In the third instance, the court of closely connected claims is also competent (Article 8(1) BR): this allows for a potential consolidation of claims against members of a cartel in the domicile of one of the defendants (conferring jurisdiction under Article 4(1) BR). This defendant is then referred to as the 'anchor defendant' in legal jargon: he or she acts as the 'anchor' pulling the entire 'damages boat' before a single court. Under Article 8(1) BR, claimants can pull various defendants into the court of the 'anchor defendant' if claims are closely connected.

20 Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16 January 2001, as amended by Regulation (EC) 1791/2006, Regulation (EC) 1103/2008 and Regulation (EC) 1215/2012 (applicable since 10 January 2015 except Articles 75 and 76, which have been applicable since 10 January 2014). Even though the Brussels Regulation is not directly applicable to Denmark, it has effectively been extended to Denmark by a separate EU-Denmark agreement in force since 1 July 2007. Furthermore, although Denmark did not participate in the reform process, it notified the European Commission in 2012 of its decision to implement Regulation (EU) 1215/2012.

21 ECJ Case 21/76, *Handelswerkerij GJ Bier BV v. Mines de Potasse d'Alsace SA*, 30 November 1976; ECJ Case 352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV and Others*, 21 May 2015.

In sum, Spanish claimants may claim damages against a non-Spanish, EU company breaching Spanish antitrust law before the court of that EU company's registered seat. Likewise, Spanish courts are competent to hear damages claims by non-Spanish, EU victims against antitrust infringers having their registered seat in Spain.

Additionally, the new version of the BR, which came into effect in 2015, harmonised the rules under which individuals, resident outside the EU, may be sued in EU courts.[22]

With regard to the expected 2014/104/EU transposition, extraterritoriality will not be tackled.

IV STANDING

Under Spanish tort law, a party who suffered damages has standing to claim damages. This can be a direct or indirect purchaser (see Section IX, *infra*).

In relation to the expected 2014/104/EU transposition, provisions on standing will be similar.

V THE PROCESS OF DISCOVERY

As a rule, pretrial discovery is not available under Spanish law. Discovery is only available during judicial proceedings.

Pretrial, future claimants can ask for some basic documents (e.g., information on legal standing, insurance policies, IP rights, etc.) under Article 256 CP. They can also request that certain measures be taken to preserve the future production of evidence under Article 297 CC. These pretrial rights are of a limited scope and only aimed at avoiding evidence no longer being available at a later stage.

Pending a trial, a party can ask the other party to disclose documents that refer to the object of the proceeding or the probative value of the evidence and are not readily available (Article 328 CP). The earliest possible moment for discovery is when interim proceedings are requested, assuming *prima facie* and *periculum in mora* tests are met. Pending a trial, a party can also request a third party to produce documentary evidence. Judges order such evidence to be produced by third parties when it is considered key for the ruling (Article 330 CP). Judges can also order public bodies to produce documents or issue certifications (Article 332 CP).

Importantly for antitrust matters, a party may be ordered by court to disclose documents relating to an NCA or EC decision. The general rule of full documentary access for litigating parties will apply. However, Article 15-bis CP prohibits the NCA or EC to disclose leniency statements.

In terms of the expected 2014/104/EU transposition, overall, discovery rules will be substantially modified. Moreover, special discovery rules will be introduced for competition issues, in a similar way as IP issues enjoy special discovery rules.

22 Article 6 of Regulation (EU) 1215/2012.

Pretrial, at the time of filing or in the course of the proceedings, parties will be able to request the court to order disclosure of evidence by any other party, third parties or public authorities, to the extent that (1) the evidence is precisely and narrowly described, necessary, proportionate (considering the legitimate interests of all parties) and cannot possibly be obtained directly, and (2) the requesting party produces sufficient proof to justify its request. Any disclosure request will be notified to all parties, who will be heard, and a decision will be taken within five days. Necessary measures will be ordered to protect any confidential information. Disclosure costs will be borne by the requesting party. In case of failure to disclose, courts will be able to order the loss of claim, penalty payments and payment of legal costs.

Special antitrust discovery rules will establish that disclosure can be requested of:

a the identity and domicile of the infringers;

b the infringement;

c the volume of products and services involved;

d the identity and domicile of direct and indirect purchasers;

e price levels;

f the identity of the group of affected individuals or companies; and

g evidence of the NCA file after an NCA decision (not in the course of NCA proceedings), to the extent that it cannot be obtained from other parties or third parties, including:

- information that was prepared specifically for the NCA proceedings;
- information drawn up by the NCA and sent to the parties in the course of its proceedings; and
- settlement submissions that have been withdrawn.

Parties will not be allowed to request the disclosure of leniency statements or settlement submissions.

VI USE OF EXPERTS

Expert reports can be produced as evidence (Article 299 CP). Economic expert reports are key to quantifying damages. Independent experts may also be appointed by courts (Article 335 CP). The importance and value of expert reports has frequently been noted by the courts.[23]

According to the Supreme Court, a defendant needs to provide an alternative quantification of damages in order to question the accuracy of the claimant's expert report.[24]

With regard to the expected 2014/104/EU transposition, the use of expert reports will remain unaltered.

23 *Centrica(Energya) v. Endesa*.

24 *Nestlé & Others v. Ebro Foods*.

VII CLASS ACTIONS

Aside from the joinder or consolidation of individual claims,[25] associations or groups of claimants legally empowered to defend collective interests are allowed to litigate (Article 11 CP). If the victims of the antitrust infringement are directly affected and can easily be identified, claims may be brought by consumer associations, other legally authorised entities or by the affected group itself. If the victims of the antitrust infringement cannot easily be identified (e.g., their number is undetermined), only claims by legally authorised and recognised consumer associations are possible. In both cases, the law provides for notice or publication of the claim and an opt-in procedure to allow victims to join the collective claim (Article 15 CP).

Despite this framework enabling collective actions, the possibility has only been used once in private antitrust enforcement, namely in a case in which a consumer association – Asociación de Usuarios de Servicios Bancarios (AUSBANC) – started a collective action on behalf of all holders of ADSL lines in Spain for €458 million damages against Telefónica, following on from an EC decision fining Telefónica for price squeezing in the retail broadband services market. However, the case was withdrawn because AUSBANC was excluded from the registry of consumer associations and therefore lost its active legitimation to claim damages on behalf of consumers.[26]

As a noteworthy development in 2015, the main consumer association – Organización de Consumidores y Usuarios (OCU) – has created an online opt-in system available for claims following-on from the NCA's car dealer and manufacturer cartel decisions.[27]

The possibility of class actions will remain unchanged after the expected 2014/104/EU transposition.

VIII CALCULATING DAMAGES

Claims can involve economic or material damages, on the one hand, and non-economic damages, on the other hand. Economic damages have to be real and certain (e.g., no punitive damages) and are calculated as the financial loss caused to the claimant (i.e., the actual damage (*damnum emergens*) and the loss of profit (*lucrum cessans*) plus interests). Non-economic damages include moral damages (e.g., harm to the claimant's reputation). Importantly, in all cases, damages are only awarded if they can be quantified and demonstrated. This is a burdensome task, in particular regarding the loss of profit and non-economic damages. Article 5.2(b) of Act 3/2013, of 4 June (the CNMC Act) empowers the NCA to assist courts in the quantification of damages. Article 15 of Regulation (EC) 1/2003 empowers the EC to assist courts.

25 Articles 12, 13 and 71 et seq. CP.

26 Appeals Court Case appeal nr. 582/2009 *Ausbanc v. Telefónica Móviles*, 31 October 2012.

27 www.ocu.org/coches/coches/noticias/reclamacion-concesionarios.

i Method

In the sugar cartel, the Supreme Court ruled that the difficulty in reproducing a counterfactual scenario should not preclude claimants from duly being awarded damages.[28] Rather, it suffices that the economic expert report provides a reasonable and technically well-founded hypothesis on the basis of contrasted and reliable data. In 2015, the Supreme Court ruled on the method to quantify damages in the petrol station cases. It determined that the nullity of a single clause in a petrol supply contract affects the validity of all intertwined contracts between the petrol station and the petrol supplier (supply contracts, property/land usufruct agreements and pledges, licensing agreements, machinery leases and sub-leases, etc.), and that damages have to restore an economic balance between both parties taking into account, on the one hand, the overcharge paid by the petrol station to the supplier as compared to the average supply price applicable in the station's region and, on the other hand, the fact that the petrol supplier had not yet recouped investments in the petrol station when the exclusive supply clause was declared void.[29]

ii Mitigation

In the sugar cartel case, the Supreme Court held that it was entirely up to the defendant to prove that the claimant's negligent conduct (e.g., failure to contain damages) had actively contributed to the damages.[30] The Supreme Court reiterated this in the 2015 *Hidrocantábrico v. Iberdrola* case, when it confirmed the award of damages to Hidrocantábrico owing to Iberdrola's abusive failure to provide access to its electricity network, which compelled Hidrocantábrico to serve its clients through separate generators and hence triggered significant overcharge. The Supreme Court stressed that the burden of proof entirely lies with the defendant to demonstrate that the claimant's conduct had enhanced or worsened the damages.[31]

Following the expected 2014/104/EU transposition the law will introduce a presumption that cartels cause damages but will stress that the burden of proof to quantify damages lies with the claimant. When quantification is difficult to prove, courts will be entitled to rely upon estimates and to request, if necessary, the NCA's assistance.

IX PASS-ON DEFENCES

Given the principle of unjust enrichment in civil law[32] and given that damages must be real and certain under Spanish tort law (see Section VIII, *supra*), passing on is taken into account. According to the Supreme Court's case law,[33] a defendant can successfully

28 *Nestlé & Others v. Ebro Foods*.

29 *Repsol v. Ribeira Baixa and Ribera Alta*; *Repsol v. Vinholan*; *Servei Pineda y Olma v. Repsol*.

30 *Nestlé & Others v. Ebro Foods*.

31 *Hidrocantábrico v. Iberdrola*.

32 Supreme Court Case 432/2010 *Don Octavio & Others v. Don Luis Pozas Osset & Others*, 29 July 2010.

33 *Nestlé & Others v. Ebro Foods*.

invoke a pass-on defence in a damages claim and adduce that claimants did not suffer damages insofar as they transferred them to third parties. Moreover, in cartel cases, direct purchasers do not only pass on the overcharge of the cartel price on their clients, but all economic damages (e.g., loss of business and competitiveness, commercial reputation, etc.).[34]

The burden of proof to demonstrate passing on lies with the defendant (Article 217 CP).

Importantly, the binding nature of an NCA decision in follow-on cases (see Section X, *infra*) only stretches to its facts and not to its legal findings (e.g., findings of passing on).[35]

The expected 2014/104/EU transposition will provide that the burden of proof to quantify passing-on defences lies with the defendant. Awarded damages will be limited to damages that have not been passed on.

X FOLLOW-ON LITIGATION

Both follow-on actions and stand-alone actions for antitrust damages are permitted in Spain. Follow-on actions are linked to a prior NCA or EC infringement decision. Stand-alone actions are not linked to any prior infringement decision (i.e., claimants assume the full burden of proving a cartel or abuse together with the alleged loss). The key difference lies in the evidence. If victims have sufficient proof against the infringers, they will opt for a stand-alone action, as they will not only have to prove before the civil court that competition law was infringed, but also that they suffered loss as a result of that infringement. In follow-on actions, on the contrary, the infringement decision constitutes evidence of the competition law infringement and the action will focus on the loss deriving from it.

Even though there have been around 400 private antitrust damages actions to date in Spain, follow-on litigation has been scarce. The Supreme Court sugar cartel rulings are the landmark follow-on cases. They followed on from a 1999 NCA decision which found that sugar manufacturers had fixed sugar prices and shared the industrial sugar market in 1995 and 1996.[36]

In 2015, the Madrid Provincial Appeals Court clarified that damages claims only qualify as follow-on claims if (1) the conduct on which the claims are based is identical to the conduct dealt with by the NCA (i.e., identical parties in an identical antitrust infringement, identical in geographic scope, timing, etc.); and (2) damages can be demonstrated, as well as their causal link with the antitrust infringement.[37]

34 Ibidem.

35 Ibidem.

36 34 ibidem.

37 *Área de Servicio Francás v. Repsol.*

i Staying proceedings

An NCA decision need not be final for claimants to bring a follow-on suit for damages.[38] Claimants can initiate follow-on actions pending judicial review of NCA decisions; for example, in the property insurance cartel, a damages claim was brought before a commercial court even though the NCA decision had been appealed.[39] Yet in practice, victims usually wait until the NCA decision is final before bringing damages claims to avoid unnecessary costs. According to Article 434 CP, judges may suspend issuing their final ruling if there is a risk of conflicting decisions because an NCA or EC decision is under judicial review. Case law states that this suspension should not happen at the beginning of the case but just before reaching a final decision. Meanwhile, proceedings should follow their ordinary course of action and run in parallel.[40] Courts also enjoy a margin of discretion to decide whether to stay proceedings if a closely connected claim is pending before another EU court if there is a risk of conflicting judgments (Article 30 BR).

ii Time bar

As set out in Section I, *supra*, the time bar and its starting point have been the main hurdles for follow-on actions to date because the one-year time bar does not necessarily start from the date of the NCA decision but when the claimant becomes fully aware of all damages.

iii Binding nature of EC and NCA decisions

Whereas EC decisions are binding on national courts pursuant to Article 16(1) of Regulation (EC) 1/2003, there is no equivalent provision in Spanish law on the binding effect of final (*res judicata*) NCA decisions applying CA or TFEU competition rules. The Supreme Court expressly acknowledges this in its 2015 case law.[41] As a rule, NCA decisions constitute highly valued pieces of evidence but do not bind civil and commercial courts, even when the facts at issue are identical.[42]

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38 The 2007 CA amended the former 1989 Competition Act to this end.

39 Madrid Commercial Court Case 88/2014 *Musaat v. Asefa/Caser/Scor* of 9 May 2014. However, the case was not a real follow-on case because the court was asked to rule upon facts that had not been ruled upon by the NCA. NCA decision S/0037/09 concerned a price-fixing cartel, whereas the court was asked to rule upon a collective boycott in the wake of the said cartel. The court considered this boycott as a separate infringement, distinct from the cartel.

40 Madrid Provincial Appeals Court Case 144/2009 *Ausbanc v. Telefónica*, 21 July 2009. This claim followed on from an EC decision against Telefónica due to the abuse of its dominant position through price squeezing, which was not final but had been appealed before EU courts.

41 *EC Copecelt v. Cepsa*; *Repsol v. Ribeira Baixa and Ribera Alta*; *Eulalio v. Repsol*.

42 See Calvo Caravaca A L and Suderow J, 'El Efecto Vinculante de las Resoluciones de las Autoridades Nacionales de Competencia en la Aplicación Privada del Derecho Anti-trust', *Cuadernos de Derecho Transnacional* (October 2015), Vol. 7 No. 2, p. 155.

However, in the sugar cartel case, the Supreme Court established that final (*res judicata*) NCA decisions bind courts in follow-on cases, but only as regards their factual account (as opposed to their legal assessment[43]) in follow-on cases.[44] The Madrid Provincial Appeals Court 2015 case law stresses that this applies to follow-on cases as opposed to stand-alone cases.[45]

As part of the expected 2014/104/EU transposition, the time bar for initiating claims will be expanded to five years as of when the claimant knows or can reasonably be expected to know of the antitrust infringement, the damages and the infringer. It shall not start before the antitrust infringement has ceased and will be suspended during NCA proceedings and ensuing judicial review. The finding of an antitrust infringement in final (*res judicata*) Spanish NCA decisions and court rulings will be irrefutably binding (*irrefutable*) upon courts in follow-on actions. The finding of an antitrust infringement in final (*res judicata*) NCA decisions and court rulings of other Member States will be binding as evidence (*vinculante*) upon courts in follow-on actions.

XI PRIVILEGES

Despite the general rule of full documentary access (Article 140(3) CP), the Constitutional Court recognises that lawyers observe professional secrecy and should not disclose their legal advice. Moreover, the duty of secrecy imposed on parties to NCA proceedings (Article 43 CA) could be jeopardised if a party were to use information obtained from the NCA's file to substantiate a damages claim. In follow-on cases, the court can ask for a copy of the NCA file, to which the full access rule applies, but the NCA is under no obligation to produce leniency applications (Article 15 CP).

Rules on privilege will remain unaltered after the expected 2014/104/EU transposition.

XII SETTLEMENT PROCEDURES

Article 1,809 CC allows private parties to settle disputes in order to avoid or terminate litigation, either in court (judicial settlement) or out of court (extrajudicial settlement). Courts check whether a settlement is possible at certain stages of the procedure.[46] When a settlement is reached and approved by court, it has the same effect as a judgment. Settlements reached out of court by parties have the effect of a private agreement between parties and trigger early termination of the judicial proceedings by means of waiver or abandonment of proceedings by the claimant or acquiescence by the defendant. If a settlement cancels the object of pending litigation, parties need to formally notify the court to allow the latter to close the case (Article 22 CP).

43 By the NCA or upon judicial review.

44 *Nestlé & Others v. Ebro Foods*; *Acor v. Galletas Gullón & Others*.

45 *Hugo & Prourbal v. Repsol*; *Área de Servicio Francás v. Repsol*.

46 Articles 415 and 428 CP.

After the expected 2014/104/EU transposition the time bar for bringing an action for damages will be suspended for the duration of any consensual dispute resolution process (for the parties involved in the process). The NCA may consider compensation paid as a result of a settlement and prior to its decision imposing a fine to be a mitigating factor.

XIII ARBITRATION

Article 2 of the Arbitration Act 60/2003 of 23 December allows arbitration for private disputes of which parties can freely dispose, as opposed to public policy matters. The existence of public policy rules (e.g., competition law) does not impede claims to be freely disposed of by parties.[47] Arbitrators have to apply mandatory rules of EU or Spanish competition law.[48] If they fail to do so, parties may bring an action for annulment of the arbitral award before ordinary courts, which will mainly check whether the award is duly motivated and reasonable.[49] According to Article 5.1(b) of the CNMC Act, parties can submit disputes subject to arbitration to the NCA when they involve competition issues. The NCA's arbitral award will be of a private nature. The procedure is set out in Article 46 of Royal Decree 657/2013 of 30 August (the CNMC Functioning Decree) and either follows UNCITRAL or special NCA rules.

After the expected 2014/104/EU transposition the time bar for bringing an action for damages will be suspended for the duration of the arbitration process (for the parties involved in the process).

XIV INDEMNIFICATION AND CONTRIBUTION

Articles 1,137 and 1,138 CC set joint liability as a general rule in case of a plurality of debtors, unless there is an express exception (e.g., an agreement or statute expressly foreseeing joint and several liability). Given that antitrust damages claims usually qualify as tort liability (see Section II, *supra*) and that the CC does not contain an express exception establishing joint and several liability for tort, the general rule applies (i.e., joint liability as opposed to joint and several liability).

Courts have nevertheless consistently interpreted the CC in a fashion that facilitates effective recovery by victims of damages caused by an illicit conduct. Following the Supreme Court's case law, tort liability is joint and several when it is not possible for a claimant to identify the liability level of each offender *ab initio*.[50] Based on this case law, courts will likely consider liability of co-cartelists to be joint and several, although there are no specific precedents to date.

47 ECJ Case C-126/97 *Eco Swiss China Time v. Benetton*, 1 June 1999.

48 Madrid Provincial Appeals Court Case 147/2013, *Camimalaga v. Vehículos Industriales*, 18 October 2013.

49 Superior Court of Justice Case 2/2012, *Basque Region, France Telecom/Orange/Atlas v. Euskaltel*, 19 April 2012.

50 Supreme Court Case 646/2001 *Rosa&Julia v. ITT Ercos*, 27 June 2001.

By analogy, courts will likely apply the CC's contractual liability rules (Article 1,145 CC) to a plurality of co-cartelists: if a cartelist fully compensated a claimant, it will likely enjoy standing to start proceedings against its co-cartelists to proportionately recover paid damages (Article 14 CP).

The expected 2014/104/EU transposition will confirm that co-cartelists are jointly and severally liable (i.e., each of the cartel members will be bound to compensate for the harm in full and claimants will have the right to require full compensation from any of them). Exceptions are foreseen for small and medium-sized enterprises and immunity recipients.

XV FUTURE DEVELOPMENTS AND OUTLOOK

To date, the lack of pretrial discovery and the one-year time bar linked to the victim's full awareness – not suspended by NCA proceedings or judicial review – have been the main hurdles for private antitrust enforcement actions in Spain.

By fundamentally modifying discovery rules and stretching the deadline to claim from one to five years – with a suspension during NCA proceedings and judicial review – the 2014/102/EU transposition will foster private antitrust enforcement in Spain, in particular follow-on actions, which so far have been lagging behind notwithstanding the high number of NCA infringement decisions and its considerable level of fines.

In addition, the Supreme Court's recent rulings in the hybrid stand-alone petrol station cases are likely to foster a new wave of stand-alone claims in that sector.

Chapter 25

UNITED STATES

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The US Supreme Court significantly changed the private antitrust litigation landscape in 2006 by establishing a heightened 'plausibility' pleading standard that governs whether a complaint survives a motion to dismiss.[2] Subsequent decisions have clarified that:

a conduct must be directly linked to cognisable harm or injury to give rise to an antitrust claim;[3]

b activities inextricably intertwined with US Securities and Exchange Commission regulatory activity are immune from antitrust attack;[4]

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;[5]

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;[6]

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2 *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); see also *Wood v. Moss*, 134 S. Ct. 2056 (2014).

3 *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009); *WeyerHaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

4 *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

5 *Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

6 *Smith v. Bayer*, 131 S. Ct. 2368 (2011).

e arbitrators may not impose class arbitration on parties unless it is contractually permissible;[7]

f express arbitration clauses trump class-action rights, even in antitrust cases;[8]

g expert testimony does not overcome lack of commonality in class actions;[9]

h class certification requires that plaintiffs establish that damages can be proven with class-wide evidence to satisfy FRCP 23(b)(3)'s predominance requirement;[10]

i individual corporate entities that are part of a joint venture may be subject to antitrust 'rule-of-reason' scrutiny;[11]

j an order disposing of one discrete case consolidated in an MDL under 28 USC Section 1407 is an appealable final decision under 28 USC Section 1291;[12] and

k that *stare decisis* may have less than 'usual force in cases involving the Sherman Act'.[13]

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.

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.[14] Section 16 allows private plaintiffs to sue for injunctive relief.[15]

i Statute-of-limitations limit the period of potential recovery

A four-year statute-of-limitations applies to Section 4 claims.[16] The limitations period commences when the cause of action accrues, which generally occurs when the plaintiff suffers injury and damages become ascertainable.[17] Section 16 claims may also be subject to a four-year statute of limitations. Some courts have held that Section 4B also applies to

7 *Stolt-Nielsen v. Animal Feeds*, 559 U.S. 662 (2010).

8 *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

9 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

10 *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013).

11 *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010).

12 *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015).

13 *Kimble v. Marvel Entertainment*, 135 S. Ct. 2401 (2015).

14 15 U.S.C. Section 15(a).

15 Id., Section 26.

16 Id., Section 15(b).

17 E.g., *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338–39 (1971).

Section 16 claims, while others have held that Section 4B does not apply.[18] 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.[19]

The statute of limitations may be tolled by government antitrust actions,[20] the filing of a class action,[21] fraudulent concealment,[22] duress,[23] or equitable estoppel.[24] 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.[25] Some courts allow the tacking of tolling periods.[26]

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,[27] 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 anti-competitive conduct that either involves US import commerce or has a 'direct, substantial, and reasonably foreseeable effect' on US

18 E.g., *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 556 (4th Cir. 1974).

19 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).

20 15 U.S.C. Section 16(i).

21 *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

22 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).

23 E.g., *Willmar Poultry Co. v. Morton-Norwich Products*, 1974-2 Trade Cas. (CCH) Paragraph 75, 292, at 97, 896 (D. Minn. 1 October 1974), aff'd 520 F.2d 289 (8th Cir. 1975); *PhilCo Corp v. RCA*, 186 F. Supp. 155, 161–62 (E.D. Pa. 1960).

24 E.g., *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974).

25 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

26 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).

27 Compare Cal. Bus. & Prof. Code Sections 16750, 16761, 17070, & 17082 with N.Y.S. Gen. Bus. Law Sections 340(5) & 349(h). A plaintiff that brings state-law claim brought in federal court has access to the procedures available under Federal Rule of Civil Procedure Rule 23. *Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

import or domestic commerce.[28] Courts have construed this to require a 'reasonably proximate causal nexus' between the conduct and the effect of US commerce or import commerce, a standard similar to a proximate causation standard.[29] A plaintiff's injury must occur in the US rather than a foreign market to 'give rise to' a claim under the Sherman Act.[30] Although the US effects requirement is sometimes characterised as a jurisdictional issue, it has been treated as a substantive element of the Sherman Act.[31]

When a plaintiff alleges other antitrust claims, such as under the Clayton Act, the extraterritoriality test applies,[32] 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.[33] Additionally, the FTAIA extends the Sherman Act's extraterritoriality test to apply to the FTC Act.[34]

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 interpreted the FTAIA as barring the Sherman Act claims,[35] the Ninth Circuit held that the conduct of the same

28 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 anti-competitive 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).

29 *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 845, 857 (7th Cir. 2012) (en banc); *In re Dynamic Random Access Memory (DRAM)*, 546 F.3d 981 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-La Roche Ltd*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

30 *F. Hoffman-La Roche Ltd v. Empagran SA*, 542 U.S. 155 (2004); *Empagran S.A. v. F. Hoffmann-La Roche Ltd*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

31 *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, 132 S.Ct. 1744 (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) (en banc) (the FTAIA's limitations are jurisdictional in nature).

32 E.g., *United Phosphorus Ltd v. Angus Chemical Co.*, No. 94 C 2078, 1994 WL 577246, at *5 (N.D. Ill. 18 October 1994); *The In Porters SA v. Hanes Printables Inc.*, 663 F. Supp. 494, 498 n.4 (M.D.N.C. 11 June 1987).

33 15 U.S.C. Section 14.

34 Id., Section 45(a)(3).

35 *Motorola Mobility v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2014).

cartel was within the reach of the Sherman Act.[36] The US Supreme Court recently denied a petition for certiorari to resolve this issue so lower courts will continue to develop the law to clarify how these decisions apply.

ii Comity considerations

A court may employ comity considerations to decline jurisdiction, even when the FTAIA's requirements have been satisfied.[37] 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.[38]

iii Exemptions

Foreign sovereigns are presumptively immune from US courts' jurisdiction under the Foreign Sovereign Immunities Act (FSIA).[39] To rebut the presumption, a plaintiff must show that one of the FSIA's seven exceptions applies.[40] The most common exemption in antitrust cases is the commercial activity exception, which precludes FSIA immunity where a foreign sovereign state's commercial activity has a 'nexus' with the US.[41] The scope of 'commercial' activity, 'foreign state', and the specific nexus required to meet this exception has been extensively litigated.[42]

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.[43] 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.

36 *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2015).

37 HR Rep. No. 97-686, at 13 (1982), reprinted in 1982 USCCAN 2487, 2498.

38 *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798–99 (1993).

39 28 U.S.C. Section 1604.

40 Id. Section 1605.

41 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'.

42 E.g., *Kato v. Ishihara*, 360 F.3d 106, 108 (2d Cir. 2004); *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1380–82 (8th Cir. 1993); *Tubular Inspectors Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 183–86 (5th Cir. 1992).

43 *WS Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990); see also *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976).

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.[44]

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 the plaintiff is a 'person' under Section 1 of the Clayton Act;[45]

b the defendant violated the 'antitrust laws';[46]

c antitrust injury ('impact' or 'fact of damage'),[47] that is, harm to competition[48] to plaintiff's 'business or property' proven by direct or circumstantial evidence or inference[49] with a reasonable degree of certainty;[50] and

d the antitrust violation was a material and substantial cause of the injury.[51]

Finally, plaintiff must satisfy the remoteness doctrine, which requires a plaintiff's injury to not be too remote from defendant's conduct, via a five-factored inquiry:

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44 E.g., *Mannington Mills v. Congoleum Corporation*, 595 F.2d 1287, 1293 (3d Cir. 1979).

45 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).

46 E.g., 15 U.S.C. Sections 12(a) and 15.

47 *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

48 E.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 488 (1977); see, e.g., *Southeast Missouri Hospital v. C.R. 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).

49 *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 126 (1969).

50 *Duty Free Americas, Inc. v. Estee Lauder Companies*, 797 F.3d 1248, 1272–73 (11th Cir. 2015); *Mostly Media v. US W 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).

51 E.g., *Tal v. Hogan*, 453 F.3d 1244, 1258 (10th Cir. 2006).

a causal connection between the violation and the harm to the plaintiff, and whether defendants intended to cause the harm;
b nature of the injury, including whether the plaintiff is a consumer or competitor;
c directness of the injury, and how speculative or tenuous the damages are;
d potential for duplication of recovery or complex apportionment of damages; and
e 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[52] from bringing a Section 4 claim unless it is a competitor.[53] Some courts require that the plaintiff is an 'efficient enforcer' or a potential competitor sufficiently prepared to enter the market.[54]

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:[55]

a the plaintiff is a 'person, firm, corporation, or association';[56]
b the defendant violated the 'antitrust laws';[57]
c the threatened loss or damage proximately results from the alleged antitrust violation;[58] and
d the 'antitrust injury', that is threatened loss or injury, is due to harm to competition.[59]

But there are differences. Section 16 requires 'threatened loss or damage'[60] 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'[61] rather than actual loss.[62] Unlike Section 4 claims, the threatened loss or injury in a Section 16 claim is not limited to

52 *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998).
53 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977).
54 *Sanger Insurance Agency v. Hub International Ltd*, 802 F.3d 732 (9th Cir. 2015); *Sunbeam Television Corp. v. Nielson Media Research, Inc.*, 711 F.3d 1264 (11th Cir. 2013).
55 *Palmyra Park Hospital v. Phoebe Putney Memorial Hospital*, 604 F.3d 1291 (11th Cir. 2010).
56 15 U.S.C. Section 26.
57 Id.
58 *Zenith Radio Corp v. Hazeltine Research*, 395 U.S. 100, 130 (1969).
59 *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 112–13 (1986); Zenith, 395 U.S. at 130.
60 1675 U.S.C. Section 26.
61 395 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).
62 15 U.S.C. Section 15.

injury to business or property.[63] 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.[64]

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:[65]

a the direct purchaser had a pre-existing 'cost-plus' contract with an overcharge, shifting the entire overcharge to the indirect purchaser;[66]

b the ownership-control exception where the direct purchaser is owned or controlled by the defendant or the indirect purchaser;[67] or

c the direct purchaser was a co-conspirator.[68]

Indirect purchasers may recover under the *Illinois Brick* repealer statutes of 26 states as well as state consumer protection statutes.[69]

V THE PROCESS OF DISCOVERY

The scope of discovery in antitrust cases is broad and expansive. Federal Rule of Civil Procedure (FRCP) 26 allows discovery of a reasonable time, geographical and subject matter if requested information is relevant to any claim or defence and outweighs the burden imposed on the responding party. What is relevant for discovery is broader than what is admissible as evidence at trial.

Courts may restrict 'unduly burdensome' discovery requests where the burden and expense outweigh the prospective benefit of the requests.[70] 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 'particularized need' for the materials.[71]

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63 *Cargill*, 479 U.S. at 111.

64 E.g., *In re Relafen Antitrust Litigation*, 221 F.R.D. 260, 273–74 (D. Mass. 12 May 2004).

65 *Illinois Brick v. Illinois*, 430 U.S. 720, 735 (1977).

66 *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481, 494 (1968); *Illinois Brick*, 431 U.S. at 736.

67 *Illinois Brick*, 431 U.S. at 736 n.16.

68 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, n.4 (8th Cir. 1998); *Arizona v. Shamrock Foods*, 729 F.3d 1208, 1212–14 (9th Cir. 1984).

69 E.g., *Ciardi v. F. Hoffman-La Roche*, 436 Mass. 53 (Mass. 2002).

70 FRCP 26(b)(2)(C)(iii); 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).

71 E.g., *United States v. Sells Engineering*, 463 U.S. 418, 443 (1983).

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 trade secrets or confidential commercial information, and whether the request will cause the non-party undue hardship.[72] A party that refuses to comply with a court order may face sanctions.[73]

Courts generally grant requests to compel discovery from domestic or foreign affiliates or subsidiaries of corporations that are parties to the antitrust case.[74] Generally, a foreign party subject to personal jurisdiction in the US is subject to discovery.[75] Foreign blocking statutes do not excuse a corporation present in the US to resist producing documents located abroad.[76]

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,[77] and on substantive antitrust issues like market or monopoly power, anti-competitive harm, antitrust injury, and damages.

Expert testimony is only admissible if: [78]

a the expert has sufficient specialised knowledge and expertise with respect to the field in question;

b the methodology and data used to reach the expert's conclusions are sufficiently reliable; and

c the expert's testimony is sufficiently relevant to assist the trier of fact.

Reliability is the most common basis on which expert testimony has been 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.[79]

72 E.g., *ACT Inc. v. Sylvan Learning Sys*, No. CIV A 99-63, 1999-1 Trade Cas. (CCH) Paragraph 72, 527 (E.D. Pa. 14 May 1999).

73 FRCP 37.

74 E.g., *In re ATM Fee Antitrust Litigation*, 233 F.R.D. 542, 544–45 (N.D. Cal. 5 December 2005).

75 E.g., *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522 (1987); *Strauss v. Credit Lyonnais*, 242 F.R.D. 199 (E.D.N.Y. 25 May 2007).

76 E.g., *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976).

77 See Section VII, *infra*.

78 FRCP 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593–94 (1993).

79 Id.

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:[80]

a the class is so numerous that joinder of all members would be impracticable;

b common questions of law and fact 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:[81]

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.[82]

Plaintiffs must establish that damages 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.[83] Plaintiffs also must prove class-wide impact – that all class members suffered injury to their business or their property – using common proof.[84] Courts have recently required more rigorous qualitative and quantitative assessments of plaintiffs' proposed common methodology for analysing

80 FRCP 23(a).

81 FRCP 23(b).

82 *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541 (2011).

83 *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013).

84 2A P. Areeda & H. Hovenkamp, *Antitrust Law*, 398a, at 438–39 (3d ed. 2007).

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,[85] a 'rigorous analysis' of expert opinions is required.[86]

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.[87] 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:

a that the class is in existence, ascertainable and definable with reasonable specificity;[88] and

b that at least one class plaintiff is able to demonstrate standing.[89]

ii Appointment of class counsel

After certification, the court must appoint class counsel to adequately and fairly represent the interests of the entire class.[90]

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.[91]

Court approval of class settlements required

To prevent abuse by class representatives, Rule 23(e) requires court of approval of class action settlements and voluntarily dismissals. Proposed class-action settlements, voluntary dismissals, or compromise proposals are generally approved if (1) the class meets the 23(a) and 23(b) requirements and (2) the settlement is 'fair, reasonable, and

85 *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 310 (3d Cir. 2009).

86 *Comcast*, 133 S. Ct. at 1432–35; *Wal-Mart*, 131 S. Ct. at 2553–54.

87 *In re Nexium Antitrust Litigation*, 777 F.3d 3, 25 (1st Cir. 2015).

88 Some courts have held that 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).

89 E.g., *Prado-Steinman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000).

90 FRCP 23(g).

91 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).

adequate'.[92] Under the latter inquiry, relief under the settlement will be evaluated against the class's expected relief at trial and its likelihood of success.[93] The settlement may be rejected if the court has concerns that the damages are inadequate or concerns regarding the class standing of the plaintiffs.[94]

Notice

Upon certification, 23(b)(3) requires notice to be provided[95] 'in a reasonable manner' to all class members who would be bound by the proposal.[96] 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.[97] Damages cannot be proven through 'speculation or guesswork'.[98] The court will award the plaintiff treble the damages amount. Courts do not allow punitive damage awards because antitrust plaintiffs already receive treble damages.[99]

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.[100]

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

92 FRCP 23(e)(2); *Amchem*, 521 U.S. at 621.

93 E.g., *Wal-Mart Stores Inc. v. Visa USA Inc.*, 396 F.3d 96, 118–19 (2d Cir. 2005).

94 E.g., *In re Refrigerant Compressors Antitrust Litigation*, 795 F. Supp. 2d 647 (E.D. Mich. 2011).

95 FRCP 23(c)(2).

96 FRCP 23(e)(1).

97 *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969).

98 *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Dopp v. Pritzker*, 38 F.3d 1239, 1249 (1st Cir. 1994).

99 *McDonald v. Johnson & Johnson Co.*, 722 F.2d 1370, 1381 (8th Cir. 1983).

100 E.g., *Howard Hess Dental Labs Inc. v. Dentsply International Inc.*, 424 F.3d 363, 374 (3d Cir. 2005).

damages in tying cases.[101] A plaintiff may be entitled to recovery only when the fair market value of the tying and tied products exceeds their combined purchase price.[102]

c The plaintiff's lost profits is 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.[103] Damages are usually limited to lost net profits, though some courts may award lost gross profits if lost net profits are negligible.[104] 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 present value of lost future profits).[105]

iii Mitigation

A plaintiff must mitigate damages and cannot recover losses that could have been avoided.[106]

iv Disaggregation

A plaintiff may only collect damages for losses caused by the defendant's antitrust violation. Therefore, the plaintiff must provide the fact finder a basis to disaggregate the losses caused by other factors.[107] If it does not, a damage award may be overturned on the grounds it is based on speculation and guesswork.[108]

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.[109]

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

101 E.g., *Crossland v. Canteen Corp.*, 711 F.2d 714, 722 (5th Cir. 1983).

102 E.g., *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672–73 (7th Cir. 1985).

103 E.g., *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 484 (7th Cir. 1980).

104 Id.

105 E.g., *Faulkner's Auto Body Center Inc. v. Covington Pike Toyota Inc.*, 50 Fed. Appx. 664, 667–69 (6th Cir. 2002).

106 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 n.47 (2d Cir. 1983).

107 E.g., *Blue Cross & Blue Shield United v. Marshfield Clinic*, 152 F.3d 588, 592–93 (7th Cir. 1998).

108 E.g., *US Football League v. NFL*, 842 F.2d 1355, 1377–79 (2d Cir. 1988).

109 15 U.S.C. Section 15(a); 28 U.S.C. Section 1961 (2000).

the direct purchasers,[110] 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.[111]

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 anti-competitive overcharge;[112]

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';[113] 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.[114]

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: (1) final, (2) rendered in a civil or criminal proceeding brought by or on behalf of the United States, (3) under the antitrust laws to the effect that a defendant has violated said laws, and (4) is not a consent judgment or decree entered before any testimony has been taken.[115] Additionally, the private plaintiff must be injured in fact by the antitrust violation proven in the government action.[116] Guilty pleas to a DoJ indictment generally are admissible as evidence in subsequent

110 *Hanover Shoe Inc. v. United Machinery Corp.*, 392 U.S. 481, 491–94 (1968).

111 See Section IV, *supra*; *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730–31 (1977).

112 *Illinois Brick*, 431 U.S. at 735–36; *Mid-West Paper Prods Co. v. Continental Group Inc.*, 596 F.2d 573, 577 (3d Cir. 1979).

113 *Jewish Hospital Association of Louisville v. Stewart Mechanical Enterprises Inc.*, 628 F.2d 971, 974–75 (6th Cir. 1980).

114 E.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 604 (7th Cir. 1997).

115 15 U.S.C. Section 16(a); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951).

116 E.g., *Theatre Enterprises Inc. v. Paramount Film Distribution Corp.*, 346 U.S. 537, 543 (1954).

private litigation.[117] 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.[118]

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,[119] but is limited to the period, products and geographical scope adjudicated in the prior government action.[120]

ii Collateral estoppel

The collateral estoppel doctrine applies in private antitrust suits.[121] 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.[122] A defendant can use collateral estoppel doctrine defensively to prevent a plaintiff from re-litigating issues previously decided and lost by the government,[123] 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.[124]

Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)[125] offers criminal defendants who participate in the DoJ's Corporate Leniency Program 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. ACERPA does not affect the plaintiff's right to recover costs, attorneys' fees and prejudgment interest provided under the Clayton Act.

117 FRE 410. A guilty plea is not admissible if a plea is later withdrawn or is a nolo contendere ('no contest') plea.

118 *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975).

119 15 U.S.C. Section 16(a).

120 E.g., *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 184 (D.C. Cir. 1965); *Michigan v. Morton Salt Co.*, 259 F.Supp. 35, 68, 74 (D. Minn. 1966).

121 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').

122 E.g., *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

123 *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322, 325–26 (4th Cir. 2004).

124 15 U.S.C. Section 16(a).

125 Antitrust Criminal Penalty Enhancement & Reform Act of 2004, Section 213, 15 U.S.C. Section 1 note.

XI PRIVILEGES

i Attorney–client privilege

The 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,[126] and covers communications with current and former employees,[127] subsidiaries, and affiliates.[128] It does not extend to communications with a lawyer acting in a business capacity.[129]

ii Waiver of attorney-client privilege

Privilege is waived if the communication is voluntarily disclosed to a third party,[130] 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.[131] Privilege may be waived if the corporation voluntarily discloses communications to third-party government agencies.[132]

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.[133] 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.[134]

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 is governed by common law principles.[135] Principles of international comity determine 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

126 *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981).

127 E.g., *In re Allen*, 106 F.3d 582, 605–06 (4th Cir. 1997).

128 E.g., *United States v. AT&T Co.*, 86 F.R.D. 603, 616–18 (D.D.C. 18 April 1979).

129 E.g., *In re Allen*, 106 F.3d at 600–05.

130 E.g., *In re Qwest Communications International Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006).

131 E.g., *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 217 (S.D.N.Y. 30 April 2001).

132 *In re Qwest*, 450 F.3d at 1187–88.

133 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).

134 E.g., *Clark v. United States*, 289 U.S. at 15.

135 FRE 501.

contrary to public policy.[136] The 'predominant' jurisdiction is usually the jurisdiction in which the attorney–client relationship was formed or where relationship was centred at the time the privileged communication was sent.[137]

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 the attorney in anticipation of litigation.[138] 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.[139] While opinion work product is virtually immune from discovery,[140] 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.[141] 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.[142]

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.[143] 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.[144] 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.[145]

136 E.g., *Wultz v. Bank of China*, 979 F. Supp. 2d 479, 486 (S.D.N.Y. 2013) (quoting *Golden Trade SrL v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 17 August 1992)).

137 Id.

138 FRCP 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495 (1947).

139 E.g., 805 F.2d at 163.

140 E.g., 329 U.S. at 513.

141 FRCP 26(b)(3)(A).

142 E.g., 805 F.2d at 163-64.

143 FRCP 16(a)(5), (f)(1).

144 FRCP 23(e).

145 Id.

XIII ARBITRATION

Federal policy favours arbitration and federal antitrust claims arising out of both international and domestic transactions generally may be arbitrated.[146] Arbitration clauses are construed broadly[147] and refuse to recognise attempts by parties to limit the statutory remedies 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.[148] 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.[149] Also, arbitrators may not impose class arbitration on parties unless it is contractually permissible.[150] The Supreme Court also made express arbitration clauses trump class-action rights, even in antitrust cases.[151]

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 damages caused by the conduct of the entire conspiracy, not just those attributable to its own conduct.[152] Antitrust co-conspirators can be held jointly and severally liable for damages predicated on sales by members of the conspiracy and damages 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 anti-competitive scheme.[153] 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.

146 E.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

147 E.g., *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004).

148 *Kristian v. Comcast Corp.*, 446 F.3d 25, 46–48, 55–62 (1st Cir. 2006).

149 *Healy v. Cox Communications, Inc.*, 790 F.3d 1112, 1118–21 (10th Cir. 2015).

150 *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

151 *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

152 E.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

153 Id. at 639–46.

iii Indemnification

Most courts prohibit a defendant from seeking indemnification from other participants of an anti-competitive conspiracy, treating contribution and indemnification analogously.[154] However, indemnification may available to 'an innocent actor whose liability stems from some legal relationship with the truly culpable party'.[155]

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 the judgment does not ordinarily stay enforcement.[156] To stay enforcement pending appeal, the losing defendant (or 'judgment debtor') must ordinarily post a bond for the full amount of the monetary judgments.[157] Enforcement of monetary judgments in US federal courts is governed by FRCP 69.[158]

The principal device contemplated by that rule is the 'writ of execution' (i.e., an order authorising the US marshals to seize and sell property of the judgment debtor within the territory of the district court).[159] 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.[160] Rule 69 authorises proceedings in aid of enforcement, including post-judgment discovery as to the judgment debtor's assets.[161] 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.[162]

US courts generally do not have authority to execute against assets outside the US.[163] However, the enforcement law of the state of New York authorises orders

154 *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186–87 (8th Cir. 1979), abrogated on other grounds by *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981); *Mortgages, Inc. v. US District Court for District of Nevada*, 934 F.2d 209, 212 n.3 (9th Cir. 1991).

155 *Wills Trucking, Inc. v. Baltimore & Ohio RR Co.*, No. 97-4067, 1999 U.S. App. LEXIS 9832, at 7–8 (6th Cir. 1999).

156 FRCP 62(a).

157 FRCP 62(d).

158 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. § 401.

159 See *Aetna Cas. & Sur. Co. v. Markarian*, 114 F. 3d 346, 349 (1st Cir. 1997).

160 See 28 U.S.C. § 1963.

161 See Fed. R. Civ. P. 69(a)(2).

162 *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).

163 Id.

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.[164] The constitutionality of this approach remains an open question.[165]

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 anti-competitive conduct and for private companies challenging the practices of other companies as anti-competitive. 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 interpret *Bell Atlantic v. Twombly*[166] 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.[167]

In its next term, the Supreme Court will decide issues implicating class action litigation:[168] first, it will decide whether a class can be certified where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in the sample. Second, it will address whether a class can be certified where the class includes uninjured members who lack a right to legal damages. Thus, appellate courts will continue to clarify the class certification requirements following *Walmart v. Dukes* and *Comcast v. Behrend*.[169] There is also presently a split in authority regarding the extent to which the ascertainability of the members of the class is an independent requirement of Rule 23 and how vigorously it should be enforced, which may require the Supreme Court's intervention to resolve.[170] The evolution of these standards is likely to impact how and when class-action plaintiffs must obtain discovery and use experts in pursuing antitrust suits.

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164 *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533, 538-41 (2009); *Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 41 A.D.3d 25, 31 (N.Y. App. Div. 1st Dep't 2007).

165 *Koehler*, 12 N.Y.3d at 544-45 (Smith, J., dissenting) (noting potential constitutional objections).

166 550 U.S. 544 (2007).

167 *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).

168 *Tyson Foods v. Peg Bouaphakeo*, No. 14-1146, 765 F.3d 791 (8th Cir. 2015), cert. granted. 135 S. Ct. 2806 (8 June 2015)(No. 14-1146).

169 See Section VII, *supra*; e.g., *In re Nexium Antitrust Litigation*, 777 F.3d. 9 (1st Cir. 2015) and *In re Freight Rail Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013).

170 See *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657-58 (7th Cir. 2015) (rejecting Third Circuit's ascertainability requirement), petition for cert. filed, *Direct Digital, LLC v. Mullins*, No. 15-549 (U.S.).

Over the past year the US Supreme Court has rendered several decisions implicating substantive antitrust law. Notably, it clarified that a board can invoke state-action immunity only if it is subject to active supervision by the state.[171] Also, the Court determined that the federal Natural Gas Act does not pre-empt state law claims against gas pipelines for alleged manipulation of market price indices.[172]

Further developments in substantive antitrust law have come from the federal appellate courts this year. For example, in the context of settling patent infringement disputes between generic and brand-name drug manufacturers, the Third Circuit held that non-monetary reverse 'payments' including agreements not to market an authorised generic drug, are subject to antitrust scrutiny under the rule of reason analysis.[173] Similarly, the Second Circuit found that there was a substantial likelihood that a pharmaceutical company violated antitrust laws by 'product hopping' – the practice of introducing new iterations of the same brand name drug to impede competition from its generic alternatives.[174] Moreover, addressing exclusive dealings cases, the Eleventh Circuit held that antitrust liability may attach even if the defendant's exclusive dealings merely slowed, as opposed to completely foreclosed, entry.[175]

Additionally, pending appeal before the Second Circuit, is whether the doctrines of act of state and international comity can immunise conduct of foreign companies which is compelled by foreign governments.

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 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.

171 *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015).

172 *Oneok Inc. v. Learjet, Inc.*, 134 S. Ct. 2899 (2014).

173 *King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*, 791 F.3d 388, 404 (3d Cir. 2015).

174 *New York v. Actavis*, 787 F.3d 638, 652–54 (2d Cir. 2015).

175 *McWane, Inc. v. FTC*, 783 F.3d 814, 837–38 (11th Cir. 2015).

Chapter 26

VENEZUELA

Pedro Ignacio Sosa Mendoza, Pedro Luis Planchart, Rodrigo Moncho Stefani and Mauricio Ramírez Gordon[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

After several attempts to reform the Venezuelan antitrust legislation, a new law – the Antimonopoly Act – was finally enacted in November 2014. Although some previous drafts of this bill proposed imposing new restrictions, new sanctions, and increasing sanctions on existing prohibitions (including higher fines, temporary or definitive closure of companies, temporary occupations and preventive confiscation of goods), the finally approved bill did not fundamentally change the previous Law to Promote and Protect the Exercise of Free Competition (LPPEFC).

Other than that, recently there has not been any relevant activity in the antitrust field. Our comments regarding the Antitrust and Similar Activities Act are included in Section XV, *infra*.

Although judicial and administrative proceedings involving civil liability claims for competition and antitrust legislation violations have been non-existent in the past two years, there have been some proceedings brought before the administrative authority in charge of overseeing competition law to determine the existence of anti-competitive activities (e.g., minor cases of unfair competition through misleading advertising). No relevant sanctions were rendered in those procedures and in most of them the Antimonopoly Superintendency found that no anti-competitive activities were being committed.

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II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Article 113 of the Constitution establishes as a general rule the prohibition of monopolies, the unconstitutionality of abuse of the position of dominance, and the unconstitutionality of concentrated demand.

In addition to the Constitution currently in force, the Antimonopoly Act regulates competition and antitrust matters in Venezuela, and is accompanied by several guidelines and regulations pertaining specifically to economic concentrations, franchises and authorisations to carry out prohibited practices.

The Antimonopoly Act prohibits, as a general rule, any conduct, practices, agreements, contracts or decisions that impede, restrict, distort or limit fair competition, as defined by the Antimonopoly Act. Furthermore, the law mainly prohibits the following types of arrangements:

a acts and conducts aimed at hindering or restricting the entrance or continuance of companies, products or services in markets;

b actions intended to manipulate production, distribution, technical development or investment so as to restrict fair competition;

c agreements entered into through unions, associations, federations or any other group that restrict or impede fair competition among their members. Similar agreements that are executed in shareholders' meetings of companies and partnerships are also prohibited;

d agreements, decisions, collective recommendations or concerted practices to: (1) fix prices and other commercial or service conditions; (2) establish limits on production, distribution and technical or technological development and investment; (3) divide markets, territories, supply sectors or sources among competitors; (4) apply different conditions for similar products or services that place competitors at a disadvantage with others; and (5) condition the execution of contracts upon the acceptance of additional provisions that are not related in any way to the nature of the contracts;

e economic concentrations; and

f abuse of a dominant position.

Some of the violations are *per se* illegal, but others will require application of the rule of reason when assessing them. The Antimonopoly Act requires the administration or the judge to assess (1) whether the conduct or actions are harmful to fair competition, (2) whether there is wilful misconduct present on the part of the companies, and (3) whether there has been any illegal conduct or action. Conduct or actions that might be deemed violations of antitrust or competition regulations will also be evaluated with regard to their economic efficiency.

The Antimonopoly Act provides for sanctions ranging from the equivalent of 10 to 40 per cent of the immediate previous year's gross income of the guilty party. The statute of limitations is five years.

III EXTRATERRITORIALITY

Article 3 of the Antimonopoly Act expressly provides that its regulations apply to economic activities only within the national territory. Any economic activity occurring in Venezuela, including that of foreign parties will therefore be subject to the provisions of the Antimonopoly Act.

IV STANDING

The Antimonopoly Act provides that antitrust and competition matters will be decided in an administrative proceeding before the Antimonopoly Superintendency, and not in a judicial process before the courts.

Any interested party may initiate the administrative proceeding or bring a case against another. In Venezuela, the interest required of the initiating party in an administrative proceeding needs only to be legitimate and direct. The direct-interest element means that the actions of the defendant must directly affect the claimant.

Only after the Superintendency determines that a particular conduct violates competition law may the affected party file a claim for damages against the liable party with the competent courts. In exceptional circumstances, cases related to unfair competition can be filed directly with a judge, without reference to a prior administrative proceeding.

V THE PROCESS OF DISCOVERY

Unlike the common law system, Venezuelan legislation does not provide a specific opportunity for the parties to produce their evidence prior to the proceeding. Each party must prove the alleged facts during the proceedings and then leave the administration or the judge to evaluate the evidence produced.

In an administrative proceeding, the Superintendency has wide discretion to investigate and to require documents or related information (e.g., accounting records). The party involved must provide the information requested; the administration will accord confidential treatment to the information.

Although in Venezuela there is no discovery process prior to the proceeding, parties may request information from the opposing party or third parties during the evidence period of the proceeding.

Parties may request as evidence information in the possession of their counterparty or third parties. First, the court requests the presentation of the documents (or at least a copy of the documents) that the requested party must produce. Second, the judge can order the third party to produce at trial the documents requested by one of the parties as evidence.

VI USE OF EXPERTS

The parties, or even the Antimonopoly Superintendency in exceptional cases, may request an expert testimony or report to be rendered on technical issues for evidentiary purposes, in a specific case.

Only qualified people are entitled to act as experts. Experts are those who, by virtue of their profession, art or industry, have the practical and theoretical knowledge required to review a specific situation. In antitrust and competition cases, economists are commonly used to assess the occurrence of legal violations or even to determine the extent of the damage that such violations cause.

Should an expert's assessment be required in an antitrust or competition proceeding, the parties will each appoint one expert and a third expert will be appointed by the administration. These three experts will participate as a team in the evaluation of a determined situation and their conclusions will be recorded in the proceedings' file in writing. If the parties agree, instead of three experts, one sole expert may be appointed. The parties may ask for clarifications.

Also, expert evidence may be brought to the proceedings through witnesses. There are two kinds of witnesses able to provide expert evidence: (1) the expert witness, who is a qualified person who does not know the facts of the case but will offer his or her technical knowledge and expertise; and (2) the witness expert, who knows the facts discussed in the case and will offer not only his or her technical assessment on the specifics of the case, but also general technical knowledge and expertise as well.

Such expert testimony can be used as evidence in the determination of a violation and the Superintendency could then request further assistance from such experts to make a determination as to the damages suffered by the affected parties, once a decision has been reached as to the actual occurrence of a competition or antitrust violation.

VII CLASS ACTIONS

Competition matters are conducted in an administrative proceeding before the Antimonopoly Superintendency and only exceptionally before the courts (see Section IV, *supra*). A group of people may initiate such administrative proceeding for competition violations followed by a judicial claim for damages.

In Venezuelan legislation, class actions as established in the common law system do not exist. However, the Venezuelan Constitution provides for a similar kind of action called the collective and diffuse rights action, which up to 2010 was extensively regulated by case law. This type of action was then recognised in the Supreme Tribunal of Justice's Act of 2010. Case law has determined that only collective claims, not individual claims, can be filed through a collective or diffuse rights action.

If the claim is related to nationally relevant issues, the competent authority to decide the matter is the Constitutional Chamber of the Supreme Tribunal of Justice; otherwise the first instance court where the facts occurred has jurisdiction. The proceeding involves both written and oral presentation of evidence and it is conducted within a very short time frame.

VIII CALCULATING DAMAGES

In Venezuela, damages may be claimed by the affected parties in trial after the Superintendency has found that prohibited conduct or actions have occurred, or directly at trial, if the case involves unfair competition. Damages are only allowed that are a direct consequence of the prohibited conduct or actions. Compensatory damages, including pain and suffering (moral damages), will be assessed by the judge.

Only ascertainable damages can be compensated, including compensatory damages, loss of profits that can be expected from the original damage, and pain-and-suffering damages. Indirect and punitive damages are not recognised under Venezuelan law and therefore cannot be compensated.

Although rare in competition enforcement claims, pain-and-suffering damages are indicated in a situation resulting from damage inflicted on a victim whereby, by virtue of such damage, the party will experience a loss or diminution of its moral assets. Also, the victim may claim all enrichment it reasonably expected to achieve had the wrongful conduct not occurred, and therefore lost as a result of the conduct.

With regard to the damage that is to be compensated, the basis of the liability plays a key role: if the damage is characterised as contractual, the cognisable damages cannot exceed those foreseeable (unless there is gross negligence or wilful misconduct, in which case damages extend to unforeseeable damages). If the damage results from tort, the damages may extend to those foreseeable and unforeseeable. In antitrust violations, the damage will always arise from an unlawful action, and, therefore, will be considered under tort theory.

The plaintiff has the burden of providing his or her estimate of damages and sufficient evidence to support his or her claim. At the end of the trial, the court will determine the compensation amount, or order that an expert be used to determine the actual damages.

The successful party of an action derived from antitrust violations may claim from the losing party all the costs it has incurred as a result of the proceedings. The 'loser pays rule' in Venezuela only applies to those proceedings in which the decision is absolutely contrary to the assertions and interest of the losing party. The proceedings' costs and expenses include attorneys' fees. In some cases, the court may rule that the losing party must pay the proceedings' costs, expenses and attorneys' fees incurred during the trial even in the absence of a request from the other party.

However, the procedural rules in Venezuela establish a limit to the costs and expenses that the losing party must pay to the winning party as 30 per cent of the amount at issue in the litigation.

IX PASS-ON DEFENCES

A pass-on defence can be used by the defendant in a civil proceeding facing damages from antitrust legislation violations to allege that its immediate buyer was not damaged because it passed on the added costs to its customer; as mentioned above, a prerequisite for being compensated for damages is actual damage. Nevertheless, the plaintiff could argue that although no loss or diminution of his or her assets occurred as a direct consequence

of the conduct, he or she did suffer damage by virtue of the expected enrichment not generated as a consequence of the conduct, which he or she could reasonably have expected to have obtained if the competition or antitrust violations had not occurred.

On the other hand, the pass-on defence would not be admissible in an administrative or judicial proceeding aimed at determining the occurrence of the antitrust violations because such procedures are not intended to determine and order the compensation of damages, but rather only the occurrence of such unlawful act. Therefore, even if the pass-on occurred, the party responsible for the antitrust violations would be subject to an administrative fine.

X FOLLOW-ON LITIGATION

Under Venezuelan law, after the conclusion of an administrative proceeding for antitrust violations, the affected party may file an action to claim damages from the liable party with a court of competent jurisdiction, unless the violation pertains to unfair competition, in which case the claim may be brought directly in the courts (see Section IV, *supra*). Therefore, the only limitation to follow-up litigation (e.g., to exercise a civil liability claim) would be to go through the previous administrative procedure when necessary.

There are no criminal sanctions for antitrust violations in Venezuelan legislation.

XI PRIVILEGES

The Civil Procedure Code, which is applicable to judicial procedures, is also applicable as supplementary rules for the administrative proceeding conducted before the Antimonopoly Superintendency.

As a consequence, information shared with attorneys by their clients pertaining to a specific case or claim is kept confidential. Thus, the judge and the administration are obliged to uphold the attorney–client, attorney work product and joint work product privileges.

Also, the Antimonopoly Act expressly establishes that the Superintendency can order the information submitted by companies to the Superintendency be kept confidential and used only in the proceeding for which it was requested. If the Superintendency requests any information, and the requested party refuses to surrender the information, such resistance may be subject to fines ranging from 1 to 20 per cent of the infringer patrimony.

XII SETTLEMENT PROCEDURES

Because of the public policy nature of antitrust matters, once initiated, administrative proceedings and the judicial process aiming to determine the occurrence of antitrust violations may not be settled.

However, a judicial proceeding initiated to claim civil damages from the liable party can be settled by an agreement between the parties. According to the Civil Procedure Code, the parties in a trial pertaining to matters not subject to public policy, such as a claim for civil damages, may enter into an agreement by means of which they

end the proceedings. In such an agreement, the plaintiff or plaintiffs agree to renounce their rights in the claim in exchange for some kind of benefit that must come from the defendant, meaning that the settlement represents a mutual commitment from both parties.

When both parties enter into a settlement agreement before a competent court, and the settlement is approved by the relevant authority, the agreement ends the judicial proceedings and is given *res judicata* effect over such claims.

XIII ARBITRATION

In Venezuela, the same principles apply to arbitration as to settlement agreements; the determination of whether an antitrust violation occurred may not be subjected to arbitration, but the parties involved could reach an agreement to have instead a civil matter subjected to arbitration (see Section XII, *supra*).

Venezuelan legislation on commercial arbitration is fully consistent with international standards. The New York and Panama Conventions apply, and the Commercial Arbitration Act of 1998 is based on the recommendations of the UNCITRAL Model Law.

According to Venezuelan law, the usual alternative dispute resolution methods used internationally may be implemented, including arbitration, mediation, dispute or adjudication boards, and expert determination. Obviously, the wording of the arbitration clause is paramount.

XIV INDEMNIFICATION AND CONTRIBUTION

As a basic principle, in Venezuela no party may be found liable unless they have participated in the trial or proceeding from which such liability arises, or at least were given full access and the option to participate and therefore exercise to the fullest extent permitted by law its right to defend against its counterparty's or the administration's allegations in such trial or proceeding. A party affected by antitrust violations may seek indemnification or claim damages from the liable party.

In fact, any party found accountable for practices or actions that violate antitrust law must be called by the judge or the administration during a proceeding to exercise its right of defence before a final decision is rendered. Only then can an affected party claim indemnification or damages.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In the near future the lack of any type of judicial procedures on competition matters will potentially continue. This phenomenon results from the ever-growing state and governmental controls that exist in Venezuela. These range from a very strict currency control to restricted economic freedom, including price controls, and costs regulations that have, in essence, rendered null much of the competition and market interactions between competitors.

As an example of these price and costs regulations, in February 2014, the Fair Prices Act was enacted, and later modified in November 2014 and then in November 2015, which limits companies' profits to a maximum of 30 per cent of their costs – 20 per cent for importers, besides regulating prices and consumer protection. The government regulates prices in almost all essential consumer products and services.

Considering that these types of regulations seem to be increasing and do not show any signs of slowing down is why, in our opinion, we will not see many procedures regarding competition matters commenced in the near term.

Appendix 1

ABOUT THE AUTHORS

BABATUNDE ABIODUN ADEDEJI

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Babatunde Abiodun Adedeji is the founder and executive director of the Consumers Empowerment Organisation of Nigeria (CEON). He founded CEON, then the Consumer Affairs Movement of Nigeria (CAMON), a non-governmental and non-profit making consumer protection organisation in 1994. He is an expert on consumer protection and competition policy, law and issues in Nigeria and ECOWAS.

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Evelyne Ameye, LLM is the founding partner of Evelyne Ameye Legal Services, which she founded in 2014. She is a Spanish and EU competition expert, qualified at the Brussels and Madrid Bars. She worked at the European Commission, worked several years for well-known competition professor Jean-François Bellis in Van Bael & Bellis in Brussels and was soon hired by US law firm Mayer Brown. After working for many years for Mayer Brown in Brussels and Paris, she moved to Madrid, where she worked for Spanish law firm Gómez-Acebo & Pombo for 10 years before starting her own independent practice based in Madrid. She was ranked in *Chambers and Partners* in 2015 as a 'recognised figure on the Spanish market with experience in cartel cases and restrictive practices'. She lectures and publishes on antitrust law issues and acts as a non-governmental adviser to the Turkish Competition Authority.

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Gonçalo Anastácio is the partner in charge of the EU, competition and regulatory department of 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 studied in Coimbra and Paris (Sorbonne).

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 is ranked in the top band for competition law in Portugal of the leading international legal directories and is author and editor of a number of reference works on competition law.

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Enrique Andreu is a senior vice president in Compass Lexecon's European competition policy practice, based in Brussels.

Before joining Compass Lexecon, Enrique worked for over six years for the Global Competition Policy Practice at LECG. Prior to this, Enrique worked as a temporary lecturer in econometrics and macroeconomics at the University of Navarra, Spain. Enrique has also worked as an instructor in economics at University College London, UK, where he taught courses on asset pricing and macroeconomics. Enrique has also worked as an associate lecturer at Instituto de Empresa Business School.

Enrique specialises in the application of economic and econometric analysis techniques to the study of antitrust and competition policy issues, including the assessment of the competitive impact of cartels and mergers, market definition, damage estimation, and state aid investigations. Enrique has worked on a wide number of antitrust cases across several industries including banking and financial markets, tobacco, hardware, consumer research, fast-moving consumer goods, fresh foods and beverages, telecommunications, packaging, electrical equipment, and chemicals. He has given expert testimony before the European Commission, the Spanish courts and the International Court of Arbitration of the International Chamber of Commerce.

Enrique obtained a MSc in economics at the London School of Economics, where he specialised in time series econometrics. He also holds a MSc in finance from the University of Navarra, Spain, and a BSc in quantitative economics from the Universidad Complutense de Madrid, Spain.

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Ms Bercaru holds a degree in Law from the University of Bucharest and is a member of the Bucharest Bar and of the Romanian Bar Association.

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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.

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Mattijs Bosch is a senior associate with Houthoff Buruma in the Amsterdam office. He specialises in EU and Dutch competition law, particularly focusing on multi-jurisdictional merger control proceedings, compliance, administrative proceedings and private (follow-on and stand-alone) litigation. He was seconded to Houthoff's office in Brussels in 2013. He studied law at the University of Maastricht (LLM, 2009), the University of Florence and at King's College, London (PG Diploma EU Competition Law, 2014). Mattijs is a member of the Dutch Association for Competition Law.

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Rick Cornelissen is counsel with Houthoff Buruma. He specialises in the area of competition litigation with a particular focus on private enforcement (advising and representing clients regarding cartel damages claims, access to distribution networks claims and contract termination claims) and vertical restraints (structuring, negotiating and advising on distribution and agency contracts and e-commerce).

He studied law at the University of Utrecht and completed his postgraduate degree in EU competition law at the King's College of London. Rick is a member of the Dutch Association for Competition Law, the Dutch Association for European Law and the Dutch Association for Distribution, Franchise and Agency Law.

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Cristiano Rodrigo Del Debbio graduated from Pontifícia Universidade Católica de São Paulo (1999) and has a master's degree in civil procedure from Universidade de São Paulo (2005) and an LLM from the University of Chicago (2007). Mr Del Debbio has extensive experience in complex commercial and antitrust litigation, including class-action suits and collective claims, before judicial and administrative authorities, involving banking and credit cards, petrochemicals, telecommunications, agribusiness and health insurance.

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Santiago del Rio is a senior associate 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, as well as providing counsel to companies that either undergo antitrust investigations or decide to initiate them, during both the Antitrust Commission's investigation and the challenge of the decision 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, anti-competitive 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.

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Luciano Di Via is a partner and head of the antitrust practice of Clifford Chance in Italy and is considered one of the primary Italian experts in antitrust. He is consistently ranked among leading antitrust lawyers in Italy according to independent commentators such as *Chambers and Partners*.

Luciano has more than 20 years' expertise in this field and provides advice to domestic and international clients on antitrust matters in the food and beverage, retail, insurance, energy and telecommunications sectors.

Before joining Clifford Chance in 2013, he spent 10 years at the Italian Competition Authority (ICA), for two of which he was the ICA's seconded national expert at the European Commission's Directorate General of Competition. During his time with the ICA, among other activities, he led teams conducting dawn raids at company premises.

He also worked for a decade as an antitrust partner at Bonelli Erede Pappalardo, one of the leading domestic Italian law firms.

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Gabriel Nogueira Dias is distinguished for his academic expertise and intense involvement in highly complex cases. He has an LLB from the Law School of the University of São Paulo and was granted an LLM and LLD by the Law School of Bonn. A former adviser to the president of the Administrative Council of Economic Defence (CADE), he was directly responsible for the development of new resolutions and opinions during his tenure. Currently, he is also director of Legislative Monitoring at IBRAC (the Brazilian Institute of Studies on Competition, Consumption and International Trade). He is the author of several articles and an award-winning book published by the German publisher Mohr Siebeck.

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One of the top 100 women in antitrust profiled by *Global Competition Review*, Kim Dietzel acts on the full spectrum of competition law issues across a range of sectors, including the aviation sector where she has a particular focus, including in relation to regulatory advice. Kim has a wealth of experience in relation to multi-jurisdictional cartel and leniency matters, and is one of the few competition practitioners with UK criminal cartel experience. Solicitor-advocate Kim has developed a leading private enforcement practice, acting in particular for defendants in precedent-setting follow-on damages cases, including appearing as an advocate in the Competition Appeal Tribunal.

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Ms Tamar Dolev-Green is a partner in the firm and co-head of the firm's competition team. She specialises in competition law, administrative law, regulation and communications law and she has been repeatedly elected by *Chambers and Partners* as one of the leading competition law practitioners in Israel.

Ms Dolev-Green received her degrees in law and economics from the University of Haifa (LLB 1999, BA economics 2000) and Complutense University, Madrid (European masters in law and economics (EMLE), 2000). Tamar was admitted to the Israel Bar in 2001.

Prior to her current position at M Firon – Epstein & Co, she was a senior attorney at the Israeli Antitrust Authority (2001 to 2005), where, *inter alia*, she was responsible

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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 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 task force formed by the IBA to comment on the draft Non-Horizontal Merger Guidelines issued by the European Commission. He is the representative of the

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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 airline, telecommunications, energy, credit cards, insurance, computers, 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).

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James Flett is a senior associate in the antitrust and competition practice group at Norton Rose Fulbright LLP. James specialises in contentious competition law work and is currently acting in a number of high-profile 'follow-on' actions before the English courts. His practice also includes economic regulation, merger control and non-contentious competition law work.

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Marta Giner Asins is a competition partner at Norton Rose Fulbright LLP, where she heads the Paris team. Marta regularly defends clients before the French and European antitrust authorities and courts, particularly in cartel markets and cases of abuse of dominant position. She has extensive experience assisting clients during 'dawn raids' conducted by competition authorities and successfully challenging such inspections before the courts. She has been involved in several French and European merger cases, among which several multi-jurisdictional filings. Marta also regularly organises internal training sessions for clients on the main aspects of competition law.

Her expertise lies mainly in the life sciences, energy, transport sectors and press distribution.

RAHUL GOEL

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Rahul Goel is a partner at Cyril Amarchand Mangaldas and his practice focuses on competition and technology, media and telecommunication (TMT) laws.

Rahul advises clients on all issues relating to competition law including behavioural or enforcement matters (cartels, bid rigging, anti-competitive agreements, dominance) and merger control provisions. He also advises and assists companies and stakeholders in competition law compliance, audit and training.

He assists and represents clients before the Supreme Court of India, High Courts (Writ Jurisdiction), Competition Appellate Tribunal and Competition Commission of India. He also advises and assists companies in auditing their existing agreements and practices, and forming compliance programmes and procedures in accordance with competition law.

Subsequent to notification of the Competition Law in India in May 2009, Rahul advised Builders Association of India (in August 2009) and successfully represented Builders Association of India (Informant) in the cement cartel matter before the CCI; wherein the CCI imposed highest ever penalty on companies involved in cartel activity. Apart from the cement cartel matter, Rahul has acted or is acting as lead counsel in a

number of matters that have been recognised as leading transactions in India and abroad, including the aluminium phosphide cartel, the real estate cartel, the auto parts matter, the PVC flooring cartel, and the leather upholstery cartel, among others.

Rahul has been continuously working towards developing jurisprudence in the competition law space. He was nominated as a finalist at the *Global Competition Review* annual awards at Washington, DC in 2013 for obtaining the landmark order from the CCI in the cement cartel matter. He was again nominated as a finalist at the *GCR* annual awards in 2014 for obtaining a landmark judgment on recognition of 'relevant turnover' in the aluminium phosphide cartel matter from the Competition Appellate Tribunal.

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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 in the 2006 to 2015 editions of *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 is a member of the American Bar Association's Board of Governors, having previously served as chair of the ABA's Section of Antitrust Law as well as 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 for over 15 years. She is a member of the editorial board of the *Antitrust Counselor* and *Competition Law International* publications and the advisory board of BNA's *Antitrust & Trade Regulation Report*. Mrs Gotts is a member of Lincoln Center Counsel's Council.

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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. She is PhD candidate in international trade law at Bucharest Academy for Economic Studies' Institute for Doctoral Studies.

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Heather has been involved in some of the most high-profile competition law cases in South Africa since the Competition Act came into effect, including two applications to the Constitutional Court. She is currently advising on dawn raids in South Africa and Zambia. Heather also advises on regulatory issues in the telecommunications and energy sector, including recent High Court review applications dealing with ICASA's regulation of wholesale mobile call termination rates and NERSA's recent determination on the maximum charges for piped gas by Sasol Gas.

She also has extensive experience with complex large mergers in Namibia, Botswana, Zambia, Tanzania, Kenya and the COMESA states. Heather is involved in designing and implementing competition law compliance and training programmes, as well as corporate leniency applications. She has dealt with complaints about anticompetitive conduct in the fuel, fertiliser, foam, tyre, agricultural and milling industries, and she successfully defended clients in the plastic pipe and retail cycle cartel cases.

She is a regular conference speaker and contributor of articles on competition law and related issues to legal journals, including the *American Bar Association's Year in Review for South Africa*, *South African Mercantile Law Journal* and *Competition Policy International's Antitrust Chronicle*.

She serves as the co-chair of the International Bar Association's Young Lawyers Committee. She is a guest lecturer and external examiner for the University of the Witwatersrand's competition law undergraduate and master's programme. She was awarded her LLB degree *magna cum laude* as well as her honours degree in English literature with distinction by the University of Cape Town, after completing a BA degree *cum laude* at the University of the Witwatersrand. Heather served as a research assistant to Justice Albie Sachs at the Constitutional Court of the Republic of South Africa before her admission as an attorney.

FILEMON RAY L JAVIER

Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)

Filemon Ray L Javier is a senior associate in ACCRALAW's litigation and dispute resolution department. Mr Javier's practice involves, among others, criminal, commercial and antitrust ligation and advice.

Mr Javier actively assisted legislators in the crafting of, and deliberations on, the Philippine Competition Act.

Mr Javier obtained his Juris Doctor, Second Honours, from the Ateneo de Manila University School of Law in 2010 and ranked second in the Philippine Bar Examinations given the same year.

ALBERT KNIGGE

Houthoff Buruma

Albert Knigge heads a team of experienced litigators at Houthoff Buruma. He joined the Amsterdam Bar in 1997 after obtaining his doctorate degree. He specialises in litigation and Supreme Court litigation and has extensive experience in complex, often multiparty and cross-border litigation, representing businesses and parties. Albert is a board member of the Dutch Association for Procedural Law, as well as an author and a member of the editorial staff of a loose-leaf handbook for Dutch civil litigators. He is continuously recommended in *The Legal 500*, *Chambers Europe* and *Chambers Global*. 'Albert Knigge is best known for his work in corporate and commercial litigation. He also has a strong reputation for financial litigation, including D&O liability and professional liability matters.' (*Chambers Europe and Global*, 2015, Dispute Resolution). Clients praise him as 'a very experienced, high-end lawyer that really is a sparring partner in business' (*The Legal 500*, 2014, Dispute Resolution).

MOLLY KOS

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Molly Kos is an associate lawyer at CMS Reich-Rohrwig Hainz in Vienna. Her main areas of expertise include competition and EU, mergers and acquisitions as well as public law. Currently she is very active in cross-border merger control matters. She holds a master's degree in law from the University of Vienna as well as a Master of Laws from the Queen Mary Law Faculty of the University of London. Prior to joining CMS she has clerked at the European Court of Human Rights and worked for the Austrian Embassy in London as well as interning with a well-known international law firm in Vienna focusing on corporate law.

PASQUALE LEONE

Clifford Chance

Pasquale Leone is a senior associate in the antitrust practice of Clifford Chance in Italy, specialised in the area of antitrust and competition in the insurance, transport and logistics, and food and beverage sectors. He is also an expert on the functioning of the European Union.

CARLOS FRANCISCO DE MAGALHÃES

Magalhães e Dias Advocacia

Carlos Francisco de Magalhães is an expert in commercial and competition law and a pioneer in the competition area in Brazil. He is the creator and founder of IBRAC (the Brazilian Institute of Studies on Competition, Consumption and International Trade), and has been the author of studies, articles and opinions on competition law published in specialised magazines and journals since 1970.

A member of several government committees that prepared amendments to the Brazilian Competition Defence Act, particularly the bill that originated most of the provisions of the current law, he drafted the provisions on Infringements and Submission of Concentration Acts for the analysis of the Brazilian System of Competition Defence.

RODRIGO MONCHO STEFANI

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Rodrigo Moncho Stefani has been an associate at AraqueReyna since 2010. His areas of practice include administrative law, tax law and administrative litigation. He obtained his law degree, *magna cum laude*, from the Central University of Venezuela (2010). He is a member of the Capital District Bar and speaks Spanish and English.

SUSAN NING

King & Wood Mallesons

Susan Ning joined King & Wood Mallesons in 1995. She is a senior partner and leads the international trade and antitrust and competition group. Since 2003, she has focused on two main areas: advising on AML compliance issues and securing MOFCOM merger clearance for clients, during which she has undertaken more than 200 antitrust merger control filings on behalf of multinational and domestic corporations. She also advises clients in antitrust administrative investigations and antitrust private litigations. 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 antidumping, safeguards, countervailing and WTO dispute settlements. Ms Ning has represented nearly 20 foreign entities that have been subject to Chinese antidumping investigations. She has also represented the Chinese government in numerous WTO dispute settlement cases.

EBENEZER ODUBULE

Glover & Temple (Legal & Human Development Consultants)

Ebenezer Odubule started his legal education in 1990 at Kwara State Polytechnic, Ilorin and gained a collegiate diploma in law in 1992. He later obtained an LLB degree in law from Lagos State University, Ojo in 1997. He undertook a National Youth Service

Corp attachment with the Department of Legal Drafting of Akwa Ibom State Ministry of Justice between 1998 and 1999. He attended the Nigeria Law School, Bwari Abuja in 1999 and was admitted to practise law in 2000. In 2004, He enrolled at the Cardiff Law School for an LLM in legal aspects of marine affairs with options in law of the sea, international trade and transportation law, admiralty law, competition policy, UK and EU competition laws.

He joined the law practice of Messrs Union-Plus Attorneys, Lagos in 2001. He later joined Foundation Chambers, Lagos in 2003. He was founding Director and Lead Researcher Competition Africa (UK) from 2005 to 2008. In March 2007, he joined the National Centre for Social Research (Natcen) London, as a part-time freelance research interviewer up to July 2008.

In January 2009, Ebenezer was engaged as contract and stakeholders' manager on the Agaja Ship Wreck Removal Project with Nigerian Conservation Foundation (NCF). In September 2009, Ebenezer joined Mike Igbokwe (SAN) & Co for a brief time practising maritime law. He founded Glover & Temple (Legal and Human Development Consultants) in March 2010 and has remained its principal partner to date. Ebenezer is a legal consultant on consumer protection and antitrust law to the Consumers Empowerment Organisation of Nigeria (CEON), on whose behalf the Nigeria chapter is presented.

W MICHAEL G OSBORNE

Affleck Greene McMurtry LLP

Michael Osborne practises competition law, commercial litigation, international arbitration, and anti-corruption law as a partner of Affleck Greene McMurtry LLP.

Michael regularly represents clients targeted by Competition Bureau cartel and other investigations, as well as defendants in class actions. He has also acted as trial and appellate counsel before all levels of court, the Competition Tribunal, and domestic and international arbitral tribunals.

Michael was called to the Bar in 1998, after completing his articles as a law clerk to the late Justice John Sopinka of the Supreme Court of Canada. He received his LLB from Dalhousie University in 1996, his MA from the University of Toronto in 1991, and his BA from the University of Saskatchewan in 1988.

Michael is an active member of several legal associations. He writes and speaks frequently on competition law and commercial litigation topics.

JORGE PADILLA

Compass Lexecon

Dr Jorge Padilla is a senior managing director and head of Compass Lexecon Europe. Dr Padilla earned MPhil and DPhil degrees in economics from the University of Oxford. He is a research fellow at the Centro de Estudios Monetarios y Financieros (CEMFI, Madrid) and teaches competition economics at the Barcelona Graduate School of Economics (BGSE).

He has advised on various cases and given expert testimony before competition authorities and courts of several EU Member States, as well as in cases before the European Commission. Dr Padilla has submitted written testimony to the European

General Court and the UK Competition Appeals Tribunal in cartel, merger control and abuse of dominance cases. He has also given expert testimony in various civil litigation (damages) and international arbitration cases.

Dr Padilla has written numerous papers on competition policy and industrial organisation in the *Antitrust Bulletin*, the *Antitrust Law Journal*, the *Economic Journal*, the *European Competition Journal*, the *European Competition Law Review*, the *European Economic Review*, the *Fordham International Law Journal*, *Industrial and Corporate Change*, the *International Journal of Industrial Organization*, the *Journal of Competition Law and Economics*, the *Journal of Economics and Management Strategy*, the *Journal of Economic Theory*, the *RAND Journal of Economics*, the *Review of Financial Studies*, the *University of Chicago Law Review*, and *World Competition*.

He is also co-author of *The Law and Economics of Article 102 TFEU*, 2nd edition, Hart Publishing, 2013.

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 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 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 the 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. In her intellectual property practice, Ms Peng advises corporate clients on IP rights protection strategies and complex licensing agreement negotiations. She also has extensive experience representing clients in trademark, patent, copyright (including software), domain names, unfair competition, trade secret misappropriation, and licensing disputes and litigation.

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.

GERGANA PETROVA

Danailov, Drenski, Nedelchev and Co/Lex Locus Law Offices

Gergana Petrova was born on 7 November 1985 in Sofia, Bulgaria. She is a graduate from the Sofia University St Climent Ohridski, Faculty of Law (LLM 2009). She has been a senior associate at Danailov, Drenski, Nedelchev and Co/Lex Locus Law Offices since March 2015.

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, anti-competitive 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 de Buenos Aires in 1994, and in 1997 obtained a master's degree in law from the University of Pennsylvania (Philadelphia).

PEDRO LUIS PLANCHART

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Pedro Luis Planchart is a senior partner at AraqueReyna. His areas of practice include banking, public financing, international financing, project finance, civil law, contracts and secured transactions, commercial law, private international law, corporate law, and capital market regulations.

He obtained his law degree, *summa cum laude*, from the Andrés Bello Catholic University (1985), and his master's degree in comparative jurisprudence from New York University (1987), where he was a Fulbright Scholar. As part of the Fulbright programme, he also worked for one year (1987-1988) in the international attorney programme at Milbank, Tweed, Hadley & McCloy in New York.

Mr Planchart has been professor of contracts and secured transactions since 1989 at the Andrés Bello Catholic University, where he is also currently professor of private law theory. He is a member of the Faculty Council. He is on the list of arbitrators of the Caracas Chamber of Commerce associated with the ICC, and of the Business

Conciliation and Arbitration Center (CEDCA). Mr Planchart also has published essays and articles on contract law and secured transactions, foreign exchange control and arbitration. He speaks Spanish and English.

ETI PORTOOK

M Firon – Epstein & Co

Advocate Eti Portook is an associate at M Firon – Epstein & Co and part of the firm's competition team.

Ms Portook advises and represents on both civil and criminal antitrust cases. Her practice includes representation in hearings before the Israeli Antitrust Authority, notifications of mergers, advising to clients and providing legal opinions in respect of all aspects of competition and antitrust law, including the Law for Enhancement of Competition in the Food Sector and the Law for the Promotion of Competition and Reduction of Concentration.

Ms Portook received her law degree from Haifa University (LLB, *magna cum laude*) in 2013 and was admitted to the Israel Bar in 2014.

Ms Portook completed her mandatory legal training at the firm's office (2013–2014), where she worked on a variety of legal matters including restrictive arrangements, mergers and criminal investigations.

Ms Portook's principal practice is in antitrust law.

PATRICIA-ANN T PRODIGALIDAD

Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)

Patricia-Ann T Prodigalidad is a partner at 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.

MAURICIO RAMÍREZ GORDON

AraqueReyna

Mauricio Ramírez Gordon has been an associate at AraqueReyna since 2015. His areas of practice include administrative law, consumer protection and administrative litigation. He obtained his law degree from the Central University of Venezuela (2015). He served as research assistant at the Institute of Private Law of the Central University of Venezuela, and as a legal assistant at AraqueReyna since 2012. He speaks Spanish and English.

PETER SCOTT

Norton Rose Fulbright LLP

Peter Scott is a partner at Norton Rose Fulbright LLP, based in London, where he heads the antitrust and competition team. Peter specialises in all areas of contentious competition law work. He has experience of acting in a number of leading and high-profile competition law cases, including both stand-alone and 'follow-on' claims before

the High Court and the Competition Appeal Tribunal, appeals to the General Court and the Court of Justice in Luxembourg, as well as arbitration cases and investigations by the competition authorities. Peter is currently acting for a number of companies in claims that follow on from decisions by the European Commission, on both the claimant and defendant side.

Peter has been recognised in all of the leading legal directories, including in *Chambers UK* as a tier 1 practictioner (as 'a trusted advisor', 'shrewd, diligent and thoughtful' and for his 'great ability to get to the essential point in double quick time') and *The Legal 500* (as a 'very commercial' contentious specialist).

Peter trained with Norton Rose Fulbright LLP and spent the first six years of his career as a commercial litigator before joining the antitrust and competition practice group in 2005, being made a partner two years later. He is a solicitor advocate and obtained his higher rights of audience in 2002.

Peter is currently serving as an elected representative on the firm's Partnership Committee for EMEA, as well as on the Diversity and Inclusion and Audit Committees for EMEA.

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.

MARK SIMPSON

Norton Rose Fulbright LLP

Mark Simpson is a partner at Norton Rose Fulbright LLP in the antitrust and competition practice group in London. He advises on all aspects of UK and EU competition law, with a particular focus on investigations and competition litigation, including regulatory appeals and judicial review. Mark advises corporates, trade associations, government agencies and regulators, and his perspective in doing so is informed by having spent periods in in-house roles, most recently as a senior competition counsel at a telecommunications company.

Mark has experience in competition cases before the English High Court (Commercial Court and Chancery), in the Competition Appeal Tribunal and before the CMA (and its predecessor, the Competition Commission) and the European Commission. He has been involved in a range of follow-on damages cases over the last 10 years, representing both defendants and claimants, and is currently advising on a number of ongoing proceedings issued in the English courts.

Mark is dual-qualified, as a solicitor in England and Wales and as a barrister and solicitor in New Zealand. He joined Norton Rose Fulbright LLP in 2008 from another international firm. Prior to moving to the United Kingdom, he practised competition law in New Zealand and was a government adviser on competition law and policy.

PEDRO IGNACIO SOSA MENDOZA

AraqueReyna

Pedro Ignacio Sosa Mendoza is a founding partner of AraqueReyna. His areas of practice include corporate law, merger and acquisitions, international business transactions and litigation.

He obtained his law degree from the Andrés Bello Catholic University (1981) and a master's degree in comparative law from the National Law Center at George Washington University (1983).

Mr Sosa is also Director of Practice Areas of the firm, a member of the Capital District Bar, a former member of the board and was president of the Venezuelan Executives Association (AVE) and coordinator of its Corporate Governance Committee. He is a member of the board of directors of the Venezuelan-Colombian Economic Integration Chamber (CAVECOL), a member of the International Bar Association (IBA), a member of the International Trademark Association (INTA) and of the Asociación Interamericana de la Propiedad Industrial (ASIPI). Mr Sosa has also published articles on corporate governance, product liability and project finance. He speaks Spanish and English.

SILVIU STOICA

Popovici Nițu Stoica & Asociații

Silviu Stoica is a partner with Popovici Nițu Stoica & Asociații and head of the competition practice group. His practice focuses on a broad range of contentious and non-contentious competition matters, with an emphasis on cartel investigations and industry inquiries, abuses of dominant position and antitrust disputes. Mr Stoica also advises clients on restrictive agreements and works closely with in-house corporate counsels in sensitive internal compliance reviews.

Mr Stoica has been commended in *Chambers Europe* as a 'strategic and realistic' competition lawyer who is 'business-friendly and very easy to communicate with'. Established clients of Silviu Stoica include Philip Morris, Cargill, ArcelorMittal, Innova Capital and Oresa Ventures, whom he has advised on a whole array of competition matters and investment issues.

Mr Stoica has been with the firm since its inception, pursuing all career stages from associate to senior associate and head of practice group. Silviu Stoica holds a degree in law from the University of Bucharest, Faculty of Law and is a member of the Bucharest Bar Association. Mr Stoica attended US Legal Methods – Introduction to US Law, Institute for US Law in Washington, DC and the International Development Law Organization Development Lawyers Course (DLC-20E) in Rome.

CANDICE UPFOLD

Norton Rose Fulbright South Africa Inc

Candice Upfold is an antitrust and competition lawyer based in Johannesburg.

Candice is an associate in the antitrust and competition team. 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 and mining sectors.

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 contributor of articles on competition law and related issues to legal journals, including the Competition Policy International's *Antitrust Chronicle* and the *Global Antitrust Compliance Handbook*.

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 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.

WEYER VERLOREN VAN THEMAAT

Houthoff Buruma

Weyer VerLoren van Themaat has been assisting international clients for over 25 years in the most challenging and complex cases related to merger control and cartel defence litigation and leads Houthoff Buruma's competition practice group. He was resident partner at Houthoff Buruma's Brussels office from 1997 to 2005, after which he returned to Amsterdam. Weyer is chair of Lex Mundi's Antitrust Competition and Trade Group and non-governmental adviser to the Dutch Authority for Consumers and Markets, ACM. He publishes and speaks regularly on competition law related subjects. Weyer is recommended in, *inter alia*, *Chambers Europe* (2015 edition), *The Legal 500* (2015 edition), *Who's Who Legal* (2014 edition), and *Best Lawyers* (2014 edition). He is 'praised by his clients for his expertise in cartel cases and excellent litigation skills' (*Chambers Europe*, 2013 edition, EU & Competition). Sources describe Weyer as an enthusiastic and active lawyer: 'When I need a really good opinion I get him involved' (*Chambers Europe*, 2013 edition, EU & Competition).

NADINE WATSON

Compass Lexecon

Nadine Watson is a senior vice president at Compass Lexecon, based in Madrid. She holds a PhD in economics from the University of California, San Diego and an MA in economics from the Universidad de los Andes, Bogotá.

Nadine has more than 10 years of experience in the application of economic analysis and econometrics in the context of the quantification of damages in litigation and arbitration and to competition policy issues. She has advised clients in a wide range of industries including in industrial products, manufacturing, telecommunications, transportation and consumer goods.

She has provided advice and expert reports in the context of antitrust and follow-on damage proceedings and merger control. She has given expert testimony before the European Commission, the International Court of Arbitration, the Finnish, Portuguese, Romanian, Ukrainian and Colombian competition authorities and before the Portuguese and Spanish courts.

Prior to joining Compass Lexecon she worked four years in the competition policy group at NERA and seven years in the European Competition practice at LECG. She also worked at the Bank of Spain, the Banco de la República of Colombia, and the Universidad Complutense of Madrid.

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. In addition, he completed a postgraduate research fellowship in which he authored scholarly publications in the areas of antitrust and criminal procedure.

STEPHEN WISKING

Herbert Smith Freehills LLP

Stephen Wisking practises in all aspects of competition law, advising clients across a broad range of sectors (including media, telecoms, pharma and energy). He is a pre-eminent competition litigator who is regularly instructed on the most complex and high-profile competition disputes (both regulatory appeals and private enforcement). Stephen is a qualified solicitor-advocate, and an active member of the Users Group for the UK's specialist Competition Appeal Tribunal.

DIETER ZANDLER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Dieter Zandler is an attorney-at-law at CMS Reich-Rohrwig Hainz in Vienna. His main areas of expertise include competition and EU, mergers and acquisitions, compliance as well as distribution and franchise law. He holds a doctorate from the University of Salzburg as well as a Master of Laws from Central European University in Budapest and received his legal education at universities in Austria, the US, Hungary and China. Prior to joining CMS, he clerked at the Austrian cartel court and has been an intern with two well-known international law firms in Vienna.

ELENA ZOIDO

Compass Lexecon

Elena Zoido is a senior vice president in Compass Lexecon, based in Madrid. She holds a PhD in economics from Harvard University and an MA in economics and finance from CEMFI.

Elena has more than 10 years of experience in the application of economic analysis and econometric techniques to competition policy issues and in the context of the quantification of damages in litigation and arbitration. She has advised clients in a wide range of industries including manufacturing, telecommunications, transportation and consumer goods.

Her work has included the application of empirical models to evaluate the competitive impact of mergers and to estimate damages in price fixing and patent infringement investigations, and she has provided advice and expert reports in the context of merger control, Article 101 and Article 102 TFEU proceedings. She has given expert testimony before the European Commission, the Spanish competition authorities, the international arbitration court and the Spanish courts.

Elena has published in a number of academic journals including *The Review of Economics and Statistics*. She is listed in the *Who's Who Legal: Competition Lawyers & Economists* and she featured in the *Global Competition Review* 'Women in Antitrust Survey' in 2013.

SUSANNE ZUEHLKE

Willkie Farr & Gallagher LLP

Susanne Zuehlke is a partner in the firm's Brussels and Frankfurt offices. She is qualified in Germany and has been practising antitrust law in Germany and Brussels (EU) for more than 15 years. She defends companies and individuals in cartel investigations. She advises and represents companies on all aspects of EU and German antitrust and competition law, including private damages enforcement or defence in the EU and in Germany. She also obtains merger clearances for global transactions. Clients frequently compliment her technical expertise and business-oriented approach. Susanne Zuehlke is recognised as an expert, *inter alia*, in *GCR*, *Who's Who Legal*, *Chambers Global*, *Legal 500* and *Juve*. *GCR* nominated her twice to the prestigious list of the top 40 global antitrust lawyers under the age of 40.

Appendix 2

CONTRIBUTING LAW FIRMS' CONTACT DETAILS

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