



LEXOLOGY

Getting The Deal Through

PRIVATE ANTITRUST LITIGATION 2024

Contributing editor

Elizabeth Morony



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Global overview

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Cartel damages claims are now widespread across Europe, the United States and beyond. In Europe, England and Wales, Germany and the Netherlands continue to see the vast majority of European wide damages claims issued in their jurisdictions. Post-Brexit and as European member states continue to get to grips with the impact of the [Damages Directive](#) in their jurisdictions – not least the introduction of disclosure for competition damages claims – European wide claims will gradually move away from the English courts in the longer term, but it will be a slow process. In Asia, the relatively recent introduction of substantive competition law is now leading to the first examples of private enforcement in many Asian jurisdictions, particularly in Japan which is seeing a marked increase in the number of competition damages claims.

There are some common themes running through a number of jurisdictions.

In Europe, competition collective (or class) actions are increasingly common in England and Wales and in the Netherlands. In England and Wales, the Competition Appeal Tribunal (the CAT) has certified 10 collective proceedings orders (CPOs) at the time of writing including in trains, trucks, and standalone claims against Apple and Google relating to their respective app stores. The judgment of the Supreme Court in *Mastercard v Merricks* has effectively lowered the bar to certification. In the Netherlands, the introduction of the Collective Settlement of Mass Damages Act in 2020 is also likely to increase the number of collective actions in the short term. Collective actions are not available by statute in Germany, although claims by multiple parties have been brought by assigning the claims to a third-party claims vehicle.

As the number of applications for collective actions increases, the CAT is now dealing with its first carriage disputes. In *O'Higgins v Barclays Bank* and others, two class representatives (and two claimants' firms) battled it out for carriage of the opt-out collective proceedings relating to the foreign exchange cartels in Europe. The CAT commented on the weakness of the claims and the appropriateness of an opt-out collective action (in circumstances where parallel litigation with named claimants was ongoing), and stayed both claims pending submission of claims on an opt-in basis. In *Pollack v Alphabet Inc* and others in 2023, the CAT ordered that a hearing on the carriage dispute as a preliminary issue should take place before any hearing on certification, in the interest of costs, and suggested that this would be the usual approach.

Funding – often in the context of class actions – is another hot topic in circumstances in which antitrust damages claims are often seen as an opportunity for investment. Third party funding is available for proceedings in England and Wales, Germany and the Netherlands and is fuelling antitrust claims, particularly collective actions in England & Wales and the Netherlands. In *Merricks v Mastercard*, the CAT rejected objections that Mr Merricks should

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not be authorised as a class representative on the basis of an agreement he had with a third-party funder. The CAT accepted that third-party funding required the class representative to incur a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages.

The increased focus of competition authorities on technology companies is leading to a greater volume of abuse of dominance investigations in Europe and elsewhere and will inevitably result in an increase in damages claims for loss caused by abuse of dominance. *Infederation Ltd v Google Inc* and *Streetmap Ltd v Google Inc* are recent examples of those claims in the English courts. There are numerous standalone claims being brought against Apple and Google in the United States, Australia and the United Kingdom to challenge the dominance of the Apple and Google app stores, including collective (class) actions, and investigations into the same conduct are being conducted by competition authorities across numerous jurisdictions.

In large part because of the growth in abuse of dominance investigations and related litigation, there has been an increase in the volume of injunction applications (or, more commonly, threatened injunction applications) designed to prevent continued abuse. It is still not unknown for a company in a dominant position to refuse to supply a third party, and, in the absence of an objective justification (most obviously non-payment) the mere threat of proceedings may prove effective in terminating the abuse. However, applicants should be realistic about their chances of success and aware of the cost-related consequences of an unsuccessful application.

The covid-19 pandemic and the global lockdown appear not to have had a significant impact on competition enforcement activity and related litigation, although the volume of cartel investigations and cartel fines worldwide has reduced in recent years and competition authorities are considering a variety of steps, including changes to leniency regimes, with a view to encouraging more leniency applications and more cartel enforcement – which, in turn, will then lead to more antitrust damages claims.

The impact of Brexit on antitrust litigation in England and Wales is minimal in the short term. Numerous other European jurisdictions are lining up to take the place of the English courts as the lead jurisdiction for European wide damages claims, particularly Germany and the Netherlands. There is no doubt that there has been a significant increase in claims across European member states (including collective actions in some EU jurisdictions) and in those jurisdictions in particular. However, the advantages of the English courts remain (even after the Damages Directive), and it will take some years for the pre-eminence of the English courts in Europe to be challenged as they will continue to hear claims relating to European Commission cartel decisions that predate the end of the transition period (31 December 2020) for many years yet.

In Japan, it is increasingly the norm for follow-on cartel damages claims to be brought after decisions by the competition regulator the Japanese Fair Trade Commission, and a number of damages awards have been made. Applications for injunctions to prevent anti-competitive conduct are increasingly popular. Japan has also seen derivative claims against the directors of companies guilty of cartel behaviour, alleging that damages were caused by the company choosing not to apply for leniency.

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In the United States, antitrust litigation is an inevitable consequence of an enforcement action by a competition regulator, whether it relates to a cartel decision or a finding of monopolistic conduct in breach of the [Sherman Act](#). Class actions and funding arrangements (including contingency fees) are common, although the courts have increased scrutiny of class actions in recent years. The Department of Justice Antitrust Division announced significant [updates](#) to its [Leniency Policy](#) in April 2022, which provides the opportunity for reduced civil damages to the first company (or individual) to self-report their role in a criminal antitrust violation and cooperate with the government.

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Cross-border antitrust litigation in Europe – Practical questions

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Antitrust litigation in Europe is evolving rapidly. In particular, damages claims relating to cartels and dominance abuses are growing exponentially. Whenever the European Commission or a national competition authority issues an infringement decision, customers will consider potential damages claims. Law firms specialising in private enforcement join forces with litigation funders or service companies and proactively invite customers to enforce claims. Claiming cartel damages has become such a common occurrence that commercial relationships do not necessarily suffer if parties are negotiating a settlement or even litigating in court.

Increasingly, claims relating to the same infringement are being made in several jurisdictions in parallel. Cartel decisions of the European Commission often sanction Europe-wide cartels that could potentially affect customers right across Europe. Currently, the Commission's Trucks case dominates the antitrust litigation landscape in Europe. Truck manufacturers face claims in practically all European countries. Many other cartel decisions have also triggered parallel lawsuits in several European countries: among them are the Commission's decisions in the vitamins, synthetic rubber, hydrogen peroxide, elevators and escalators, gas-insulated switchgear, candle wax, car glass, air cargo, consumer detergents, TV/computer monitors and polyurethane foam cases.

European law, in particular the EU Damages Directive, has harmonised the legal framework for antitrust litigation in national civil courts on many aspects. Fundamental questions are regulated in the same way across Europe, including standing to bring a claim, presumption of harm and joint and several liability of defendants. Even plaintiffs and defendants who are not familiar with the respective national regimes will, therefore, have a good idea of what to expect. Details and, in particular, the practical approaches taken by national courts of course still vary.

In addition, in cross-border litigation cases, both claimants and defendants face a variety of practical questions. These include strategic questions such as the jurisdictions in which to file claims or the alignment of the defence across jurisdictions as well as operational questions such as the handling of large quantities of data and the use of legal tech solutions.

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This chapter addresses 10 of the most common practical questions in (cross-border) anti-trust litigation cases in more detail and explores how they are typically approached by the parties involved.

Forum shopping

A fundamental question for claimants can be where to file claims and, for defendants, where to expect them.

The applicable European regulation, Brussels I, allows claimants to choose between the courts of various jurisdictions including where the defendant is domiciled, where the infringement took place or where it impacted the market.

Often claimants opt for their home courts, or the courts where the defendants are domiciled. Other factors the claimants may take into account are the ability to bundle claims, rules on costs and the availability of litigation funding, expected damages amounts and the likely duration of proceedings.

'Forum shopping' is a frequent occurrence in Europe. Statistically, most claims end up in the three traditionally preferred jurisdictions: England, Germany and the Netherlands. Notably, in the *Trucks* case, most bundled claims filed in these three jurisdictions include claims lodged by customers located in various Western and Eastern European countries. It remains to be seen how Brexit will impact the claimants' choices.

Individual claim versus collective claim

Another important question for claimants is whether to pursue claims individually or as part of a collective claim.

Rules on the admissibility of collective proceedings differ across Europe. Collective proceedings are available in a number of European jurisdictions, including the UK and the Netherlands. However, the exact prerequisites are not settled yet. In countries that do not allow collective proceedings in antitrust matters, such as Germany, claimants have developed other models to bundle claims. The most frequently used model is the 'assignment model' pioneered by CDC.

The following are a few factors that a claimant will consider when deciding how to bring a claim. Collective claims can be attractive for claimants because they often do not bear any costs (in exchange for ceding parts of their damages claims). Since service companies ('claims vehicles') typically run the proceedings, claimants do not need to bother with the case management themselves. For other claimants, however, this is not an option because they prefer to control the litigation strategy themselves and want to preserve greater flexibility over settling cases. Collective claims also typically have a longer duration – currently, many questions around the admissibility of collective claims are unsettled and courts often decide first on these procedural questions and proceed to the substantive questions only once all appeals have been exhausted (eg, see the cases *Merricks v MasterCard* in England or *Financialright claims* in Germany).

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If bundled claims involve claimants located in different countries, additional practical issues arise. For instance, courts sometimes consider separating and grouping proceedings by country or region, which can lead to higher court fees. Proceedings can become quite complex if courts need to apply various foreign laws (mosaic approach). Another practical issue is the processing and submission of evidence, in particular, concerning the affected purchases, as the language and quality of the evidence may vary.

Limitation risks for claimants and defendants

In many cases, limitation risks determine the timing of proceedings.

Claimants regularly file claims shortly before the time bar lapses. However, the EU Damages Directive ensures that claimants in fact have ample time to assess and file potential claims after an infringement decision has been issued.

For defendants, the limitation rules concerning contribution claims are a common issue. Defendants are jointly and severally liable for all damages caused by the cartel but can claim contribution from their co-defendants for damages caused by them. However, in some countries (eg, Germany), the statute of limitation for contribution claims is not linked to the statute of limitation for damages claims. Therefore, gaps can arise and defendants may need to consider seeking protection.

Coordinating the defence in cross-border cases

If a defendant is simultaneously sued in several jurisdictions, the defence will need to be coordinated.

Different national regimes may warrant different approaches, for example when it comes to substantiating defence arguments. While in some countries the focus can lie on destroying the plaintiff's case with little need to present the defendant's own evidence, in other countries the evidentiary rules may require a more constructive approach and substantial input. At the same time, once evidence is disclosed in court in one country, it is not always possible to avoid it ultimately being introduced in proceedings somewhere else.

It is therefore important that defence arguments strike the right balance and work in all countries. Frictions can be avoided if the defendants' lawyers in the various relevant countries collaborate seamlessly.

Gathering evidence

It is often said that cases are won and lost based upon the facts. A good storyline, corroborated by sound evidence, is indeed fundamental. This requires access to relevant evidence.

Potential practical issues when gathering evidence are manifold. One of the most fundamental issues is information asymmetries. Certain information needed by one party may only be accessible to the opponent or third parties. For instance, it would help claimants to prove the occurrence of harm if they knew how the cartel operated or how the cartelists set prices. In turn, defendants regularly have difficulties in proving that claimants passed

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on higher prices caused by the cartel to their customers instead of simply absorbing any overcharges.

In common law jurisdictions such as the UK, such information asymmetries are remedied through extensive disclosure. The EU Damages Directive has introduced similarly broad disclosure regimes in all European member states. However, courts have huge discretion and it remains to be seen to what extent they will make use of the new rules. Spanish courts, for example, have already applied the new rules and ordered the disclosure of documents in cases relating to the trucks cartel. In Germany, in contrast, courts appear reluctant. The traditional means in civil law jurisdictions such as Germany to deal with information asymmetries are evidentiary rules. For example, the German Federal Court of Justice ruled that the burden of substantiating a pass-on may shift from the defendant to the plaintiff once the defendant has established that a pass-on is plausible.

In cross-border litigation cases, these differences have additional implications. For claimants, they can be a factor when deciding where to file a claim. For defendants, they require particular attention when coordinating the defence. Where possible, strict confidentiality should be imposed to avoid documents the defendants are obliged to disclose in one country being used against them in another country. Disclosure exercises in large cross-border cases are also particularly costly and require significant time.

Economic expertise

Economic issues lie at the centre of many competition litigation cases. In cartel damages, the three fundamental economic issues are the occurrence of harm (causal link), the damages amount and the pass-on rate. Both plaintiffs and defendants therefore typically instruct their own economists and submit economic reports.

Success hinges on the quality of these reports. They must not only be economically sound, but also support the legal arguments. Lawyers and economists need to collaborate closely to develop the right – and often novel – arguments. This requires a good mutual understanding of each other's disciplines.

Cross-border litigation presents additional challenges. For example, economic models for estimating damages must take account of all the factors impacting the price of the cartelised products. These factors can, however, vary across countries as market conditions are not always uniform. Sophisticated cross-country models or separate models for each country may be required.

Level of damages

Another key question for plaintiffs is how much they can expect in terms of damages and interest. Conversely, for defendants, this question lies at the heart of their risk assessment.

Although the first cartel damages claims in Europe date from the early 2000s, there is still little case law on this central aspect. Not many judgments that award damages exist. And most of these judgments relate to cases with small values, and the damages calculation is based on rather simplistic methods. They, therefore, do not necessarily allow conclusions to be drawn for larger cases requiring a textbook economic damages estimation. For example,

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many Spanish courts have awarded damages in smaller cases relating to the trucks cartel at overcharge rates of 5–15 per cent. These rates have been based on general and abstract considerations, such as references to the well-known Oxera study – a meta-study from 2009 compiling all the then-available economic research on the price effects of cartels. It also remains to be seen whether these judgments will ultimately stand after all appeals are exhausted.

While it can be difficult to predict the damages amount, the interest rules are relatively straightforward. Interest can be a significant factor – since damages claims regularly relate to cartels that took place 10 or more years before, large sums of interest accrue and can make up more than half of the damages amount. Interest rates such as seven percentage points above the European Central Bank (ECB) base rate in the Netherlands and five percentage points above the ECB base rate in Germany are substantial.

Costs and fees

Court, attorney and economist fees can be significant.

For claimants, this typically raises the question of whether to resort to third-party funding. Collective claims are typically financed by litigation funders. They bear all the costs in exchange for a portion of the damages amount awarded to the claimants. Although rules on the admissibility of litigation funding and contingency fees differ across Europe, ‘all-round carefree packages’ for claimants are offered in most countries.

For defendants, the main goal is to fend off any damages claims. In particular, in cross-border cases, ensuring cost efficiency of the defence work is another key objective. A good and open collaboration among the defendants’ lawyers in the various jurisdictions involved saves costs. Project management tools can further help increase efficiency. Finally, legal tech solutions are relied upon more and more.

Legal tech

Large, cross-border litigation cases are an important and growing field of application for legal tech tools.

Both plaintiffs and defendants need to collect, process and host huge volumes of data, in particular data on the purchases that were potentially affected by the infringement. Legal tech solutions can support this.

Handling high numbers of proceedings also requires automated processes. Law firms are developing bespoke platforms for case management (eg, to monitor deadlines) and (visualised) client updates. In mass proceedings, legal tech tools are used to analyse and categorise incoming briefs and court writs. Automation in the drafting of briefs is also developing.

Tactics in public investigation

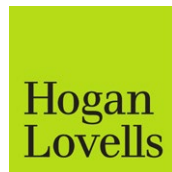
Finally, defendants must anticipate the increasing risk of follow-on damages claims during the public investigation.

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Litigation risks already feed into the decision of whether to apply for leniency and disclose the existence of an infringement. While the first leniency applicant is protected from any fines in exchange for cooperating with the authorities, there is no immunity from damages claims.

If the investigation is settled, the wording and scope of the infringement decision can be influenced to a certain degree. Since the decision forms the basis of all follow-on damages claims and binds civil courts, its wording and scope are fundamental. Nuances can make all the difference and the case law on cartel damages claims provides valuable lessons. Paragraphs in the infringement decision on aspects that only played a minor role in the investigation sometimes turn out to be at the heart of a dispute in court.



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Brazil

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 | How would you summarise the development of private antitrust litigation in your jurisdiction?

Brazil is experiencing a boost in private antitrust litigation as an increasing and substantial number of private actions for antitrust damages have been filed in recent years.

Antitrust law enacted in 1994 ([Federal Law No. 8,884](#)) introduced the statutory basis for private antitrust actions for damages or injunctive relief. However, the first claim for cartel damages dates from 2006, after the Brazilian competition authority (the Administrative Council for Economic Defence (CADE)) imposed severe fines on participants in a collusive scheme in the long steel market. The first collective proceeding for cartel damages was filed in 2010, following a decision from CADE imposing fines for collusion in the medical and industrial gases market. Brazil's current Antitrust Act (AA), enacted in 2011 ([Federal Law No. 12,529 of 2011](#)), included the same provisions and grounds for private actions for damages. Subsequently, as CADE became one of the leading competition agencies in the world and prosecuted international cartels along with the European Commission and the US Department of Justice, the number of follow-on damages actions increased accordingly.

Following the [EU Directive on Damages Actions](#), CADE decided to promote private antitrust enforcement. In 2018, it issued a regulation concerning disclosure and access to evidence from its investigations files. As a general rule, documents gathered in the course of administrative proceedings are disclosed after CADE issues a final decision. Notable exceptions are pieces of evidence related to leniency agreements and settlements, including statements provided by applicants on the history of the unlawful conduct. Documents concerning trade secrets and confidential and unrelated business information also remain sealed.

In addition, [Law No. 14,470/2022](#) entered into force in mid-November 2022, amending the AA to provide for new measures to make private enforcement options in Brazil more favourable. For example, the law created a system of double damages and a statute of limitations for damage claims of five years (counting from the publication of CADE's final decision).

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Applicable legislation

- 2** | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Article 47 of the AA provides that victims of competition infringements are entitled to seek full redress for their losses as well as injunctive relief. In addition, a general provision from the [Civil Code](#) (CC) enshrining the right to compensation for losses from unlawful conduct also applies.

Standing to bring a claim is not limited to direct or indirect purchasers, although claimants bear the burden of proving infringement, causation and individual damage.

- 3** | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Private antitrust actions are primarily governed by the AA.

For actions brought by consumers, the [Consumer Protection Code](#) (Federal Law No. 8,078/1990 (CDC)) also applies. Under the CDC, consumers – defined as individuals or undertakings who purchased a product or service as the ultimate beneficiary – have standing to sue for double damages.

The CC applies to private antitrust actions brought under the AA and the CDC. According to the CC, when more than one undertaking infringes the law, those undertakings are jointly and severally liable for redressing any damages derived therefrom (article 942). Companies are strictly and jointly liable for compensating damages from acts of their employees (article 932).

For private antitrust claims filed before domestic courts, the Civil Procedure Code (Federal Law No. 13,105 of 2015) also applies. State courts have jurisdiction to hear private antitrust actions except when a federal agency is party to the litigation, in which case a federal court will have jurisdiction to adjudicate the case. Plaintiffs may choose to file damages actions at the legal venue where the injury occurred or where one of the defendants is domiciled.

PRIVATE ACTIONS

Availability

- 4** | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions for damages are available in the case of any infringement of the Antitrust Act (AA) (ie, against anticompetitive conduct), irrespective of a previous investigation or infringement decision by the Administrative Council for Economic Defence (CADE). Courts will award

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damages provided that a plaintiff successfully proves the existence of an infringement, losses and causation.

For actions brought following a CADE investigation, plaintiffs may rely on CADE's decision to demonstrate the infringement. Courts have reaffirmed that it represents unequivocal evidence of an antitrust infringement. Importantly, in 2019, the Supreme Court issued a decision stating that courts of law should defer to CADE's findings of fact, given the agency's expertise and resources to find whether an investigated conduct produced anticompetitive effects on the Brazilian market (*Comal Combustíveis Automotivos v CADE*, Supreme Court, Regimental Appeal on Extraordinary Appeal No. 1.083.955/DF, issued on 28 June 2019).

Furthermore, Brazilian courts have reaffirmed that CADE's decision triggers the limitation period concerning follow-on damage claims. This stance grants victims the possibility to rely on CADE's investigation to substantiate their claims.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

In terms of subject matter, the AA applies to actions concerning anticompetitive conduct that produced direct or indirect effects, or had the potential to produce those effects, on the Brazilian market.

In terms of parties, the Brazilian courts have jurisdiction to hear a claim in cases where a defendant is domiciled in Brazil, or relevant facts or acts giving rise to the claim (ie, cause of action) occurred or were performed in Brazil.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

There are no restrictions on bringing private actions against corporations or individuals, including those from other jurisdictions.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Third parties may fund private antitrust litigation in Brazil. Although there is no specific regulation on third-party funding (TPF), under the applicable rules of the Civil Code (CC) funding is implemented by means of assignment of credit, alienation of res judicata or non-typical contracts.

By means of credit assignment, parties that suffered damages may assign their compensatory credit, provided that the nature of the obligation to redress, the law or an agreement with the debtor does not preclude such agreement. Under this contract, the victim only transfers the compensation value to a third party, remaining the right holder.

Parties might also fund litigation through an alienation of res judicata contract under which the party who suffered damages assigns to a funder its right to claim compensation. Accordingly, under such a contract the funder has standing to sue on behalf of the assignee. Parties might also design a TPF structure through a non-typical contract, modelling rules and provisions to their mutual preferences (provided that it complies with the general rules of contracts).

When a TPF agreement is executed in the course of a legal proceeding, the [Brazilian Civil Procedure Code](#) (BCPC) allows the funder to succeed the funded party in the lawsuit, as long as the other party approves it. In case of refusal, the funder may still step in as a co-party. Upon a court ruling, the funder might seek enforcement regardless of any consent.

Contingency fees are available and, according to the Brazilian Bar Association, must be reasonable and in general limited to 20 per cent of the recovery. In addition, the BCPC provides for statutory attorney fees paid by the losing party in the amount of 10 to 20 per cent of the amount under dispute.

TPF is developing rapidly in Brazil, given the complexity of private antitrust claims and, therefore, the considerable time a court can take to issue a decision. Indeed, litigation financing can provide an alternative solution to fund collective and individual claims.

Jury trials

8 | Are jury trials available?

No. In the first instance, one federal or state judge will hear the case. On appeal, a case is reviewed by a panel of three judges. On further appeals filed before the Superior Court of Justice (STJ) or the Supreme Court, cases are adjudicated by panels of five or more judges.

Discovery procedures

9 | What pretrial discovery procedures are available?

Pretrial discovery procedures in Brazil are available to a limited extent. Claimants may initiate a court proceeding for primary or immediate production of evidence, provided that there is a reasonable concern that it may become impossible or difficult to obtain the evidence or prove specific facts during the damages action itself or that the evidence sought is relevant for triggering a settlement agreement, or if prior evidence of events may avoid the filing of a private action.

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Admissible evidence

10 | What evidence is admissible?

The parties may use all legal and morally legitimate means to prove facts grounding the statements made in a claim or defence. Evidence including but not limited to the following is allowed:

- documentary evidence;
- expert evidence;
- disclosure of documents;
- oral testimonies; and
- inspections by judges.

In existing private antitrust actions, plaintiffs have been relying on expert evidence to demonstrate and calculate their losses. Expert evidence is normally produced by a court-appointed expert upon request of one or more parties, who may also submit their own experts' reports. Judges are also allowed to rule based solely on expert reports or documents submitted by the parties.

The use of evidence produced in the Administrative Council for Economic Defence's (CADE) administrative proceedings is not only suitable under the terms of the BCPC, but also is of great value, as it facilitates the proof of elements of civil liability. In effect, it speeds up the proceedings and honours the principles of judicial efficiency, reasonable duration of the proceedings and unity of jurisdiction.

Legal privilege protection

11 | What evidence is protected by legal privilege?

Attorney-client communication is privileged irrespective of whether it concerns outside or in-house counsel. According to the law that regulates the practice of law and the Brazilian bar association, legal privilege encompasses any communications and files related to an attorney-client relationship. Counsel may lawfully refuse to provide courts with documents and to testify about facts protected by legal privilege, including trade secrets.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. Cartels characterise criminal conduct under Brazilian law, and a criminal investigation tolls the limitation period for bringing private antitrust actions.

Although only individuals face criminal charges, under the CC, employers are strictly, jointly and severally liable for redressing losses caused by their employees. Therefore, victims can rely on a decision held in a criminal proceeding to bring an action for damages against a company of which the executives or employees participated in unlawful conduct.

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Utilising of criminal evidence

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

The records of criminal proceedings are generally public, and plaintiffs may rely on them to support their claim for damages in parallel private actions. Even when a criminal proceeding runs under secrecy, plaintiffs suing for cartel damages may petition the court to request the relevant criminal files.

Leniency agreements grant immunity from criminal charges. However, the beneficiaries of leniency agreements remain liable for redressing damages derived from their conduct.

Importantly, the STJ has decided that CADE must disclose pieces of evidence gathered during its investigations to claimants, including information provided by beneficiaries of leniency agreements and settling parties, after CADE has concluded its investigation and issued a definitive decision (see *Electrolux do Brasil SA v Whirlpool SA*, Special Appeal No. 1.554.986-SP, Third Panel, adjudicated on 8 March 2016). The STJ has reasoned that, under the Federal Constitution, those documents are not allowed to remain perpetually sealed given their relevance to the public.

Reacting to the ruling and seeking to strike a balance between public and private enforcement, CADE issued a regulation introducing a disclosure regime for its files. According to this regulation, CADE will proactively disclose part of its files upon issuing a final decision. Notable exceptions to this rule are items of evidence related to leniency agreements and settlements, including statements provided by applicants on the history of the unlawful conduct. Documents concerning trade secrets and confidential and unrelated business information also remain sealed.

CADE's Tribunal has sought to balance on the one hand the constitutional principle of publicity in public administration and the right of compensation for damage provided in article 47 of the Antitrust Act (AA), and on the other hand, incentives to leniency and settlement applications. Accordingly, it has been constructing such regulation not to comprise documents and information submitted to CADE due to agreements signed before the enactment of the disclosure policy (ie, 19 September 2018), aiming at protecting the legal certainty standard (Order No. 44/2019, 13 November 2019, Proceeding No. 08700.004073/2016-61).

Stay of proceedings

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The BCPC lays down the circumstances in which a defendant can petition the court for a stay of proceedings. The court will grant the request in the following cases:

- death or loss of procedural capacity of any party, their legal representative or their attorneys;

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- agreement among the parties;
- filing of a motion to disqualify the judge for conflict of interest; and
- admission by a court of appeal of a request to rule on multiple claims grounded on an identical matter.

Defendants may also request a stay when a ruling on the merits of a case depends on a decision concerning another lawsuit. In private actions brought following a decision by CADE, defendants have sought stays based on the fact that parallel claims challenging CADE's findings and seeking annulment of CADE's decision were brought. However, the courts have denied those requests based on a plaintiff's right to bring a standalone action and produce evidence it deems appropriate (see *Indústria e Comércio de Produtos Siderúrgicos Açomax Ltda and other v Gerdau SA*, Court of Justice of the State of Minas Gerais, Interlocutory Appeal No. 1.0145.10.060085-0/001, 14th Private Law Chamber, adjudicated on 13 August 2015).

Standard of proof

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

There is no generally applicable standard of proof for claimants. Under the Brazilian legal system, judges can rely on their analysis and evaluation to rule on cases after reviewing the evidence produced during the proceeding.

Claimants must present evidence demonstrating the existence of anticompetitive conduct, individual damage and causation.

For private actions following a decision by CADE, claimants may rely on this ruling to demonstrate the existence of the infringement. CADE's decision is presumably a piece of truthful and lawful evidence as it is an administrative act issued by a specialised agency with powers and unique expertise to detect and verify anticompetitive conduct. On those grounds, the Supreme Court recently affirmed that Brazilian courts should defer to CADE's findings on the merits since only CADE has the technical expertise to verify competition infringements (see *Comal Combustíveis Automotivos v CADE*, Supreme Court, Regimental Appeal on Extraordinary Appeal No. 1.083.955/DF, adjudicated on 28 June 2019).

Additionally, Brazilian courts have relied on expert evidence to verify the existence and extent of individual damages caused to claimants. According to recent decisions from the Court of Appeals of São Paulo State, there is a clear violation of due process when a judge denies a request to produce expert evidence and dismiss the lawsuit on the grounds that the claimant has not substantiated the claim (see *EIT – Empresa Industrial Técnica SA v Votorantim and others*, TJSP, Appeal No. 1049928-98.2017.8.26.0100, 25th Private Law Chamber, Rapporteur Judge Leila Hassem da Ponte, adjudicated on 23 April 2021).

Passing on is a matter for a defendant to prove. Under the BCPC, a defendant bears the burden of proving facts that hamper, modify or extinguish the claimant's right to compensation. Applying this provision, the Court of Appeal of São Paulo recently ruled on a private action following a CADE decision imposing fines on the cement industry, ruling that defendants bear the burden of proving alleged passing on, and courts should impose the burden

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on them from the start of the proceedings (see *Paez de Lima Construções e Comércio Ltda e outros v Votorantim Cimentos S/A e Lafargeholcim (Brasil) SA*, TJ-SP, Appeal No. 1050035-45.2017.8.26.0100, 19th Private Law Chamber, adjudicated on 28 August 2019).

Keeping in mind the position of the Court of Appeal of the State of São Paulo, Law No. 14,470/22, amending the AA in mid-November 2022, included a provision expressly establishing that the passing-on defence in cartel cases is not presumed.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is no typical timetable for collective and single-party proceedings. A private action's timetable depends on several factors, such as the complexity of the case, procedural strategy and which court has jurisdiction to hear the case.

In complex litigation, it takes at least three to five years for a court of first instance to rule on a case. If the losing party appeals, the Court of Appeal may take from one to two years to issue a decision. Finally, when it is possible to appeal to the STJ or the Supreme Court, it takes at least two additional years. To accelerate the proceedings, claimants may file motions for interim remedies or injunctive relief.

Limitation periods

17 | What are the relevant limitation periods?

The CC established as a general rule that a three-year limitation period applies to individual recovery actions, while a five-year limitation period applies to collective claims. However, Law 14,470/2022, which amended the AA in mid-November 2022, increased the statute of limitations for recovery claims to five years.

The STJ has reaffirmed in recent years that the limitation period only starts to run from the moment a claimant has obtained 'unequivocal knowledge' about the tort and its consequences, namely:

- the occurrence of an illegal act;
- the identity of the wrongdoers;
- the existence of losses and their full extent; and
- the causal relationship between the infringement and the losses.

See the following cases:

- *State v Edmundo Soares Neto*, STJ, Interlocutory Appeal in Special Appeal No. 1.704.473/CE, Justice Herman Benjamin, Second Panel, adjudicated on 1 March 2021;
- *LPS Online Consultoria de Imóveis Ltda and others v Fabio Alexandre Franca*, STJ, Interlocutory Appeal in Special Appeal No. 1.741.583/SP, Justice Ricardo Villas Bôas Cueva, Third Panel, adjudicated on 29 April 2021; and

- *Oi SA v Augustin Anibal Tonelotto*, STJ, Special Appeal No. 1.785.771/RS, Justice Nancy Andrighi, adjudicated on 26 August 2020, reaffirming *Lidia Zaratini Gonçalves and others v Maria Angela Gonçalves Cotta*, STJ, Special Appeal No. 1.698.732/MG, Justice Nancy Andrighi, adjudicated on 18 May 2020.

Accordingly, the Court of Appeals of São Paulo State has ruled that CADE's final (infringement) decision triggers the statute of limitations period for follow-on damages claims. In relation to this, see the following cases:

- *Construtora G-maia, Ltda v Holcim Brasil SA and others*, TJSP, Appeal No. 1076386-55.2017.8.26.0100, 4th Private Law Chamber, Judge Rapporteur Alcides Leopoldo, adjudicated on 11 February 2022;
- *Cemaz Indústria Eletrônica da Amazônia SA v Philips Consumer Electronics, Co*, TJSP, Appeal No. 1014284-14.2015.8.26.0020, 34th Private Law Chamber, Judge Rapporteur L.G. Costa Wagner, adjudicated on 18 August 2021; and
- *Cia de Cimento Itambé v Empresa Construtora Brasil SA*, TJSP, Interlocutory Appeal No. 2103903-90.2018.8.26.0000, 33rd Private Law Chamber, Judge Rapporteur Luiz Eurico, adjudicated on 21 February 2019).

Encompassing the position of the STJ and of the Court of Appeal of São Paulo, Law No. 14,470/22 expressly specified the publication of CADE's final decision as the starting date of the statute of limitations for follow-on damage claims, as only upon such publication can victims obtain unequivocal knowledge of the offence.

Lastly, a few days before Law No. 14,470/2022 came into effect, the Fourth Panel of the Superior Court of Justice made new relevant clarifications specifically about the *dies a quo* of the statute of limitations for private antitrust claims. In *Antonio Claudemir Teles v Sucocitrício Cutrale Ltda*, the STJ understood that, in follow-on actions, the date of CADE's final infringement decision triggers the prescription. Conversely, in stand-alone actions, the general rule applicable in actions for damage in case of tort would be suitable. This means that the statute of limitation would be triggered by the moment that the victim becomes effectively aware of the wrongdoing that caused the damage – a fact that can only be verified in each concrete case (see Special Appeal No. 1.971.316/SP, Justice Luis Felipe Salomão, Fourth Panel, adjudicated on 25 October 2022).

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Appeals on the law and facts are available to challenge interlocutory and final rulings by courts of first instance. At courts of appeal, a judge will write a report and an opinion on the case, and a panel of three judges will issue a ruling on the adjudication session. Following a decision from a court of appeal, the parties may seek to further appeal solely on the issues of law to the STJ and, when there is a constitutional issue involved, to the Supreme Court.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Two types of collective actions may be (concurrently) brought to remedy anticompetitive practices: class actions for defence of 'homogeneous individual rights' and public civil actions. The latter aims at halting or remedying a conduct that affects collective or diffuse interests not specifically individualised and is often brought by a public prosecutor's office, seeking payment of compensation to a public fund. The former – a hybrid of representative and opt-out class actions – aims at obtaining damages or injunctive relief for a class of plaintiffs.

Class actions must be brought by an adequate representative, typically trade or consumer associations that meet certain requirements. Representatives seek a broad declaratory decision establishing that defendants must pay damages (eg, for overcharges imposed) to a class. Subsequently, the injury suffered by each member of the class is collectively or individually calculated and recovered through the specific procedure of liquidation. Injured companies may opt out and file an individual action. Conversely, parties that filed individual actions before the class action have the option to request that their actions be stayed until a final decision concerning the collective action is issued, which will be binding with regard to their claims only if it is decided in favour of the plaintiffs. Otherwise, the individual processes are resumed.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Yes. In addition to the Antitrust Act, the Consumer Protection Code, the [Public Civil Actions Act](#) (Federal Law No. 7,347/1985) and the Civil Procedure Code apply to collective proceedings.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no certification process under the Brazilian legal system, and class actions are brought by adequate representatives, typically trade or consumer associations that meet certain requirements.

22 | Have courts certified collective proceedings in antitrust matters?

Although there is no certification process in Brazil, examples of collective proceedings in Brazil include a class action initiated by associations of construction companies from different states following an infringement decision from the Administrative Council for Economic Defence concerning collusion in the steel industry, and class actions by associations of hospitals from three different states following an infringement decision concerning collusion by producers of medical and industrial gases.

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Opting in or out

23 | Can plaintiffs opt out or opt in?

Injured companies or individuals can opt out from a class action to bring individual claims.

Conversely, parties that filed individual actions before the class action have the option to request that their actions be stayed until a final decision concerning the collective action is issued, which will be binding with regard to their claims only if it is decided in favour of the plaintiffs. Otherwise, the individual processes are resumed.

When the court holds a decision favourable to the plaintiffs in class proceedings, this ruling produces erga omnes effects. As a consequence, injured parties may enforce this decision in a liquidation proceeding.

Importantly, the Supreme Court (STF) has declared article 16 of the Public Civil Actions Act unconstitutional. This section used to limit the effectiveness of the collective res judicata to the territorial jurisdiction of the court that rendered the decision. Consequently, only individuals or companies domiciled in a given state or a judicial district comprising a few had standing to liquidate individual damages and enforce such a decision (STF, Extraordinary Appeal No. 1,101,937/SP, Rapporteur Justice Alexandre de Moraes, Full Bench, adjudicated on 13 April 2021). The STF decision has granted compensation to victims of anticompetitive conduct regardless of their domicile, further increasing the effectiveness of collective actions.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Collective settlements do not require judicial authorisation but in certain cases may require authorisation from the Public Prosecutor's Office.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Federal law governs both private antitrust actions and collective proceedings.

Different plaintiffs may simultaneously bring private actions in respect of the same matter in more than one state depending on the infringement's scope.

The Superior Court of Justice has ruled that the territorial jurisdiction of the court that awarded damages does not prevent the victims from bringing liquidation proceedings before other domestic courts, which allows for a national collective proceeding (see *Instituto Brasil de Defesa do Consumidor v Caixa Econômica Federal and others*, Special Appeal No. 1.134.957-SP). This stance has been upheld in the Extraordinary Appeal No. 1,101,937/SP, in which the full bench of the STF ruled that there is no territorial limitation to the subjective effects of the decisions rendered in collective proceedings.

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The territorial jurisdiction only limits the exercise of jurisdiction, so that if more than one collective proceeding of national or regional scope is filed, the judge that first received one of them has jurisdiction and therefore will be responsible for adjudicating all similar or connected claims.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

A few firms have focused on representing plaintiffs in recovery actions for cartel damages, but a proper plaintiff's collective-proceeding bar has not yet developed.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Injured parties may seek compensation for actual losses, lost profits, and non-pecuniary losses (ie, damage to a company's 'image' and 'moral damage'). Double damages apply for claims brought by consumers under the Consumer Protection Code. In addition, Law No. 14,470/22, amending the Antitrust Act (AA) in mid-November 2022, expanded the scope of double damages to other recoveries against cartels. However, it exempted signatories of leniency agreements or consent decrees.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Aggrieved parties may also go to court seeking interim remedies and injunctive relief.

To obtain an interim remedy or preliminary injunctive relief, claimants must demonstrate *fumus boni iuris* and *periculum in mora*. The courts may also grant injunctions when there is prima facie evidence supporting the claim and the defendant does not produce evidence raising a reasonable doubt.

The law does not require evidence of injury or fault when injunctive relief aims at inhibiting unlawful conduct, halting the continuation of wrongdoing or eliminating an infringement.

Punitive damages

29 | Are punitive or exemplary damages available?

Double damages apply for claims brought by consumers under the Consumer Protection Code. In addition, Law No. 14,470/22, amending the AA in mid-November 2022, expanded the scope of double damages to other recoveries against cartels. However, it exempted signatories of leniency agreements or consent decrees.

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Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Damages shall be adjusted for inflation and statutory interest pursuant to the Civil Code (CC). Interest shall accrue from the harmful event according to the Superior Court of Justice's Binding Precedent No. 54.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

No.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Court costs

Legal costs comprise costs of court proceedings, compensation for travel expenses, fees of retained experts and the travel expenses of witnesses.

As a general rule, parties bear the costs of acts they perform or request in a proceeding, advancing payment for it. Parties requesting expert evidence will share the costs of producing it. The final ruling will impose on the losing party the obligation to reimburse the prevailing party for the expenses advanced.

Plaintiffs in collective proceedings receive a waiver both from anticipating legal costs (including expert witness fees and costs of pleadings) and paying attorneys' fees and court costs if they lose.

Attorneys' fees

In individual claims, the losing party pays statutory attorneys' fees to the attorneys of the prevailing party. The judge sets the attorney fees in a range of 10 to 20 per cent of the awarded damages or the amount under dispute in view of the following factors: the attorneys' diligence, the place where the service was rendered, the nature and the relevance of the claim, the work performed and the time spent by the attorneys.

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Joint and several liability

33 | Is liability imposed on a joint and several basis?

Under the CC, offenders and co-offenders are jointly and severally liable for damages derived from unlawful practices. Moreover, employers are jointly and severally liable for compensating damages derived from an unlawful act performed by an employee or executive.

The AA also provides for joint and several liability among companies of the same economic group, establishing, therefore, joint and several liability beyond classical parental liability. Pursuant to the AA, this provision applies both to administrative and civil liability (ie, private actions for damages).

Also, the precise share of each party in the damage is irrelevant for establishing joint and several liability under the CC. The formation and maintenance of an infringement, such as a cartel, depends on several participants who have the same common goal, which makes it difficult to specify the liability of each one for the joint criminal enterprise. In this sense, the Superior Court of Justice admits that in cases of non-contractual liability the eventual distinction between the proportion of each participant's conduct that resulted in the damage is unnecessary (see *Koch do Brasil Projetos Industriais Ltda v Koch Metalurgia SA*, Special Appeal No. 1719131-MG, Third Panel, adjudicated on 11 February 2020).

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Under the CC, defendants have the right to seek contributions from other co-debtors or co-defendants in cases where one of them is obliged to pay claimants for the entire amount of the awarded damages.

If one defendant is or becomes insolvent, his or her share will be equally divided among the other co-defendants, who will bear the burden of paying the outstanding amount. Defendants who have settled, however, might not bear the insolvent defendant's share if a plaintiff grants a 'remission' to the settling parties, extinguishing their share of the debt.

Partial payment by a debtor or remission from the creditor regarding one debtor does not affect the joint and several liability of the other co-defendants for the outstanding amount. Nonetheless, claimants deduct from the total claim a settling party's share of the debt.

Passing on

35 | Is the 'passing-on' defence allowed?

A passing-on defence is allowed, and it is a matter for the defendant to prove.

Under the Civil Procedure Code, a defendant bears the burden of proving facts that hamper, modify or extinguish the claimant's right to compensation.

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Applying this provision, the Court of Appeal of São Paulo recently ruled on a private action following an Administrative Council for Economic Defence (CADE) decision imposing fines on the cement industry, ruling that defendants must prove alleged passing-on (see *Paez de Lima Construções Comércio e Empreendimentos Ltda e outros v Votorantim Cimentos S/A e Lafargeholcim (Brasil) SA*, TJ-SP, Appeal No. 1050035-45.2017.8.26.0100, 19th Private Law Chamber, adjudicated on 28 August 2019).

Accordingly, Brazilian courts have affirmed that passing on a cartel overcharge is not automatic and cannot be presumed. Thus when defendants are found to have adequately substantiated a passing-on defence, the courts have ordered production of an expert report to analyse whether:

- the claimant passed on part of the overcharge; and
- the claimant suffered volume harm due to losses of sales as a consequence of passing on.

See TJSP, Appeal No. 1049435-24.2017.8.26.0100, 8th Private Law Chamber, adjudicated on 30 September 2020.

Keeping in mind the position of the Court of Appeal of the State of São Paulo, Law No. 14,470/22, amending the AA in mid-November 2022, included a provision expressly establishing that the passing-on defence in cartel cases is not presumed, and that the procedural burden of proof falls upon the defendants.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

The court will award damages when a plaintiff proves the existence of an infringement, individual damage and causation; hence, defendants may rely on pieces of evidence to refute a plaintiff's narrative, demonstrating the lack of one of those requirements.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Under the Civil Procedure Code, the judge must encourage the parties to settle the case during a conciliation (or mediation) hearing that precedes the filing of a response and the statement of defence. Arbitration is also available when the parties expressly agree to submit the claim to an arbitration panel or sole arbitrator.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

Law No. 14,470/2022 entered into force in mid-November 2022, amending the Antitrust Act to provide for new measures to make private enforcement options in Brazil more favourable.

This will significantly foster enforcement by establishing double damages applicable to recovery actions for cartel damages against parties that have neither executed a leniency agreement nor subsequently settled with the Administrative Council for Economic Defence (CADE).

Law No. 14,470/2022 also codifies the case law from Brazil's higher courts on limitation, the passing-on defence and the effect of CADE's decision on follow-on litigation, enhancing certainty and enabling private antitrust enforcement to flourish.

In 2017, the Panel of the Federal Justice Council approved a legislative resolution that provides for a proposal for the specialisation of federal courts in competition and international trade law. Since then, a specialised court has been created in the Federal Court of the Second Region and a working group has been created to analyse the feasibility of implementing one in the Third Region. The idea behind the creation of specialised courts is to develop human capital, specialising judges and creating more uniform jurisprudence and parameters for economic order and defence of competition.

However, the enactment of the new law is already raising debates about its retroactivity and application in pending action, mainly because it brings provisions qualified as material and procedural. The difficulty is greater in the numerous private actions that are being processed in the Brazilian judiciary, as the matters addressed by the new law are still being discussed. Therefore, the analysis of the retroactivity of Law No. 14,470/2022 is extremely important, since its immediate applicability can determine the viability of these actions (eg, if the claim is not time-barred), or make the process less burdensome and more rewarding for the victims.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 | How would you summarise the development of private antitrust litigation in your jurisdiction?

The jurisdiction of England and Wales has a longstanding history of private antitrust claims based on both UK and EU competition law. Post-Brexit, claims for damages for breach of EU competition law can still be brought in certain circumstances and European Commission decisions reached before the end of the transition period (ie, 31 December 2020) remain binding on UK courts. A number of features of the English legal system are attractive to claimants considering where to issue private antitrust proceedings.

Disclosure

The disclosure rules in English litigation are extensive compared with those of most EU jurisdictions, although the implementation of the EU Directive on antitrust damages actions has introduced more extensive disclosure rules in EU jurisdictions.

In High Court proceedings, the parties are required to make a reasonable and proportionate search for and to disclose not only documents on which they themselves rely, but also documents that could harm their case and that could assist the other party's case. In cartel cases, for example, such disclosure is of particular importance because the majority of relevant documentation is otherwise likely to be unavailable to all parties in the litigation. The parties must complete disclosure questionnaires describing the potentially relevant documents (including electronic documents) they may have prior to disclosure being given. This provides greater transparency about what documents exist, where they are located and the likely cost of retrieving them.

From 1 January 2019, cases in the business and property courts (including the Commercial Court and Chancery Division) have had to comply with the Disclosure Practice Direction (formerly the Disclosure Pilot – see [Practice Direction 57AD](#)), which introduces various changes to the disclosure regime. However, Practice Direction 57AD states that the Practice Direction shall not, unless otherwise ordered, apply to competition law claims (as defined in paragraph 2(2) of Schedule 8A to the [Competition Act 1998](#), CA 1998). The rules for disclosure in the Competition Appeal Tribunal (CAT) are similar to those in the High Court and are set out in the revised Competition Appeal Tribunal Rules ([SI 2015 No. 1648](#)) (the CAT Rules).

Specialist courts

Claims for stand-alone and follow-on actions can be brought either in the High Court or the CAT.

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In the High Court, proceedings are governed by the [Civil Procedural Rules](#) (CPR) and the Competition Law Practice Direction provides for competition litigation in the High Court to be heard in two specific divisions of the Business and Property Courts (the Chancery Division and the Commercial Court), with judges in those courts receiving competition law training.

In the CAT, proceedings are governed by the CAT Rules. Cases are typically heard by a tribunal of three persons drawn from a pool of High Court judges, economists, lawyers or accountants, usually chaired by a judge.

Costs

While the nature of proceedings in England and Wales can make litigating there more expensive than in other jurisdictions, the general rule in High Court proceedings is that the losing party must pay the successful party's reasonable costs. In the CAT, costs awards are made as the Tribunal sees fit, taking into account a number of factors, including whether a party has succeeded on part of its case, even if that party has not been wholly successful. The appropriate starting point in damages claims is that the successful party should be awarded its reasonable costs.

Fee arrangements (including damages-based agreements, which allow the payment of a percentage of recoveries to legal representatives in return for no fee as the case progresses, and conditional fee arrangements, in which lawyers acting for a claimant are paid nothing or a reduced fee in the event of an unsuccessful claim but an 'uplift' of up to 100 per cent on their basic fees if they win, have encouraged claimants to issue proceedings in England and Wales on a relatively low-risk basis in terms of costs. The uplift, or success fee, is not recoverable in costs from the losing party. Instead, the success fee must be paid by the claimant from the damages awarded. In addition, damages-based agreements are not enforceable if they relate to opt-out collective proceedings.

Widening of the CAT's jurisdiction

In 2015, the CAT's jurisdiction was expanded via amendments to the [Enterprise Act 2002](#) (EA 2002) and the Competition Act 1998 (CA 1998) to allow the CAT to hear stand-alone cases; introduce collective proceedings and procedures for collective settlements; harmonise limitation periods with those of the High Court; provide schemes for voluntary redress approved by the Competition and Markets Authority (CMA); and introduce a fast-track scheme for small or medium-sized enterprises. In addition, a number of changes were introduced by the revision of the CAT Rules. Since the introduction of these powers, the CAT's actions have included:

- the certification of 10 collective proceeding claims, with 14 awaiting certification and 5 which are either discontinued or on appeal;
- judgments which provide clarity as to when the fast-track scheme will be deemed appropriate; and
- the judgment of *Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2023] CAT 15* which clarified the position on limitation harmonisation.

The Regulations implementing the Damages Directive

The EU Damages Directive was adopted on 26 November 2014. On 9 March 2017, the Claims in Respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the [2017 Regulations](#)) came into force, inserting Schedule 8A into the CA 1998. The 2017 Regulations transposed the Damages Directive into domestic UK statute. In broad terms, they confirm that decisions of the Commission and the CMA are binding in respect of the existence of an infringement in damages actions; the passing-on defence for defendants is available; and there is protection against requests to disclose leniency statements and settlement materials.

The 2017 Regulations are also supplemented by a [Practice Direction](#) in the Competition Appeal Tribunal (the Practice Direction Relating to Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the CAT Rules).

However, paragraphs 42–44 of Schedule 8A (CA 1998) place limits on the cases to which these parts apply at present. In broad terms, the 2017 Regulations apply only to the extent that the claims and proceedings relate to loss or damage suffered on or after 9 March 2017. If an infringement takes place over two or more days, then it is deemed to take place on the first day. Therefore, with the exception of the rules on disclosure, the use of evidence and determining whether a document is a settlement submission or a leniency statement, these regulations will only apply to claims where an infringement has taken place wholly on or after 9 March 2017. The rules governing disclosure and the use of evidence (including in relation to settlement submissions and leniency statements) apply to proceedings that began on or after 9 March 2017.

Brexit

The United Kingdom formally left the European Union on 31 January 2020, following which it entered into a transition period in which EU law continued to apply and was implemented in the United Kingdom.

Following the ratification of the EU–UK Trade and Cooperation Agreement, signed in December 2020, the transition period concluded on 21 December 2020, and EU law has ceased to apply in the United Kingdom (save in respect of ongoing cases and in certain areas where grandfathering arrangements apply, and in Northern Ireland under the Northern Ireland Protocol).

Prior to its departure, the United Kingdom issued a series of statutory instruments that amended the domestic statute book and brought an end to the direct jurisdiction of the EU institutions in the United Kingdom. The [Competition S](#) includes key changes for private anti-trust damages cases in the UK, including the following.

- Section 60 of the CA 1998, which requires consistent interpretation of UK competition law with EU law, has been repealed. This has been replaced with a new section 60A, which requires UK competition authorities and courts or tribunals to ensure there is no inconsistency with EU law as at the end of the transition period when interpreting UK competition law, but allows departure from this EU law where it is considered appropriate in light of certain specified circumstances. Section 60A applies to all UK new competition

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- authority investigations and UK court cases, whether the facts of those cases arose before or after the end of the transition period.
- Sections 47A and 58A of the CA 1998 have been amended so that decisions of the European Commission reached after the end of the transition period will no longer be binding on UK courts in follow-on claims. However, European Commission decisions reached before the end of transition will continue to be binding, including if they only become final (ie, after any appeals have been exhausted) after this date.
 - Schedule 4, paragraph 14 of the Competition SI provides transitional provisions that will enable claimants to bring claims for alleged breaches of EU competition law on a stand-alone basis based on conduct that occurred while the United Kingdom was a member state of the EU.
 - Schedule 8A, paragraph 35 of the CA 1998 has been amended so that UK courts are not required to treat a decision of an EU member state national competition authority as prima facie evidence of a breach of articles 101 or 102, etc, of the Treaty on the Functioning of the European Union (TFEU). However, decisions of member state national competition authorities reached before the end of the transition period will still constitute prima facie evidence of an infringement (even if they only became final after the United Kingdom's exit). European Commission decisions reached prior to the end of the transition period are binding in the United Kingdom, including for the purposes of follow-on damages claims.

Competition Appeal Tribunal rules and guidance

On 22 April 2022, the UK government announced a consultation to reform the CAT rules governing procedure of cases in the Tribunal. This included a technical review of the CAT rules, working with the Tribunal and other interested parties, to encompass updating and improvement of case management procedures including in the context of private actions and with a view to enhancing the Tribunal's ability to conduct proceedings by electronic means. Following this, the UK government intends to expand the CAT's jurisdiction to include the ability to grant declaratory relief, and give it and other courts discretion to award exemplary damages for breaches of competition law.

In a recent case, *Justin Le Patourel v BT PLC* [2022] EWCA Civ 593, the Court of Appeal suggested that amendments also be made to the CAT Guide to Proceedings which accompany the CAT rules, in particular in relation to collective proceedings certification.

The CAT has also published numerous Practice Directions including [Practice Direction 2/2021 on Trial/ Appeal Witness Statements](#), the [Practice Direction relating to Disclosure and Inspection of Evidence](#) and [Practice Direction 2/2022, introducing a bespoke regime for so-called 'Umbrella' Proceedings](#), allowing multiple cases to be grouped for the purposes of determining and managing common issues.

Applicable legislation

- 2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Provided jurisdiction is established, any natural or legal person who has suffered loss or damage as a result of an infringement or alleged infringement of Chapters I or II of the CA

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1998, or articles 101 or 102 of the TFEU (occurring prior to 31 December 2020), has standing to bring a claim in the High Court, or alternatively the CAT (section 47A of the CA 1998).

High Court

Private antitrust actions arising out of an infringement of competition law may be brought in the High Court based on the tort of breach of statutory duty (*Garden Cottage Foods Limited v Milk Marketing Board* [1984] AC 130 at 141 and *Crehan v Inntreprenneur Pub Company* [2004] EWCA Civ 637 paragraph 156). The breach is of the provisions of Chapters I or II of the CA 1998, or section 2(1) of the European Communities Act 1972 (as preserved by the [EU \(Withdrawal\) Act 2018](#)) in respect of damage occurring prior to 31 December 2020.

CAT

Follow-on and stand-alone damages claims brought in the CAT are based on sections 47A and 47B of the CA 1998, as amended by the EA 2002. Section 47A provides for private actions for compensation to be brought in the CAT where an infringement decision has already been reached by either the UK or (in respect of decisions reached prior to 31 December 2020) EU competition authorities (ie, follow-on claims) or, since 1 October 2015 (following implementation of the CRA 2015), where a claimant brings an action for an 'alleged infringement' of competition law, a stand-alone action.

Section 47B of the CA 1998 allows collective proceedings to be brought in the CAT. A collective proceeding may be commenced by someone proposing to be the class representative. This will combine two or more claims and may be brought on an opt-in or opt-out basis; that is, brought on behalf of each class member without specific consent unless a class member elects to opt out by notifying the representative that his or her claim should not be included in the proceedings. Collective proceedings can be brought on a follow-on or stand-alone basis.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The relevant legislation includes the CA 1998 and the EA 2002, and the relevant courts are the High Court and the CAT. If claims are brought in the High Court, they should be brought in the Business and Property Courts Competition List and assigned to the Chancery Division or the Commercial Court (see the [Competition Law Practice Direction](#) and [CPR Rule 58.1\(2\)](#)). Under [CPR Rule 30.8](#) and the Competition Law Practice Direction, any competition law claim commenced in the Queen's Bench Division or the County Court should be transferred to either the Chancery Division or, where appropriate, the Commercial Court.

Transfer between the High Court and the CAT

Damages claims may be transferred between the High Court and the CAT (section 16 of the EA 2002). The [Section 16 Enterprise Act 2002 Regulations 2015](#) (SI 2015/1643) state that where there falls for determination an infringement issue, the High Court may, by order, transfer to the CAT for its determination so much of the proceedings as relates to the infringement issue. Correspondingly, the CAT Rules provide that the CAT may, at any stage of the proceedings, on the request of a party or of its own initiative, and after considering any observations of the parties, direct that all or part of a claim brought under section 47A of the CA 1998 be

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transferred to the High Court (CAT Rule 71). The CAT Rules also outline the procedure that the claimant must follow where any court has ordered the transfer to the CAT of all or part of any proceedings.

In *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2015] EWHC 3472 (Ch), the High Court considered whether to transfer the case to the CAT, which was unopposed by the parties. In deciding to transfer proceedings to the CAT, Barling J noted that the proceedings were lengthy (nine weeks) and complex, and they would involve considerable economic evidence and argument. There was no risk that, as a result of transfer, the trial window would be jeopardised. In addition, Barling J noted that, as he was available to sit as chair of the CAT panel, the transfer would not result in loss of such familiarity gained of the issues in the proceedings.

In a separate judgment by the Court of Appeal in the same case, the court stated (obiter) on the basis of Barling J's judgment that claims in respect of infringement decisions or alleged infringements of competition law 'should in normal circumstances be transferred to the CAT' (*Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2018] EWCA Civ 1536).

In *Unwired Planet International Ltd v Huawei Technologies and Others* [2016] EWHC 958 (Pat), the claimants issued patent infringement proceedings in the High Court against the defendants and, in response, a number of the defendants brought counterclaims for alleged breaches of competition law. Samsung, one of the defendants, applied to transfer the competition law aspects of the case to the CAT. The High Court noted that such a decision involved the exercise of the court's discretion, taking into account all the circumstances ([PD30 paragraph 8.11](#)) and the overriding objective. This meant that saving expense and dealing with the case in a manner proportionate to the value, importance, complexity and position of the parties was relevant, as was dealing with the case expeditiously and fairly and allotting an appropriate share of the court's resources to it.

Birss J found that no transfer should be made without some positive reason for doing so and that the provisions of section 16(2) are expressed in a limited way. Their purpose was not to empower the court to transfer the whole proceedings to the CAT if those proceedings involve an infringement issue; on the contrary, they only empower transfer of so much of those proceedings as relates to the infringement issue to the CAT. In this case, to transfer the competition law aspects to the CAT would leave the interrelated contract claims in the High Court, which would create a recipe for confusion. Therefore, Birss J rejected the application.

PRIVATE ACTIONS

Availability

- 4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions can be brought in respect of any breach of UK or EU competition law (Chapters I or II of the Competition Act 1998 (CA 1998) and – for damage arising prior to the end of the Brexit transition period – articles 101 or 102 of the Treaty on the Functioning of the European

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Union (TFEU) respectively). Claims can be brought either as a stand-alone claim (ie, one in which the claimant must show the infringement as well as loss and causation) or as a follow-on action (in which an infringement finding has already been made by the competition regulator at UK or EU level and in respect of which the claimant need only show loss and causation).

A relevant finding of infringement by the Commission or the Competition and Markets Authority (CMA) is binding on the High Court or the Competition Appeal Tribunal (CAT), provided that it is final (ie, no appeal has been lodged against the decision and the time limit for appealing has expired; or all avenues of appeal have been exhausted). As such, a claimant will be required to show evidence of loss and causation in a follow-on claim but, in a stand-alone claim, evidence of the infringement as well.

Paragraph 35 of Schedule 8A of the CA 1998 provides that a final decision of an EU member state competition authority or review court that there has been an infringement by an undertaking is prima facie evidence of the infringement. This only applies to claims brought on or after 9 March 2017. Following the United Kingdom's exit from the Brexit transition period, decisions of the European Commission reached after 31 December 2020 are longer binding on the UK courts, and the UK courts no longer have to consider decisions of EU member state national competition authorities as prima facie evidence of an infringement.

In relation to follow-on damages actions, sections 58 and 58A of the CA 1998 state that the court must accept the decision of the CMA or the European Commission as binding, provided the decision is final (ie, no appeal has been lodged against the decision and the time limit for appealing has expired, or all avenues of appeal have been exhausted). Following the United Kingdom's exit from the European Union, the Competition SI states that decisions of the European Commission reached after the transition period (ie, 31 December 2020) are no longer binding on the UK courts.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

For claims brought prior to the conclusion of the UK's Brexit transition period, and where the defendant is domiciled in an EU member state, jurisdiction will be governed by Regulation (EU) No. 1215/2012 (the Brussels Regulation), which replaced the previous Brussels Regulation (EC) No. 44/2001 for cases commenced on or after 10 January 2015. Defendants domiciled in Norway, Switzerland and Iceland are subject to the provisions of the Lugano Convention 2007, which is similar in its terms to the first iteration of the Brussels Regulation. The jurisdiction rules of the Brussels Regulation (and the Lugano Convention 2007) only apply to defendants domiciled in an EU member state or in Norway, Switzerland and Iceland. The jurisdiction rules applicable to claims brought after the end of the UK's Brexit transition period (ie, 31 December 2020) are the same as those governing jurisdiction over non-EU defendants.

For defendants domiciled outside the EU (and inside the EU in respect of claims brought after 31 December 2020), the common law jurisdiction regime will apply. In those cases, jurisdiction depends on whether the defendant is located within England and Wales. If so, the English

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courts have jurisdiction, although they can stay proceedings on application if it is shown that another court that also has jurisdiction is a more appropriate forum.

If the defendant is not within England and Wales, the claimant can apply for permission to serve proceedings outside the jurisdiction if it can show that the claim has a reasonable prospect of success; that there is a basis for jurisdiction set out in the Civil Procedural Rules (including that damage was sustained in the jurisdiction or as a result of an act committed within the jurisdiction or that the defendant is a necessary and proper party to a claim against another defendant); and that England and Wales is the proper place to bring the claim.

The CAT considered the application of these transitional rules in *Epic Games, Inc and Others v Apple Inc and Another and Alphabet Inc, Google LLC and Others* [2021] CAT 4. Epic brought claims against both Apple and Google alleging breaches of EU and UK competition law arising from the requirements imposed regarding software applications on the two main operating systems for mobile devices. Both actions named defendant entities in the United States, and in Ireland in the Google action. As the claims were commenced before the end of the transition period under the Withdrawal Agreement, the Brussels Regulation applied to both claims. Claims against EU-domiciled defendants did not therefore require permission from the CAT. However, the Tribunal did consider permission under the common law rules in respect of claims against the US-domiciled entities. Applying the *forum conveniens* doctrine, Roth J considered that the CAT was not the appropriate forum for claims to proceed against the US defendants in Epic's claim against Apple in light of parallel ongoing US litigation, but did grant permission for Epic's claim to proceed against the US defendants in the Google action on the basis that the US entities were necessary and proper parties to a claim that would otherwise proceed in any event against the EU-domiciled entities.

In *Samsung Electronics Co Ltd and others v LG Display Co Ltd* [2021] EWHC 1429 (Comm) the claimants sought to bring contribution proceedings against the defendants having settled in full a claim brought by 42 UK local authorities against the liquid crystal display cartel. The court accepted that Samsung's contribution claim was a claim in tort that fell within the tort gateway, but refused jurisdiction on grounds of *forum non conveniens*, accepting that Korea or Taiwan was the more appropriate forum as the documents and factual witnesses relevant to deciding the relative responsibility of the parties in the cartel were based there. On appeal ([2022] EWCA Civ 423) the Court of Appeal upheld the High Court's judgment, but stated obiter that if an argument had been raised at first instance that a Commission decision is not binding in the UK on the issue of relative culpability between cartellists, the High Court's view that this issue should be tried in Korea or Taiwan would be mistaken. However, this argument was not raised in the High Court.

On 28 September 2020, the United Kingdom submitted a new instrument of accession to the Hague Convention on Choice of Court Agreements (the Hague Convention) having withdrawn its previous instrument on 31 January 2020. Under the Hague Convention, EU member states must give effect to an exclusive jurisdiction agreement in favour of the English courts.

Following the conclusion of the UK's Brexit transition period, the Brussels Regulation and the Lugano Convention 2007 have ceased to apply in the United Kingdom. The United Kingdom is now bound by the Hague Convention in its own right rather than by virtue of its former EU membership.

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On 28 April 2020, the United Kingdom deposited a request for re-accession to the Lugano Convention 2007; however, its application has not been approved by the European Union. This means that the common law rules of jurisdiction will apply in relation to EU member states, as supplemented by the Hague Convention. There remains a possibility – which is disputed – that bilateral treaties between the United Kingdom and individual EU member states (which were ‘superseded’ by the Brussels Convention), will become applicable again.

For claims brought prior to the conclusion of the UK’s Brexit transition period, the main provisions of the Brussels Regulation in the context of where competition damages claims can be brought are:

- article 4(1): the place where the defendant is domiciled;
- article 7(1): in contract claims, the place of performance of the obligation under the contract; article 7(2): in tort claims, the place where the harmful event occurred;
- article 8(1): a defendant joining co-defendants to an existing action;
- article 25: jurisdiction agreements;
- article 26: submission to the jurisdiction; and
- article 30: related actions.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Damages actions can be brought against any entity that infringes the competition rules. Actions can, therefore, be brought against legal entities and against individuals to the extent they are an undertaking and, therefore, capable of breaching articles 101 and 102 of the TFEU (in respect of damage that arose prior to 31 December 2020) or Chapters I and II of CA 1998.

In respect of defendants from other jurisdictions, the English Common law rules on jurisdiction (and the grandfathered provisions of the Brussels Regulation) allow for defendants not domiciled in England and Wales to be sued in the English courts.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Yes. Costs can be significant in the context of litigation in the English courts, in particular given that the unsuccessful party will, as a general rule, be required to pay the winning side’s reasonable costs. It is, therefore, important for claimants to ensure they consider before commencing litigation both how to fund the litigation and the risk of an adverse costs order. There are a number of potential arrangements that may be available.

Conditional fee arrangements (CFAs) often involve the lawyers acting on a ‘no win, no fee’ basis, but with provision for a ‘success fee’ (ie, their basic fee, plus an uplift) to be paid to them in the event of a successful outcome. To be enforceable, a CFA must comply with section

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58 of the [Courts and Legal Services Act 1990](#). In particular, CFAs must be in writing, and the percentage uplift cannot be more than 100 per cent of the lawyer's normal fees and, since April 2013, cannot be recoverable in costs from the losing party.

Under damages-based agreements (DBAs) (as provided for by the Courts and Legal Services Act 1990 (as amended) and the [Damages-Based Agreements Regulations 2013](#)), lawyers can agree to accept a share of the clients' winnings, capped at 50 per cent in commercial cases. DBAs must be on a no win, no fee basis, and the lawyer is only entitled to payment if the claimant both wins and recovers the sum awarded to it in damages. A DBA is unenforceable if it relates to collective opt-out proceedings (section 47C(8) of the Competition Act 1998 (CA 1998)), although CFAs are permitted for such claims.

Potential litigants may also have legal expenses insurance or may be able to take out after-the-event insurance to cover their legal costs. However, following changes in April 2013, an after-the-event insurance premium cannot be recovered from the losing party.

Third-party funding by a professional funder is also an option. In *Arkin v Borchard Lines Limited* [2005] EWCA Civ 655, the defendant successfully defended the claim and sought an order for the funder to pay their costs (which were in the region of £6 million). The Court of Appeal held that the professional funders should be liable to pay the costs of opposing parties but capped at the amount of the funding they provided.

Two of the *Trucks* claims (*UK Trucks Claim Ltd v Fiat Chrysler and others* [2019] Competition Appeal Tribunal (CAT) 26 and *Road Haulage Association Ltd v Man SE and others* [2020] CAT 7) came before Roth J in the CAT on funding issues. The CAT had previously ruled that it could hear as a preliminary issue the question whether owing to funding arrangements, either claimant should not be authorised to act as class representative.

The Tribunal rejected arguments made by DAF and others that the funding arrangements constituted DBAs and were unenforceable. It concluded that litigation funders are engaged in the funding of a claim, not the management of the making of a claim, and if they are not engaged in providing claims management services, the funding arrangement does not fall within the definition of a DBA. Other defendants challenged the adequacy of the funding arrangements. The Tribunal considered the funding arrangements for both representatives in some detail, noting that the Road Haulage Association had £27 million in funding, and the *UK Trucks Claim* had £24 million in funding, both from third-party funders. The Tribunal concluded that it could not find either claimant's budget unrealistic or inadequate and that there was a reasonable prospect that either party could secure additional funding if necessary.

Both claimants had after-the-event insurance policies in place to cover their liability to costs up to £20 million. After a detailed consideration of the insurance arrangements, the Tribunal concluded that the proper approach in a case with such high costs is to determine that the class representative has at the outset the ability to pay a substantial level of adverse costs cover, which should be sufficient for at least a significant part of the proceedings. Authorisation should not be refused on the basis that this might prove insufficient to the end of trial. The issue could be revisited, and the Tribunal could amend the terms of the collective proceedings order accordingly.

The judgment was upheld on appeal to the Court of Appeal (*DAF Trucks v RHA Limited and ors* [2021] EWCA Civ 299). The issue that the Court of Appeal considered was whether funding arrangements entered into with claimants by third parties who play no part in the conduct of the litigation, but whose remuneration is fixed as a share of damages recovered by the client, are DBAs. The court found that these sorts of arrangements do not constitute 'claims management services' and therefore DBAs, thereby avoiding striking down most of the current litigation funding agreements as unenforceable. The UK Supreme Court granted DAF leave to appeal on 27 May 2022. The appeal was heard on 16 February 2023, and is awaiting judgment.

Jury trials

8 | Are jury trials available?

Jury trials are not available either in the High Court or in the CAT in relation to competition proceedings.

Discovery procedures

9 | What pretrial discovery procedures are available?

High Court

Disclosure in the High Court is governed by [Rule 31 of the Civil Procedural Rules](#) (CPR). Cases in the Business and Property Courts (including the Commercial Court and Chancery Division) must comply with the Disclosure Practice Direction (formerly the Disclosure Pilot – see Practice Direction 57AD), which introduces various changes to the disclosure regime. However, Practice Direction 57AD states that it shall not, unless otherwise ordered, apply to competition law claims (as defined in paragraph 2(2) of Schedule 8A to the Competition Act 1998, CA 1998).

The CPR require parties in larger cases to complete disclosure questionnaires before the disclosure exercise is started so that the other parties, and the court, are aware of what documents (including electronic documents) are thought to exist and where they are located. The parties can then agree, or the court can order, disclosure that is more relevant to the specific case, if necessary. 'Standard' disclosure is still available as one of the options that the parties or the court can choose.

Standard disclosure

Standard disclosure generally takes place after pleadings have closed, namely after the claim form, particulars of claim, defence and any replies have been served. It requires the parties to the litigation to search for and disclose all documents in their control on which they rely, and documents that adversely affect their own case, adversely affect another party's case or support another party's case. Privileged documents cannot be inspected by the other parties.

However, the fact that documents are confidential is not normally a bar to disclosure: concerns of commercial sensitivity are typically dealt with by way of a 'confidentiality ring', whereby only specified persons (eg, external experts, legal advisers, in-house lawyers) will be permitted access to the documents.

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One example of the use of a confidentiality ring is *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 (Ch), a damages claim brought by Nokia against certain companies involved in the manufacture or supply of liquid crystal displays. During the course of the English litigation, Nokia's English legal team obtained material disclosed in US proceedings pursuant to a confidentiality ring. Nokia obtained an order in the English litigation for use of the US disclosure material in a manner reflecting the US confidentiality arrangements. This led to certain parts of Nokia's particulars of claim (which had been amended in light of the material disclosed in the US proceedings) not being able to be shared with the in-house counsel of some of the defendants. The court held that Nokia bore the burden of seeking to adjust the earlier order to allow the in-house counsel of those defendants to view the material.

In *Infederation v Google* [2020] EWHC 657 (Ch), the claimant Foundem sought to add an independent expert to existing confidentiality rings agreed in the course of the litigation that related (in part) to the EC's decision in *Google Search (Shopping)*. In support of an application to strike out part of the claim, Google served evidence from its own software engineers designated as confidential. Referring to the authorities on confidentiality rings, Roth J emphasised that such arrangements should be exceptional, must be limited to the narrowest extent possible and require careful scrutiny by the court to ensure no resulting unfairness. On the facts, and in circumstances where Google was relying on its own technical witnesses of fact, Foundem needed expert assistance to properly understand that evidence. Therefore, the court ordered that the expert should be able to inspect the confidential documents, with an appropriate confidentiality undertaking to the court. It offered Google the alternative of abandoning its reliance on the relevant evidence for the purpose of its application.

Bespoke disclosure

The High Court can also order a bespoke disclosure regime where it finds that a standard disclosure process is not appropriate. In the case of *Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd* [2022] EWHC 2637 (Ch), the High Court found that a process of 'massive overdisclosure' should be adopted rather than standard disclosure provided the following conditions are satisfied:

- if the standard disclosure process was used, there was a real risk that relevant documents would be missed;
- there was no danger of the process being used to oppress other parties in the litigation (ie, if the receiving party would not be able to review the documents);
- the risk of disclosing privileged material is contained to the levels of any standard disclosure process; and
- confidential material is appropriately protected.

The High Court noted that, with changes in the way that documents are now reviewed shifting from human agents to electronic filtering, there is a risk that important documents would never be looked at by a human agent and a lessened risk that important documents would be hidden if disclosure was over extensive. Under this bespoke regime, the aim of the electronic review was to filter out only those documents that were irrelevant on the broad test set out in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano* (1882) 11 QBD 55 (which included within the scope of discovery documents that, although not helpful or harmful to either party's case in themselves, may fairly lead a party on a train of enquiry relevant to the case), rather than searching to disclose what was relevant.

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Specific disclosure and third-party disclosure

Specific disclosure can be sought requiring a party to disclose specific documents or categories of documents (CPR 31.12). Disclosure can also be sought from non-parties under CPR 31.17 if a document or class of documents is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary to dispose of the claim fairly or to save costs.

Pre-action disclosure

In addition to disclosure in the course of litigation, claimants or potential claimants can ask for pre-action disclosure under CPR 31.16 from someone who is likely to be a party to litigation. CPR 31.16(3) sets out the conditions for ordering pre-action disclosure, including that disclosure before proceedings have started is desirable either to dispose fairly of anticipated proceedings, to assist the dispute to be resolved without proceedings or to save costs. Even in the case of successful applications for pre-action disclosure, it is normally the applicant who is required to pay the costs of the respondent.

Applications for pre-action disclosure that are overly broad will be refused, so potential claimants should consider carefully the scope of any requests they make. In *Hutchison 3G UK Limited v Vodafone, O2, Orange and T-Mobile* [2008] EWHC 55 (Comm), the claimant's pre-action disclosure request was refused because it was too broad. As a matter of both jurisdiction and discretion, the material sought was not necessary for Hutchison 3G to plead its case, the claim was speculative in terms of liability, the scale of the disclosure requested was very large and unfocused and was likely to go further than what would be required under standard disclosure, and the costs and difficulty of obtaining the documents requested were prohibitive.

Non-disclosure of leniency materials or settlement submissions

For cases that began on or after 9 March 2017, paragraph 28 of Schedule 8A (CA 1998) states that a court or tribunal must not make a disclosure order in respect of a settlement submission that has not been withdrawn or a cartel leniency statement (regardless of whether it has been withdrawn). A cartel leniency statement means information provided, orally or in writing, to a competition authority that comprises information about a cartel and the person's role in relation to the cartel; is provided voluntarily; and is provided specifically for the purpose of the authority's cartel leniency programme excluding any pre-existing information. It includes part of or a quotation from a cartel leniency statement, all or part of a record of the statement, or copies of either. Pre-existing information (eg, pre-existing contemporaneous documents) means information that exists irrespective of an authority's investigations. Upon the application of a claimant, a court or tribunal can determine whether information is a cartel leniency statement.

For cases that began before 9 March 2017, there is no absolute bar on the disclosure of these materials. Instead, it is necessary to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency. That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case (*Pfleiderer v Bundeskartellamt* [2011] Case C-360/09). This balancing exercise has been conducted in a number of subsequent cases, including *National*

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Grid v ABB [2012] EWHC 869 (Ch) where, ultimately, limited disclosure was provided, and in *ABF v Recticel* [2017] EWHC 3610 (Ch), where Rose J exercised her discretion not to order the disclosure of either the drafts of the speaking note used in oral leniency submissions to the Commission or the Commission's questions.

Paragraph 32 of Schedule 8A (CA 1998) states that settlement submissions (which have not been withdrawn) or cartel leniency statements (regardless of whether they have been withdrawn) are not admissible in evidence in competition proceedings. However, if a party to the proceedings obtains the statement or submission lawfully and otherwise than from a competition authority's file then these restrictions do not apply.

Paragraph 33 of Schedule 8A (CA 1998) also introduces a restriction over the use of a competition authority's investigation materials. These are defined as information prepared by a person (other than a competition authority) for the purpose of an investigation by the competition authority; information sent by a competition authority during an investigation to the subject of the investigation; or a settlement submission that has been withdrawn.

The disclosure of confidential infringement decisions

In the context of disclosure, disputes may also arise relating to the disclosure of confidential infringement decisions. In *Emerald Supplies Ltd v British Airways plc* [2015] EWCA Civ 1024, the claimants claimed damage in respect of loss that they alleged was caused by the conduct of British Airways in a cartel in the market for air freight services. The Commission issued the confidential decision in *Air Freight* on 9 November 2010 but had not, by the time of the hearing, issued a non-confidential version of that decision. The High Court ordered that the unredacted confidential Commission decision, minus leniency material and material for which legal professional privilege was claimed, be disclosed to all parties but subject to a confidentiality ring. The Court of Appeal overturned part of that judgment, particularly in relation to the disclosure of material relating to Pergan (a non-addressee of the EC decision) that had been subject to adverse findings in the decision following the Court of First Instance's judgment in *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* [2007] T474/04.

CAT

Follow-on damages claims brought in the CAT require claimants to annex to the claim form a copy of any infringement decision and copies of any document referred to in the claim form (CAT Rule 30(5)(a)–(b)). In practice, claimants in follow-on damages actions are likely to rely to a large extent on documents in the hands of the defendant and on the CAT to order disclosure of them.

Disclosure

The CAT may at any point give directions as to how disclosure is to be given and, in particular, what searches are to be undertaken, in what format documents are to be disclosed and whether disclosure is to take place in stages (CAT Rule 60(3); see also CAT Rule 89 in relation to disclosure in collective proceedings under section 47B of CA 1998). The CAT Rules are supplemented by the CAT Practice Direction relating to Disclosure and Inspection of Evidence 2017 which sets out the CAT's general approach regarding disclosure and inspection of evidence, including the procedure for seeking disclosure from a competition authority regarding their

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investigation. A party's duty to disclose documents is limited to documents that are or have been in its control. In practice, as with High Court proceedings, the CAT orders disclosure after close of pleadings, and parties may be required to file electronic disclosure questionnaires. As is the case in High Court litigation, privileged documents are protected from disclosure, and confidentiality rings are also used to ensure commercially sensitive information is ring-fenced as appropriate, including from disclosure to the public during and after trial. However, in recent cases, including *BGL (Holdings) Limited* [2021] CAT 33 and *Meta Platforms, Inc.* [2022] CAT 17, the CAT emphasised that the principle that proceedings should be held in public as far as possible should inform the conduct of all parties at all stages of the Tribunal's proceedings, and that the paramount objective is to produce a final judgment that is comprehensible to a reasonably interested person, an outsider to the litigation, who wishes to understand precisely why the Tribunal has reached the conclusion that it did.

Specific disclosure and third-party disclosure

It is also possible for the parties to request specific disclosure, in particular because the requirement to disclose documents with pleadings only applies to documents supporting the case.

To obtain specific disclosure, the applicant must specifically identify the documents sought. The application will be rejected if the documents are not relevant and necessary for the fair and just disposal of the proceedings, although the CAT will look at the case as a whole (*Albion Water Limited v Water Services Regulation Authority* [2008] CAT 3). The Competition Appeal Tribunal Rules (SI 2015 No. 1648) (the CAT Rules) also provide that the CAT can order disclosure from non-parties on similar grounds to the High Court. The CAT may make such an order only if the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary to dispose fairly of the claim or to save costs (CAT Rule 63).

Pre-action disclosure

Under the CAT Rules, in addition to disclosure in the course of litigation, claimants or potential claimants can make an application (supported by evidence) to the CAT for disclosure before proceedings have started (CAT Rule 62). For the CAT to make an order, similar requirements to those set out in CPR Part 31 for the High Court apply.

Admissible evidence

10 | What evidence is admissible?

High Court

Factual evidence in the High Court may take the form of documents or witness evidence.

In relation to documents, contemporaneous documents can be particularly valuable in relation to allegations of collusive or cartel activity where evidence is sparse. For example, in *Bookmakers Afternoon Greyhound Services Limited v Amalgamated Racing Limited* [2008] EWHC 2688 (Ch), the court accepted that 'documents which pointed, even obliquely, to the existence of an agreement or concerted practice had particular weight' (paragraph 18). Under [CPR 32.19](#), a party is deemed to admit the authenticity of any document disclosed to

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him or her under CPR 31 unless notice is served requiring the other party to prove the document at trial.

In relation to witness evidence, this is provided in witness statements and oral evidence at trial. Witness statements stand as the witness's evidence-in-chief (CPR 32.5(2)) with the witness then being cross-examined and re-examined at trial. The weight given to witness evidence depends on the witness's credibility, as well as the other circumstances of the case. A party wishing to secure the evidence of a witness present within the jurisdiction to give oral evidence at trial can also issue a witness summons under [CPR 34.31](#).

The rules on expert evidence are set out in [CPR 35](#). Expert evidence may only be given with the permission of the court and follows exchange of witness statements from the witnesses of fact. Under CPR 35.3 the expert is subject to an express duty to help the court on the matters within his or her expertise, and this duty overrides any obligation to the party from whom he or she has received instructions. Expert evidence is given initially in the form of a written report (eg, an economist's report defining the relevant market, or a forensic accountant's report on the loss suffered by the claimant). Following the exchange of expert reports, written questions may be put to the expert by the other party. The experts may also be ordered to meet to identify the issues on which they agree and those on which they disagree, and to report back to the court accordingly (CPR 35.12). Experts will also be subject to cross-examination (and re-examination) at trial.

The court can also order that expert evidence be provided by a single expert appointed jointly (CPR 35.7). This is unlikely to be used much in competition cases, given their complexity.

CAT

In relation to factual evidence in proceedings in the CAT, the Tribunal held in *Argos v OFT* [2003] CAT 16 that it will 'be guided by overall considerations of fairness rather than technical rules of evidence'. Many factors, including whether the evidence in question is hearsay evidence, can affect the weight it is given (*Aberdeen Journals v OFT* [2003] CAT 11). As in the High Court, factual evidence in the CAT can include contemporaneous documents and written and oral evidence from witnesses. The CAT's approach to witness statements is to give them such weight as seems appropriate in the circumstances, bearing in mind the extent to which cross-examination has been sought. Under CAT Rule 55, the CAT has the general power to control the evidence placed before it by giving directions in respect of the issues on which it requires evidence, the nature of the evidence it requires and the way in which the evidence is to be placed before it.

The [CAT's 2021 practice direction](#) (Practice Direction 2/2021) on witness statements for trial provides that a trial/appeal witness statement must contain only evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence-in-chief if they were called to give oral evidence. In addition, a witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial/appeal witness statement. Both the

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witness and the relevant legal representative must sign a statement of compliance to state they have complied with this practice direction.

Expert evidence can be given in the CAT as it can before the High Court. Again, in the context of follow-on damages actions, this involves the submission of expert reports, and experts may be cross-examined at trial. As set out in the CPR in relation to High Court proceedings, paragraph 7.67 of the [CAT Guide to Proceedings](#) (October 2015) (the CAT Guide) states that the expert is subject to an overriding obligation to the CAT to assist on the matters within his or her expertise. Single joint experts may also be appointed in CAT proceedings, although it is unlikely that they would be in the context of complex claims (CAT Guide paragraph 7.66).

In relation to evidence, CAT Rule 55(1) provides that the CAT may give directions, among other things, in respect of the provision by parties of statements of agreed matters, the issues on which it requires evidence and the nature of the evidence that it requires to decide those issues. The CAT may limit cross-examination of witnesses to any extent or in any manner it deems appropriate (CAT Rule 55(6)). The CAT also has the power, at the request of any party, to issue a summons requiring a person in the United Kingdom to attend as a witness before the CAT or answer any questions or produce any documents or other material in their possession or control that are relevant to the proceedings (CAT Rule 56).

The CAT Rules also provide that the CAT may give directions for the appointment and instruction of experts, whether by the CAT or by the parties and the manner in which expert evidence is to be given (CAT Rule 53(2)(e)). The CAT may sometimes organise, before or during the hearing, a structured discussion, in the presence of the CAT, between the parties and their experts in an endeavour to focus on the main points of dispute. This may include, for example, experts being asked to agree joint statements. The CAT may also order that certain evidence of like discipline should be given concurrently ('hot-tubbing', which involves the CAT putting questions to experts in relation to a particular issue as an alternative or supplemented by cross-examination).

Legal privilege protection

11 | What evidence is protected by legal privilege?

There are two types of privilege in English law: legal advice privilege and litigation privilege. They apply in both High Court and CAT proceedings. The practical consequence of a document being privileged is that, while it must be included on a disclosure list (in the High Court), it cannot be inspected. The CAT Rules provide that where a party inadvertently discloses a privileged document, the party who has seen the document may use it or its contents only with the permission of the CAT (CAT Rule 65).

Legal advice privilege

Legal advice privilege covers confidential communications between client and lawyer for the purpose of giving or receiving legal advice. There are three elements to this.

The communication must be confidential, so anything that has come into the public domain or anything that has been circulated widely such that it can no longer be considered confidential will not be privileged.

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The communication must be between lawyer and client. Under English law, 'lawyer' includes both external and in-house counsel, provided they are authorised persons as defined by the [Legal Service Act 2007](#) (ie, qualified in any jurisdiction). In this respect, English law is different from the position under EU law as confirmed by the European Court of Justice (ECJ) in *Akzo Nobel Chemicals Ltd v Commission* (Case C-550/07 P). Following *Three Rivers* (No. 5) [2003] EWCA Civ 474, the definition of 'client' may be relatively restricted in some circumstances: in the context of an undertaking it may apply only to a unit or certain specific persons within the undertaking who are instructing the lawyers, rather than all employees within the undertaking. In *SFO v ENRC* [2018] EWCA Civ 2006, the Court of Appeal would have been in favour of departing from this position had it been open to do so, but it stated that this is a matter that will have to be considered again by the Supreme Court in an appropriate future case.

The communication must be made for the dominant purpose of giving or receiving legal advice (*R (Jet2) v CAA* [2020] EWCA Civ 35). For example, communications between a lawyer (internal or external) and persons within the business discussing commercial issues but not providing legal advice in relation to them will not be privileged.

In the *RBS Rights Issue Litigation* [2016] EWHC 3136 (Ch), RBS claimed privilege over transcripts, notes or other records of interviews conducted by or on behalf of RBS's lawyers with employees and ex-employees in relation to two internal investigations. Hilyard J found that the client, for the purposes of privilege, consists only of those employees authorised to seek and receive legal advice from the lawyer, and that legal advice privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

In English law, lawyers' working papers are also privileged. The justification for withholding those documents is that disclosure of them would give the party requesting them a clue to the advice that had been given by the solicitor (*Lyell v Kennedy* (No. 3) [1884] 27 Ch D 1). Where the selection of documents that a solicitor has copied or assembled betrays the trend of advice that he or she is giving the client, the documents are privileged (*Ventouris v Mountain* [1991] 1 WLR 607).

In *SFO v ENRC* [2018] EWCA Civ 2006, the Court of Appeal, following *Three Rivers* (No. 5), held that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee had been tasked with seeking and receiving such advice on behalf of the corporation. In doing so, the court acknowledged that confining legal advice privilege to communications passing between the lawyer and the client in this way puts large corporations in a less advantageous position than individuals or small businesses, as the information upon which large corporations seek legal advice is unlikely to be in the hands of the main board of directors or those it appoints to seek and receive legal advice.

Litigation privilege

Litigation privilege covers confidential communications between client and lawyer, or between one of them and a third party, that come into existence after litigation is contemplated or has been started and made with a view to obtaining or giving legal advice in relation to the litigation, obtaining evidence to be used in it or obtaining information that may lead to the obtaining of evidence. These must be the sole or dominant purposes of the communications if they are

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to attract litigation privilege. This would cover, for example, correspondence with witnesses of fact, experts, reports and drafts made in the context of bringing or defending a competition claim.

Litigation may be considered to be ‘in prospect or pending’ at the stage of the Commission or the Competition and Markets Authority (CMA) investigation such that any documents produced would be covered by litigation privilege. In *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 6, the CAT refused an application by the Office of Fair Trading (OFT) (as it then was) for disclosure of information about Tesco’s contacts with potential witnesses and records of discussions with those individuals. The CAT held that the proceedings were confrontational by the time that Tesco began collecting the material as the OFT had already issued a statement of objections and a supplementary statement of objections, and Tesco stood accused of wrongdoing. Accordingly, the administrative procedure was sufficiently adversarial by the time third-party witnesses were contacted that the material Tesco gathered was subject to litigation privilege.

In *SFO v ENRC* [2018] EWCA Civ 2006, the Court of Appeal found that contemplated litigation will include, for example, circumstances where there is a clear threat of criminal investigation. The fact that a defendant could not say with certainty that a prosecution was likely did not in itself prevent proceedings being in reasonable contemplation.

In a case management conference of the *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* 1403/7/7/21 proceedings, the CAT looked into the justifications required when asserting privilege. In these proceedings, Apple had disclosed a number of documents to the CMA but then refused to disclose nearly half of them to the proposed class representative on the basis of privilege. The CAT ordered Apple to further justify its privilege claims but rejected the claimants’ request to compel Apple to provide individualised explanations for every single document that has been withheld, noting that further granularity should only be addressed if issues still remained after the disclosure statement was provided.

Joint privilege and common interest privilege

English law also respects joint privilege or common interest privilege. Joint privilege protects communications that come into existence during a joint retainer of the same lawyer by two parties or a sufficiently joint interest by the two parties in the relevant subject matter. Common interest privilege protects a party’s privileged material that it has voluntarily shared with another party (pursuant to a common interest in the subject matter) from disclosure to the rest of the world.

Without prejudice privilege

In addition, English law recognises without prejudice privilege. This is founded on the public policy of encouraging litigants to settle disputes before trial. It applies where the communication is genuinely aimed at settlement and where, in the course of negotiation, parties contemplated or might reasonably have contemplated litigation if they could not agree. If it applies, documents relating to negotiations genuinely aimed at settlement are privileged and cannot be given as evidence. This applies to both oral and written communications (*Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280). This was applied in the CAT in the recent case of *Sportradar AG and Others* [2022] CAT 29, where the Tribunal determined

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whether an email inadvertently disclosed fell under without prejudice privilege protection. The CAT found that this email clearly was part of a negotiation aimed at settlement, as it covered matters later settled in a variation deed and that litigation was in contemplation given the issues at stake and the email expressing an intent to 'pursue a different path' if an agreement could not be reached. The email was therefore inadmissible as evidence.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Under section 188 of the Enterprise Act 2002 (EA 2002), only an individual can be found guilty of the criminal cartel offence. Private damages actions, on the other hand, are brought against the company that has breached competition law.

Private actions are available where there has been a criminal conviction in respect of the same matter. The Marine Hose cartel is an example: in January 2009, the Commission fined a number of undertakings for their participation in the cartel, including Dunlop Oil & Marine. Following a plea-bargain process in the United States, in June 2008, three Dunlop executives pleaded guilty and were convicted in the United Kingdom for their role in the cartel. In July 2009, the Libyan oil firm Waha Oil Company lodged a claim for damages against Dunlop in the High Court.

In *Marine Hose*, the criminal cases had already concluded by the time the follow-on litigation was brought. This need not necessarily be the case, although where a private action and criminal proceedings are brought at the same time, the private action may be stayed pending the outcome of the criminal proceedings. In the *Passenger Fuel Surcharge* case, a civil investigation by the OFT (as it then was) into British Airways and Virgin Atlantic regarding the fixing of passenger fuel surcharges on transatlantic routes was stayed pending the outcome of the criminal prosecution it brought against four of the British Airways executives, which collapsed in May 2010. The OFT subsequently resumed its civil investigation, imposing a fine on British Airways.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

The fact that an individual has been convicted of a criminal offence is admissible in civil proceedings to prove the infringement has been committed, but this will just be one piece of evidence in establishing the infringement and will not assist in showing loss or causation.

The EA 2002 has specific rules governing the admissibility of evidence discovered in criminal proceedings. The CMA and the Serious Fraud Office (SFO), the bodies in the United Kingdom responsible for investigating criminal cartel offences, are entitled to disclose information that has come to their attention in the course of a criminal investigation in specified circumstances only. They are not permitted to disclose such information to assist potential claimants seeking

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damages unless the information has already legitimately been disclosed to the public. The CMA and the SFO have entered into a memorandum of understanding that outlines the basis on which the CMA and the SFO will cooperate when investigating or prosecuting individuals under the criminal cartel offence in circumstances where serious or complex fraud is suspected.

For claims where the loss or damage suffered from an infringement takes place before 9 March 2017, there are no statutory provisions protecting leniency or immunity applicants from follow-on damages claims brought in England and Wales. However, for claims where the loss or damage suffered from an infringement takes place on or after 9 March 2017, paragraphs 15 and 16 of Schedule 8A (CA 1998) apply to undertakings that have been granted immunity from financial penalties under a cartel leniency programme.

Paragraph 15 of Schedule 8A (CA 1998) states that an immunity recipient is not liable (either alone or jointly) to pay damages in respect of loss or damage suffered by a person as a result of the cartel infringement (whatever the legal basis of liability) except in the following circumstances:

- the person is unable to obtain full compensation for the loss or damage from other undertakings involved in the cartel infringement;
- the person acquired (or provided) a product or service that was the object of the cartel infringement directly or indirectly from the immunity recipient (or to the immunity recipient);
- the person acquired a product or service containing or derived from a product or service that was the object of the cartel infringement indirectly from the immunity recipient; or
- the product or service that was the object of the cartel infringement contained or was derived from a product or service provided by the person.

The CMA and the Commission do not routinely disclose documents obtained in their investigations directly to private claimants. For claims that began on or after 9 March 2017, a court or tribunal must not make a disclosure order addressed to a competition authority in respect of documents or information included in a competition authority's file except where the court or tribunal is satisfied that no one else is reasonably able to provide the document or information (paragraph 30, Schedule 8A of the CA 1998).

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

In respect of decisions made prior to 31 December 2020, English courts are under a duty not to take decisions running counter to those of the European Commission or courts (article 16 of Council Regulation (EC) No. 1/2003). Furthermore, a relevant decision of the CMA (or the Commission reached prior to 31 December 2020) is binding on the court, provided that it is final (ie, no appeal has been lodged against the decision and the time limit for appealing has expired; or all avenues of appeal have been exhausted). Where a follow-on damages action is brought in the United Kingdom in circumstances where the underlying CMA or Commission decision is being appealed, defendants may therefore apply for an action to be stayed pending the outcome of the appeal.

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High Court

In proceedings in the High Court, there is no specific provision relating to competition litigation, but [CPR 3.1\(2\)\(f\)](#) allows the court to stay proceedings as part of its general case management powers. In *Infederation Ltd v Google Inc* [2013] EWHC 2295 (Ch), Google sought a stay to proceedings brought by Infederation that alleged that Google had abused its dominant position on the basis that Google had also offered commitments in response to European Commission preliminary findings that some of Google's business practices might be considered abusive and it would be disproportionate to embark on standard disclosure in this case as the Commission was expected to clarify its position 'in the very near future'. In refusing both applications, and ordering limited, targeted disclosure, Roth J summarised the principles that would govern a court's approach to considering how far it was appropriate to allow an action to progress when there were EU proceedings concerning the same issues ongoing. These principles were that:

- there was no objection as a matter of EU law for the national proceedings to continue to a point short of an actual decision or judgment;
- it was in the discretion of the court to determine what steps short of trial should be taken;
- that discretion was to be exercised, having regard to the overriding objective and the requirement to avoid a decision that was counter to that of the Commission or the EU courts;
- it would normally be appropriate to require the defendants to plead a defence; and
- whether further steps should be taken depended on all the circumstances, including, among other things, whether the proceedings were a follow-on action subsequent to a Commission decision or an action brought in parallel to a Commission investigation.

The High Court may also stay proceedings where parallel proceedings in another jurisdiction are ongoing, and the UK proceedings (or at least part of them) may be rendered unnecessary as a result of the outcome of those other proceedings. In *FDIC v Barclays and others* [2022] EWHC 391 (Ch), Sir Anthony Mann ordered a temporary stay pending the outcome of procedural issues ongoing in parallel US proceedings, which may render the UK proceedings unnecessary.

CAT

In proceedings in the CAT, the Tribunal has case management powers that allow it to stay proceedings where appropriate (CAT Rule 51(2)(k)) for section 47A of the CA 1998 claims; see also Rule 85(1)(k) for collective proceedings under section 47B of the CA 1998). In addition, section 58A of the CA 1998 (as amended by the Consumer Rights Act 2015 (CRA 2015)) states that in respect of claims brought on the basis of an infringement decision of the Commission (reached prior to 31 December 2020) or the CMA (follow-on claims), the CAT will be bound by that decision once it has become 'final' (ie, all avenues of appeal have been exhausted or the time for bringing such appeals has expired) (*Emerson v Morgan Crucible* [2008] CAT 8).

The CAT may also order a stay in proceedings pending the outcome of an appeal in a related case; see *David Courtney Boyle & Edward John Vermeer v Govia Thameslink Railway Limited & Others* [2021] CAT 38, where the CAT considered but did not grant an application for a stay pending the outcome of an appeal in related collective proceedings in *Justin Gutmann v London & South Eastern Railway Limited* [2021] CAT 31.

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Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The burden of proof in private antitrust litigation falls on the claimant to establish that there has been an infringement, loss and causation. In relation to the infringement aspect, a decision of the CMA or European Commission (reached prior to 31 December 2020) will be binding on the court, provided that it is final (ie, no appeal has been lodged against the decision, and the time limit for appealing has expired; or all avenues of appeal have been exhausted). It, therefore, falls to the claimant to prove causation and loss in a follow-on damages claim and to prove the entire infringement as well as causation and loss in the case of a stand-alone claim.

The standard of proof in competition litigation cases, as for all civil claims, is the 'balance of probabilities' (ie, more likely than not).

In *Royal Mail and others v DAF Trucks and others* [2020] CAT 7, the CAT considered as a preliminary issue the extent to which the European Commission decision in *Trucks* was binding for the purpose of domestic damages claims. All the parties agreed that the finding of infringement in the operative part of a decision is binding on a national court. The dispute related to the recitals in parts of the decision. The Tribunal set out the following principles in its judgment:

- the recitals can be relied on as an aid to interpretation of the operative part insofar as the operative part is unclear or ambiguous;
- the legal effect of the recitals is not limited to cases where the operative part is ambiguous or unclear; and
- the relevant determinations in the operative part comprise not only the finding of infringement but also the imposition of the fines.

The Tribunal concluded that if a judgment were to be inconsistent with recitals in the decision that were the essential basis or necessary support for the operative part, that would be inconsistent with the decision and in breach of the obligation in article 16 of Council Regulation (EC) No 1/2003 that a national court must not make a decision inconsistent with a decision of the Commission. The claimants also argued that it was an abuse of process for the defendants – who had settled the European Commission investigation – to challenge the findings in the recitals of the decision. The Tribunal accepted that there are circumstances in which it will be an abuse of process to challenge recitals that form the essential basis of the decision.

The truck manufacturers appealed against the CAT's judgment that it would be an abuse of process for them to seek to contest facts set out in the European Commission decision. The Court of Appeal upheld the CAT's decision and held that the doctrine of abuse of process was properly engaged; the CAT is entitled to find that admissions recorded in the European Commission settlement may stand in the national court proceedings, even where the admissions related to 'non-essential' facts. In *SOSH and others v Servier* [2020] UKSC 44, the Supreme Court considered whether findings of fact made by the General Court of the EU are binding in subsequent domestic proceedings under the EU principle of absolute *res judicata*. There was significant overlap between the allegations of infringement in claims brought in the High

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Court and those investigated by the EC (in a decision that was subject to an appeal to the CJEU). Servier argued that certain findings made by the General Court annulling aspects of the decision were binding on the domestic courts in a preliminary issues trial. The Supreme Court unanimously dismissed the appeal on the basis that the findings of the General Court were not definitive and they may never become definitive because they may be overturned by the CJEU on appeal. Nonetheless, the Supreme Court went on to consider the principle of absolute *res judicata*. The principle gives dispositive effect to the judgment itself. It is essential to look beyond the operative part of the judgment to identify the reason for the decision and will extend to findings that are necessary to support the operative part. In particular, only those aspects of the judgment that explain the meaning of the annulment decision form part of the ratio, because those are the aspects that must be respected to fulfil the purpose of preventing the annulment judgment from being called into question in subsequent proceedings.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

High Court

The timetable in the context of a private antitrust action in the High Court will depend on the nature of the proceedings and the complexity of the case. In relation to a follow-on damages case, much will depend on whether proceedings are stayed (eg, in a follow-on claim pending appeals against an infringement decision); how extensive disclosure is; the number of witnesses and experts; and other such issues. In relation to a stand-alone claim, again the complexity of the issues will largely determine the typical timetable. The practice in high-value claims assigned to the 'multi-track' procedure under the CPR is to have a case management conference after close of pleadings ([CPR 29.3](#)) in which a timetable to trial is agreed or ordered that sets deadlines for the various stages in the proceedings (eg, disclosure, exchange of witness statements and expert reports). Cases may be expedited where circumstances warrant it, but this will be rare for a damages claim.

Cases in the High Court can be subject to strikeout or summary judgment applications where the statements of case disclose no cause of action or the claimant or defendant has no real prospect of success ([CPR r.3 and r.24](#)). In *Nokia Corp v AU Optronics* [2012] EWHC 731 (Ch), Sales J held that a measure of generosity concerning pleadings should be given to claimants in competition cases where some covert or secret behaviour is alleged. However, he also stated that this generosity depends upon certain procedural protections being available to defendants, such as the requirement that defendants should not be subjected to allegations of fraud or dishonest conduct without sufficient material being available to those who plead statements of case.

Issues may also be tried as 'preliminary issues' where to do so could allow the court to dispose of proceedings expeditiously (see, for example, the [Chancery Guide](#), paragraph 3.15 and [CPR 3.1\(2\)\(U\)](#)) by hiving off a specific issue that can be dealt with discretely and that would allow the action to be determined without recourse to a full trial on all the issues.

In *Sainsburys Supermarkets Ltd v Mastercard Inc* [2013] EWHC 4554 (Ch), the court rejected an application for an argument based on *ex turpi causa* to be tried as a preliminary issue. The

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court held that such an application involved a balancing of competing factors, and in this case, it was not clear that, if the preliminary issue was decided in Mastercard's favour, the entire claim would be disposed of. The court stated that, irrespective of the outcome of the preliminary issue, there was the real possibility that there might still have to be a trial on the question of infringement, and even if success on the preliminary issue did avoid a substantive trial of the main action, it was entirely possible that that result could be achieved without the extra expense and effort of trying the preliminary issue because of Mastercard's appeal against the relevant Commission infringement decision. Finally, the court regarded the time, expense and evidence required to hear the preliminary issue as being potentially substantial.

In *Emerald Supplies v British Airways plc* [2014] EWHC 3514 (Ch), the court considered two applications for summary judgment and strikeout (one by the defendant and one by the claimant). The defendant's application was for strikeout and summary dismissal of the claimant's claims in the torts of unlawful means conspiracy and unlawful interference. At first instance, the High Court found that it was not appropriate to determine this important point of principle at a summary judgment stage. On appeal (*Emerald Supplies Limited v British Airways plc* [2015] EWCA Civ 1024), the Court of Appeal accepted that where the issue of law depends upon facts that have yet to be determined, it cannot be right for a court to strike out the case, or any part of it, before disclosure. That was not, however, the position in this case, as there was sufficient material before the judge to determine the issue.

In *Streetmap.EU Limited v Google Inc and Others* [2016] EWHC 253 (Ch), the claimant brought a stand-alone claim in the High Court, alleging that Google had abused its dominant position in the market for online search and search advertising. In this case, it was directed that the allegations of abuse raised by Streetmap should be tried as a preliminary issue, on the assumption that Google held a dominant position as alleged. Roth J noted that this appeared to be a sensible course, since if the abuse allegations failed, that would be an end for the matter, whereas if they succeeded, the question of dominance could be determined at a subsequent trial.

In *Daimler AG v Walleniusrederierna Aktiebolag* [2020] EWHC 525 (Comm), the claimant pursued a follow-on claim (based on the time period and geographical scope identified by the European Commission decision in relation to the supply of international shipping services for roll-on, roll-off cargo) and a stand-alone claim relating to time periods and geographical areas not covered by the European Commission decision. The defendant admitted liability in relation to the follow-on claim, disputed liability in relation to the stand-alone claim and applied for a split trial, with liability being determined first and then a subsequent trial on quantum. The court found that a liability trial would not produce significant savings in respect of the amount of disclosure required, the number of permutations that the experts must consider for determining quantum or in the total amount of court time used. In addition, the court found that with a split trial, it would be many years before the quantum would be known, and it would, therefore, provide no incentive to the defendants to settle the overall proceedings.

CAT

The timetable of a claim in the CAT will depend on similar factors to those set out above in relation to the High Court. The CAT also has the power to hear issues as preliminary issues (CAT Rule 53(2)(o)); the power to strike out claims in whole (or in part) (CAT Rule 41) and the power to give summary judgment (eg, if the claimant or defendant has no real prospect of

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success and there is no other compelling reason why the issue should be disposed of at a hearing (CAT Rule 41)).

In *Allianz Global Investors GmbH & Others v Deutsche Bank AG London & Others* [2022] CAT 44, the CAT considered the Defendants' application to have its limitation defence determined as a preliminary issue. The Defendants argued that there was a real prospect that its limitation defences would succeed on the merits such that there would be no need for any trial. The Claimants argued that, even if the Defendants were successful, it would not be determinative of the case and would not cut down the scope of the eventual trial. The CAT found that the limitation issues in this case were weighty, with a substantial number of potentially important legal issues that would be likely to arise. This created a considerable prospect that a losing party would be able to identify at least some issues that could be subject to appeal which would lead to further delay. In light of the complexity of the issues and risk of delay the CAT rejected the application.

In *Dr Rachael Kent v Apple Inc. and Apple Distribution International Ltd* [2022] CAT 45, the CAT set out its reasons for refusing Apple's application for the hearing of a preliminary issue on the issues of market definition and dominance. Apple argued that a decision in its favour on market definition would effectively dispose of the proceedings, leading to cost and time savings. However, the CAT agreed with the proposed class representative that there was a clear overlap between factual matters relating to market definition and dominance/ abuse issues, so it would be difficult to hear market definition as a separate preliminary issue. The CAT also identified a significant risk of appeal if the trial was split and of duplication as matters may need to be addressed more than once.

In *David Courtney Boyle v Govia Thameslink Railway Limited & Others* [2022] CAT 46, the CAT was asked to determine whether a two or three stage trial would be appropriate to hear the issues in this case. The CAT held that a two stage trial would be appropriate, with issues of quantum to be heard at stage two and all other issues heard at stage one, on the basis that the CAT could not be extremely confident that questions of dominance could be hermetically sealed from questions such as abuse and regulatory compliance. The CAT found that, if it was eventually the case that these issues could not be hermetically sealed, it would cause serious delay if these were artificially separated as adjournments would need to be made subsequently to the trial schedule.

In *PSA Automobiles SA & Others v Autoliv AB & Others* [2023] CAT 27 the CAT refused to exercise its power under CAT rule 41 to strike out a claim. The CAT found that the claimant did have a realistic chance of showing that the entity concerned was engaged in cartel activity and that there were reasonable grounds that a fuller investigation of the facts would put more material before the CAT at trial to determine the matter. The CAT noted that, in cases where there are allegations of concealment and destruction, it is expected that the evidence the claimants can show would be fragmentary which should be considered when determining whether the claim has a realistic chance of success.

The CRA 2015 introduced a fast-track procedure for simpler competition claims in the CAT (CAT Rule 85). The fast-track procedure means that the main substantive hearing will be fixed to commence as soon as practicable and in any event within six months of the CAT's order to fast-track the proceedings, and the amount of recoverable costs will be capped at a level to be

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determined by the CAT (CAT Rule 58(2)). In deciding whether to make proceedings subject to the fast-track procedure, the CAT takes into account all matters it thinks fit, including:

- whether one or more of the parties is an individual or a microenterprise or a small or medium-sized enterprise (SME);
- whether the time estimate for the main substantive hearing is three days or less;
- the complexity and novelty of the issues involved;
- whether any additional claims have been or will be made;
- the number of witnesses involved (including experts);
- the scale and nature of the documentary evidence;
- the likely extent of (if any) disclosure; and
- the nature of the remedy sought and (if relevant) the amount of damages claimed.

Since their introduction on 1 October 2015, a number of fast-track claims have been made in the CAT. In April 2016, purchasers of flexible polyurethane foam brought a follow-on damages claim pursuant to a decision of the European Commission and applied to be designated as a fast-track claim because they were SMEs (*Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and Others* [2016] CAT 8). Roth J refused the application. He found that the claimants' status as SMEs was only one factor, and it did not follow that because the case was brought by one or more SMEs it would fall within the fast-track procedure. He also considered that disclosure was of a scale and scope well beyond the procedure and that there was no particular urgency in this case. He further commented that when a case concerned damages for a cartel, particularly one of several years' duration, it was unlikely to come within the criteria of the fast-track procedure.

In contrast, a claim issued by Socrates Trading Limited (a provider of online training) against the Law Society of England and Wales (the professional body for solicitors in England and Wales) alleging an abuse of a dominant position was considered suitable for the fast-track procedure. The CAT also exercised its discretion to cap the level of recoverable costs in the case (Rule 58(2)). In his judgment, Roth J stated that there was no magic formula that produces an objectively correct figure for the level of recoverable costs. However, where parties are of very disparate means, it is important that those costs strike a fair balance between enabling access to justice for the claimant and providing a measure of protection to the defendant not only from unmeritorious claims but also from the burden of having to defend a claim that it is assumed for this purpose proves to be unfounded. The case was the first to proceed to trial under the fast-track procedure (*Socrates Trading Limited v The Law Society of England and Wales* [2017] CAT 10) and resulted in a finding that the Law Society had abused a dominant position. The trial in respect of the existence of an infringement was completed in four days. Each side adduced two factual witnesses and called one economist, whose expert evidence was confined to questions of market definition and dominance. The evidence of the experts was heard concurrently in a 'hot tub'.

In *Instaplanta (Yorkshire) Limited v Leeds City Council* [2023] CAT 11, the CAT refused an application to apply the fast track procedure given that the nature of the factual evidence in the case meant a three-day trial would not have been feasible and the range of issues and degree of complexity of some of those issues created a material risk that the parties might not properly be prepared for a hearing in six months' time, leading to further delay and inefficiency.

In *Rest & Play Footwear Ltd v George Rye & Sons Ltd* [2021] CAT 18, the CAT refused an application to apply the fast-track procedure, as the parties had agreed a trial estimate of longer than three days, the claim was likely to involve complex legal and economic issues regarding causation and quantification of loss and it was common ground between the parties that there was no particular urgency, given that the case concerned damages alleged to have been suffered between 2015 and 2019.

Limitation periods

17 | What are the relevant limitation periods?

The rules on limitation for competition damages claims are complex, vary depending on when the loss or damage suffered from an infringement took place and differ in certain respects from the rules relating to other civil claims.

Where the loss or damage suffered took place wholly on or after 9 March 2017

Where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, proceedings in respect of a competition law claim may not be brought after the end of the limitation period (six years) (see paragraphs 17 to 25, Schedule 8A, CA 1998). This applies regardless of whether the claim is brought in the High Court or the CAT.

The limitation period begins with the later of the day on which the infringement ceases or the claimant's day of knowledge. The 'claimant's day of knowledge' is the day on which the claimant first knows or could reasonably be expected to know:

- of the infringer's behaviour;
- that the behaviour constitutes an infringement of competition law;
- that the claimant has suffered loss or damage arising from part infringement; and
- the identity of the infringer.
- The beginning of the limitation period may be deferred in certain circumstances, including where a claimant is 'under a disability', during the investigation by a competition authority, during a consensual dispute resolution process, or during collective proceedings.
- Where a competition authority investigates an infringement of competition law, the period of the investigation is not to be counted when calculating whether the limitation period has expired. The period of an investigation begins when the authority takes the first formal step in the investigation. It ends either one year after the day on which the authority closes the investigation or one year after the infringement decision becomes final (eg, when all appeals have been exhausted).

Where at least some of the loss or damage suffered took place before 9 March 2017

The limitation rules are different depending on whether the claims are brought in the High Court or the CAT. Claims brought in the High Court and transferred to the CAT are subject to the High Court limitation rules rather than those of the CAT (*Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2015] EWHC 3472 (Ch)).

High Court

For claims where the loss or damage began wholly before 9 March 2017, in civil claims brought in the High Court (which includes private antitrust litigation), the limitation period is six years from the date on which the cause of action accrued (section 2 of the [Limitation Act 1980](#)). The cause of action continues to accrue until the date the infringement of competition law ceases, so the limitation period will expire six years from the date on which the infringing conduct ends. Follow-on claims based on European Commission or CMA decisions relating to infringing conduct more than six years old would, therefore, be time-barred.

However, where there is deliberate concealment, the six-year period will not begin to run until such time as the claimant either discovered the concealment or ought reasonably to have discovered it (section 32 of the Limitation Act 1980). In relation to claims pertaining to cartel activity (that is likely to have been secret or concealed, or both), this may, depending on the facts of each case, extend the limitation period until, for example, the date on which the cartel activity was made public, such as an announcement by the competition regulator that it was investigating the infringement.

The High Court considered limitation in *Arcadia Group Brands Limited and others v Visa Inc* [2014] EWHC 3561. The defendants applied for summary judgment to strike out those aspects of the claims that alleged infringement of competition law six years prior to the issue of proceedings. The High Court found that there were facts that were known, or discoverable by the exercise of reasonable due diligence, by the claimants before the limitation period that were sufficient to establish a prima facie case. Simon J considered that this was not a 'secret cartel'; rather the existence and operation of the Visa payment system and interchange fees were matters of public knowledge that had been notified to the competition authorities.

In addition, the High Court found that competition cases (for all their potential complexity) do not fall within an exceptional category calling for a different approach to the application of section 32 of the Limitation Act 1980. The Court of Appeal upheld the decision and concluded that the statement of claim test (as set out in *Johnson v Chief Constable of Surrey* [1992] 10 WLUK 225) applied in the present case. This was on the basis that all the necessary ingredients for the causes of action were included in the particulars of claim, and the appellants accepted that no new material facts came to light in the six-year period prior to the commencement of proceedings. The Court of Appeal also found that the judge's decision did not infringe EU principles of effectiveness and full compensation.

In May 2016, three claimants commenced proceedings just under six years from the date of the European Commission's press release announcing its decision finding that the defendants had participated in a cartel coordinating price levels and quotations of dynamic random-access memory chips from 1998 to 2002. The court considered, as a preliminary issue, whether the claimants' claims were time-barred (*Granville & Ors v Infineon & Ors* [2020] EWHC 415). It was common ground that the burden of establishing that the claim is not time-barred lies on the claimant. They must establish that they could not have discovered the fraud without exceptional measures that they could not reasonably have expected to take.

The High Court found that two claimants' claims were time-barred on the basis that, with the exercise of reasonable diligence, they could have discovered not only the US developments (eg, various press reports about the progress of a US Department of Justice (DOJ) investigation

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starting in 2002) but also the fact and progress of a European Commission investigation (eg, as reported from June 2007), and the significant provisions that Infineon had made for a fine resulting from that investigation (eg, reported in the press in July 2004). However, the third claimant's claim was not time-barred because it ceased trading before any reports of the US DOJ investigation.

In *DSG Retail Ltd & Ors v Mastercard* [2020] EWCA Civ 671, the Court of Appeal confirmed the approach taken in *Arcadia* to section 32 of the Limitation Act and held that whether a claimant could with reasonable diligence have discovered the relevant concealment was fact dependent. At first instance, the CAT decided that the claimants' claims were not time-barred. The Court of Appeal acknowledged that the CAT had considered some of the things the respondents might have known about the alleged infringement, but had not asked what precisely had put them on notice of the need to investigate a potential claim. The Tribunal had wrongly assumed that the claimants were aware of important press articles. The court noted that in an internet age, huge numbers of documents are in the public domain; it does not follow that, even objectively judged, a potential claimant was aware of a particular claim or that it could with reasonable diligence have seen particular documents. In relation to the test in section 32(1)(b) of the Limitation Act, the Court of Appeal reiterated that proof of additional loss by another causative route flowing from the original breach of duty is not sufficient to show that there is a new or different cause of action, and that a 'fact relevant to the plaintiff's right of action' in accordance with section 32(1)(b) is a fact without which the cause of action is incomplete.

In *The Federal Deposit Insurance Corporation v Barclays Bank and others* [2020] EWHC 2001 (Ch), Snowden J refused UBS's application for summary judgment on limitation grounds on the basis that – prior to the regulatory findings by the FCA and the CFTC – there was nothing in the publicly available materials at the time that would have justified the inference that there was dishonest collusion between the banks.

In *OT Computers Ltd (In Liquidation) v Infineon Technologies AG* [2021] EWCA Civ 501, the Court of Appeal considered whether the judge at first instance was wrong to take account of OTC's insolvency in considering whether it could have with reasonable diligence discovered enough about the existence of the cartel to enable it to plead a viable claim. The Court of Appeal acknowledged that interpreting section 32 requires an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position. However, in dismissing the appeal, the Court of Appeal found that a claimant in administration or liquidation which is no longer carrying on business is not in a similar position to claimants that do continue actively in business. In *Mastercard v Deutsche Bahn* [2015] EWHC 3749 (Ch), the High Court gave permission for the claimant to amend their claim to introduce a new claim and held that this new claim had commenced earlier for the purposes of limitation (applying the doctrine of 'relation back'). Barling J found that, as the new claim arose out of the same facts or substantially the same facts as claims already made by the claimants in the proceedings, it justified an amendment with the benefit of the doctrine of 'relation back'. The Court of Appeal in *Mastercard v Deutsche Bahn* [2017] EWCA Civ 272 overturned the judgment of the High Court. Sales LJ held that there was an important difference between the claimants' existing claim and their proposed new claim and that the factual enquiries that would be required if the new claim was added would be very different from those required if it was not. This clearly indicated that the new claim does not arise out of the same or substantially the same facts. The Court of Appeal also held that a claimant had to sue within the relevant time, and if it failed to do so, it could

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not retrieve the position by the simple expedient of introducing new matters in its reply and then making an application to amend.

Applying these cases, the High Court in *Gemalto Holding and Thales DIS France v Infineon Technologies and ors* [2022] EWHC 156 stated that time will start to run when the claimant's state of knowledge is such that it and its professional advisers can properly plead a claim that would not be liable to be struck out as unarguable or lacking sufficient evidential basis. The limitation period is not postponed until the claimant has completed its investigations or is certain that the claim will succeed. Mere suspicion will not, however, be enough, particularly if it is vague and unsupported. Rather, the standard is one of 'reasonable belief' of the facts giving rise to the relevant cause of action. In this case, Bacon J held that by the time the European Commission had announced the statement of objections, taking account also of the other information available to it, Gemalto had sufficient material before it to be able to form a reasonable belief as to the essential elements of a claim for damages arising from the cartel, sufficient to plead a claim at that stage without waiting for the decision which followed. As such, the limitation period started to run, for the purposes of section 32(1)(b) CAT Rules 2003, from the earlier date and not from the date of the EC decision.

On appeal, the Court of Appeal found that limitation begins to run in a deliberate concealment case when the claimant recognises that it has a worthwhile claim, and that a worthwhile claim arises when a reasonable person could have a reasonable belief that there had been a cartel. A claimant is not entitled to delay the start of the limitation period until it has any certainty about its claim succeeding. Once the claimant knows objectively that a cartel has been concealed, it does not need to have certainty about its existence or about the details of that cartel. The claimant needs only sufficient confidence to justify embarking on the preliminaries; a claim in respect of a concealed event would not be a worthwhile one if it were pure speculation, but it would be if an authoritative regulator had thought it sufficiently serious, having investigated all the evidence available, to lay charges or issue a statement of objections. The court held that it makes no sense to say that the test for whether the limitation period has begun to run is when the claimant recognises that it has a worthwhile claim, and then to say that it does not have a worthwhile claim when it knows there may have been a cartel but did not know, for example, the period during which the cartel operated. The formulation for necessary knowledge is 'knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ'. One can embark on the preliminaries to the issue of a writ once one knows that there may have been a cartel without knowing chapter and verse about the details.

The situation is more complicated in relation to claims that commenced before 1 October 2015, but where the claim arose before 20 June 1997 (see *DSG Retail Ltd & Ors v Mastercard* [2020] EWCA Civ 671).

CAT

Claims brought in the CAT are subject to additional rules depending on precisely when the claim was brought and when the alleged loss and damage was sustained:

- Where the loss or damage is suffered before 9 March 2017 but on or after 1 October 2015, a six-year limitation period applies (section 47E of the CA 1998).
- Where the loss or damage is suffered before 1 October 2015, transitional limitation rules apply, which means that claimants have two years from the date the infringement decision

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became final or the date on which the cause of action accrued (CAT Rules 119 and CAT Rules 2003, Rule 31). This two-year rule also applies to stand-alone proceedings and collective proceedings (*Dorothy Gibson v Pride Mobility* [2017] CAT 9), even though stand-alone or collective action claims were not envisaged under the CAT Rule 2003.

- For proceedings that commenced before 1 October 2015, the CAT Rules 2003 apply. This means that the limitation period remains two years from the later of the date on which the substantive infringement decision becomes final and can no longer be appealed or the date on which the action accrued (CAT Rules 2003, Rules 31(1) to 31(3)).

In *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2023] CAT 15, the CAT ruled that Mastercard could rely on limitation rules to exclude claims arising before June 1997. The claimant had argued that the 2015 CAT Rules meant that limitation rules did not apply to this case but the CAT concluded the lawmakers could not have intended the ‘illogical conclusion’ that proceedings commenced before October 2015 might be subject to a time bar for claims arising prior to June 1997, whereas proceedings commenced after that date would not be time-barred. As a result, the CAT held that the general legislation on limitation does apply to claims arising before 1 October 2015.

The effect of appeals against infringement decisions

In *Deutsche Bahn AG v Morgan Crucible Company plc* [2011] CAT 16, the CAT held that the limitation period must be determined in relation to each defendant individually. Accordingly, the CAT held that an action brought against Morgan Crucible in December 2010 on the basis of the *Commission’s Electrical and Mechanical Carbon and Graphite Products* decision of December 2003 was brought out of time: in circumstances where Morgan Crucible had not appealed the decision, the limitation period in respect of damages claims brought against it began to run from the deadline for filing an appeal to the European courts (in February 2004) and expired two years later (in February 2006). The CAT’s judgment was reversed on appeal by the Court of Appeal ([2012] EWCA Civ 1055). However, in a unanimous judgment, and following an intervention by the European Commission, the Supreme Court set aside the Court of Appeal’s judgment, restoring the CAT’s judgment and striking out the claims against Morgan Crucible (*Deutsche Bahn AG v Morgan Advanced Materials plc* [2014] UKSC 24).

The Court of Appeal in *BCL Old Co v BASF* [2009] EWCA Civ 434 held that there is a distinction between an appeal of an infringement decision that concerns only the imposition of a fine and appeals relating to the substance of the infringement finding. In relation to the former, section 47A does not extend the limitation period (which will, therefore, start to run from the date on which the deadline to lodge an appeal expired), but if an appeal relates to the substance, then the limitation period may be extended (until the appeal has been determined and no further appeal is possible). In a separate judgment in *BCL Old Co v BASF* [2010] EWCA Civ 1258, the Court of Appeal held that the CAT does not have the power to extend the limitation period for follow-on claims brought under section 47A of CA 1998. In *BCL Old Co Limited v BASF plc* [2012] UKSC 45, the Supreme Court dismissed an appeal by BCL that the consequences of these findings breached the principles of effectiveness and legal certainty.

Prior to its departure from the EU, the United Kingdom issued a series of statutory instruments that amended the domestic statute book, bringing an end to the direct jurisdiction of the EU institutions in the United Kingdom on 31 December 2020. These regulations (the Competition SI), remedy deficiencies in UK competition law arising from the United Kingdom’s

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withdrawal from the European Union, and provide for a transitional provision for the purposes of calculating the limitation period to bring stand-alone claims. For cases that the European Commission had not concluded before 31 December 2020, the Competition SI provides that the time before 31 December 2020 during which the European Commission was investigating will not be counted when calculating whether the time period to bring a stand-alone claim has expired.

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Judgments of the CAT (section 49 of CA 1998) and the High Court may be appealed to the Court of Appeal, provided the permission of the lower court or the Court of Appeal has been obtained. [CPR 52.11\(3\)](#) provides that appeals can be made on the basis that the lower court was either wrong, or unjust because of a serious procedural or other irregularity.

In *Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 50, the CAT explored the limits that section 49 of CA 1998 imposes on the right to appeal. It noted that Parliament intended to circumscribe the appeals that could be made from the CAT to the 'appropriate court'. This means that, in addition to obtaining permission to appeal, there are restrictions in place on the questions that can be appealed. The CAT clarified in this ruling that the 'ousters of the courts' review jurisdiction... by way of controlling the rights of appeal are to be narrowly... construed'. It noted that, while there is a safeguard of judicial review for issues that are ousted from the courts' jurisdiction, it cannot be presumed that a right of judicial review automatically arises in these circumstances. Ultimately, the CAT refused Mastercard permission to appeal on the grounds that it did not consider any of the grounds raised by Mastercard to have a real prospect of success, nor did it consider that any arguable point of law had arisen justifying permission to appeal.

Appeals can be made either by a party to the proceedings or by someone who has a sufficient interest in the matter. This was widely interpreted by the CAT in *English Welsh and Scottish Railways v Enron Coal Services* [2009] EWCA Civ 647, where the Court of Appeal held that it had jurisdiction to hear an appeal against the CAT's refusal to strike out part of the claim for damages. A request to the CAT for permission to appeal must be made in writing and sent to the Registrar within three weeks (reduced from one month under the old rules) of the notification of that decision (CAT Rule 107(1)).

A further appeal from the Court of Appeal to the Supreme Court is possible on a point of law, again provided permission is granted either by the Court of Appeal or the Supreme Court.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

The Consumer Rights Act 2015 (CRA 2015) introduced collective actions in the Competition Appeal Tribunal (CAT) for both follow-on and stand-alone claims on an opt-in or an opt-out basis.

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While it is possible to bring representative actions in the High Court, this is difficult to do in the context of private antitrust litigation.

CAT

Under section 47B of the Competition Act 1998 (CA 1998), claims may be brought before the CAT combining two or more claims and may be on an opt-in or an opt-out basis (ie, brought on behalf of each class member except those who opt out (by notifying the representative) or who are not domiciled in the United Kingdom, unless they opt in).

Section 47C of the CA 1998 provides further safeguards in relation to collective proceedings. First, the CAT may not award exemplary damages in collective proceedings (section 47C(1)). Second, damages-based agreements, under which lawyers' remuneration is based on the amount they recover, will not be enforceable if they relate to opt-out collective proceedings (section 47C(8)). However, conditional fee arrangements (sometimes called 'no win, no fee') will still be permitted. In opt-out collective proceedings, where the CAT makes an order, it must make an order that the damages be paid to the representative on behalf of the represented persons or such other person as the CAT thinks fit (section 47C(3)).

In 2022, the CAT issued the Umbrella Proceedings Practice Direction 2/2022. This gives the CAT the power⁹ to order that issues in one set of proceedings may be determined together with the same or similar issues featuring in other, unrelated proceedings. Rather than hearing the cases together or consolidating them, as the CAT has done when the claims themselves overlap, where 'Ubiquitous Matters' arise across different cases, these matters may be dealt with together. An Umbrella Proceedings Order was made under this practice direction in *Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 50, on the basis that certain common issues could be agreed between the parties and determined by 'host cases' in the first instance. In those proceedings, this includes the issue of pass-on.

High Court

In the High Court, [CPR 19.6\(1\)](#) allows a representative action to be brought by a claimant representing him or herself and other claimants, thereby avoiding the need for those persons to issue their own claim form. Representative proceedings can be brought where more than one person has the 'same interest' in a claim and the interested persons must opt into the action to participate.

It is difficult to bring a representative action in the context of private antitrust litigation, as is shown in *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch). The claimants in that case were cut flower importers who were direct and indirect customers of British Airways' airfreight services. They alleged that they had paid inflated air freight prices as a result of a price-fixing cartel to which British Airways and other airlines were party and claimed damages for themselves and other importers of cut flowers who they purported to represent. The High Court struck out the action on the basis that the class of direct and indirect purchasers was too ill-defined for the purposes of CPR 19.6, as the criteria for inclusion in the class depended on the outcome of the claim itself (ie, whether they were indeed purchasers of services at inflated prices), and the direct and indirect purchasers would not all benefit from the relief sought by the claimant because of the need for direct purchasers to pass on the overcharge to indirect purchasers for the latter to benefit from damages awarded.

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The Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 confirmed the High Court's decision. The court held that the appellant and those it purported to represent did not all have 'the same interest' required by CPR 19.6: they were not defined in the pleadings with a sufficient degree of certainty to constitute a class of persons with 'the same interest' capable of being represented by the appellant. The potential conflicts arising from the defences that could be raised by British Airways to different claimants reinforced the fact that they did not have 'the same interest' and that the proceedings were not equally beneficial to all those to be represented.

Group litigation orders (GLOs) are also available in the High Court (CPR 19.11). GLOs are made where one or more claims raise 'common or related issues' and are ordered by the court to consolidate proceedings commenced by two or more claimants bringing separate actions. In practice, GLOs are rarely used, and have not been used in the context of competition litigation to date.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Yes.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

High Court

In the High Court, there is no equivalent in England and Wales of the US-style (opt-out) class-action procedure, nor is there a similar certification process. In relation to representative proceedings, it is necessary for the claimant representing others who have the same interest in the claim to show that the 'same interest' test is satisfied. The Court of Appeal's judgment in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 has shown that this will be difficult in the context of follow-on damages claims.

In relation to GLOs, an order can be made either of the court's own motion or following a request from a claimant or defendant. GLOs are made where one or more claims raise 'common or related issues', a concept that is wider than the requirement that the persons have the 'same interest' for representative proceedings.

CAT

There is a certification process in the CAT. Under section 47B of the CA 1998 (as amended by the CRA 2015), any collective proceedings will only be continued if the CAT makes a collective proceedings order. The CAT will make such an order if the person bringing the proceedings is someone it could authorise to act as the representative and it must also be satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, claims must raise the same, similar or related issues of fact or law and be suitable to be brought in collective proceedings. The collective proceedings must authorise the person who brought the

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proceedings to act as the representative; describe the class of persons whose claims are eligible for inclusion; and specify whether the proceedings are on an opt-in or an opt-out basis.

Class representatives

The collective proceedings must be commenced by a person who proposes to be the representative in the proceedings. The CAT may authorise a representative, regardless of whether that person is a class member, but only if the CAT considers that it is just and reasonable for them to act (CAT Rule 78(1)). CAT Rule 78(2) outlines that in determining whether it is just and reasonable for a person to act as the class representative, the CAT will consider a range of factors, including, for example, whether they would fairly and adequately act in the interests of class members and would be able to pay the defendants recoverable costs if ordered to do so. A class representative must establish a register on which it will record the names of those class members who opt in or opt out (CAT Rule 83) and may only withdraw from acting if the CAT gives permission (CAT Rule 87(1)).

The first case to be brought under the new collective proceedings regime was *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9. Although ultimately the CAT did not issue a collective proceedings order (CPO) in this case, Roth J found that it was just and reasonable for the applicant to act as a class representative.

In *Walter Merricks CBE v Mastercard* [2017] CAT 16, the CAT considered objections raised by Mastercard that Mr Merricks should not be authorised as a class representative on the basis of an agreement he had entered into with a third-party funder. The CAT rejected the concerns raised by the respondent, subject to proposing certain amendments to the funding agreement. The CAT found that if a third party agrees to provide substantial monies to fund litigation, the payment that has to be made to that party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings. The government clearly envisaged that many collective actions would be dependent on third-party funding and that this could not be achieved unless the class representative incurred a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages.

Before the Supreme Court judgment in *Merricks*, the CAT did not consider whether the claims fulfilled the eligibility condition in section 47(B) of the CA 1998. However, it concluded that the question of which representative should be authorised to act (the authorisation condition) should not be considered separately in circumstances where there could be interplay between the eligibility and authorisation conditions and that both should be considered at the certification hearing. It rejected arguments of material savings of time and cost if the carriage dispute were heard in advance of certification (other than for the losing applicant) on the basis that a single hearing would be cheaper than two separate hearings. In the absence of a *Merricks*-induced delay, it was even less clear what time and cost savings would result from a preliminary issue hearing. However, the CAT said that this did not condemn all future carriage disputes to be heard alongside the question of certification.

O'Higgins v Barclays Bank and others [2020] CAT 9 was the first carriage dispute in which not one but two different proposed class representatives (PCRs), Michael O'Higgins and Phillip Evans each sought an opt-out CPO to bring follow-on claims for damages against the foreign exchange cartels. The European Commission's findings are set out in two separate

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decisions adopted pursuant to its settlement procedure. The CAT considered whether it could direct a preliminary issue as to which applicant would be the most suitable to act as class representative.

In its subsequent judgment in the same case, *Mr Phillip Evans v Barclays Bank PLC and Others and Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others* [2022] CAT 16, the CAT resolved the carriage dispute, and also addressed the issue of whether the claim should proceed on an opt-in or opt-out basis. The applications for collective proceedings orders were heard together. While the CAT found that the PCRs met the authorisation and eligibility conditions, it considered that the factors pointing towards certifying on an opt-out basis were substantially outweighed by the strength and practicability factors. The claims, as presently framed, were so weak that they were deserving of a strikeout and there was no practical reason why members of the class had not opted in (indeed access to justice should not be forced upon an unwilling class). The CAT gave permission for both PCRs to submit revised applications for certification on an opt-in basis. While it did not have to decide which PCR would have had carriage of the claims if they proceeded on an opt-out basis, the CAT found marginally in favour of the Evans PCR. The applications were very similar and the question of carriage was a very marginal decision. Being the first to file its application was not a point in favour of the O'Higgins PCR. While O'Higgins had an advantage in terms of the extent of after-the-event (ATE) insurance, which was a material point, it was given limited weight given the costs the respondents were likely to incur. The Evans PCR was 'better thought through', but the CAT emphasised that it was drawing a distinction between two cases that only just survived strikeout. It had very serious concerns about the manner in which the claims had been articulated. After the close of proceedings, the Evans PCR provided improved ATE insurance cover. Ultimately, the CAT concluded that even without the improved offering, that carriage should be given to the Evans PCR.

In *UK Trucks Claim Limited v Stellantis NV and Others and Road Haulage Association Limited v Man SE and Others* [2022] CAT 25, the CAT considered another carriage dispute in competing CPO applications for a follow-on claim to the EC *Trucks* decision, refusing certification in the UK Trucks Claim Limited application in favour of the Road Haulage Association application due to the differences in methodology proposed and preferring the opt-in nature of the successful Road Haulage Association application.

Most recently, the CAT considered a carriage dispute between two class representatives in *Pollack and Arthur v Google* [2023] CAT 34. The CAT considered whether it should determine the carriage dispute between the PCRs in an earlier, separate hearing, or in a combined hearing dealing with certification (which was the approach adopted in the above *Evans/O'Higgins* and *Trucks* claims). The Tribunal decided that an earlier hearing should determine the carriage dispute. The CAT noted that determining carriage as a preliminary issue can produce significant costs savings, and that approach is likely to be appropriate for most carriage disputes, and that defendants should not be entitled to have much of a say - save to assist the Tribunal - in picking the party that will be seeking to carry on collective proceedings against them. Consistent with *Evans/O'Higgins*, the CAT noted that the question of which PCR was 'first to file' is not determinative, though credit can be given to a PCR who filed first where they have spent time and money framing a carefully considered standalone claim. The longer the delay before the second claim is filed, the harder it will be to displace the first PCR.

CPOs

Collective proceedings only continue if the CAT makes a collective proceedings order. The CAT will make such an order only if the person bringing the proceedings is someone it could authorise to act as the representative, and it must also be satisfied that the claims are eligible for inclusion in collective proceedings (CAT Rule 77(1)). To be eligible, the claims must raise the same, similar or related issues of fact or law and be suitable to be brought in collective proceedings. CAT Rule 79 states that when deciding whether claims are suitable to be brought in collective proceedings, the CAT will take a range of matters into account. These include, for example, the size and nature of the class and whether claims are suitable for an aggregate damages award. When deciding on whether the proceedings should be opt-in or opt-out, the CAT will take into account all matters it thinks fit, including the strength of the claims, whether it is practicable for the proceedings to be brought on an opt-in basis, including the estimated damages that class members may recover along with those set out at CAT Rule 79(2).

If the CAT issues a collective proceedings order, the order must fulfil various formalities that are set out at Rule 80. Where the CAT gives a judgment or makes an order, the judgment or order will be binding on all represented persons, unless the CAT specifies a subclass of represented persons or individual represented persons to whom it will not apply (CAT Rule 91(1)). A collective settlement approval order is binding on all represented persons (CAT Rule 94(1)).

In *Dorothy Gibson*, the CAT considered whether the conditions for the grant of a CPO had been met (whether the claims raised common issues and whether they were suitable to be brought in collective proceedings). Roth J said that the approach to the certification of claims should be rigorous and not simply take at face value whatever may be said on behalf of the applicant. The CAT considered that the US approach to certification of common issues was of limited assistance (involving extensive discovery, deposition and cross-examination of witnesses and long hearings). The approach under the UK regime was intended to be very different, with either no or only very limited disclosure and shorter hearings. The CAT followed the approach in Canada, holding that the expert methodology must be sufficiently credible or plausible to establish some basis for loss on a class-wide basis.

A second case, *Walter Merricks CBE v Mastercard* [2017] CAT 16, was brought in September 2016 and proposed to combine follow-on actions for damages arising from a decision of the Commission. The decision found that Mastercard had infringed competition law by in effect setting a minimum price that merchants had to pay to their acquiring bank for accepting payment cards in the European Economic Area. The proposed claim included individuals who between May 1992 and June 2008 purchased goods or services from businesses selling in the United Kingdom that accepted Mastercard for those who were, at the time, both resident in the United Kingdom and aged over 16 (estimated to be approximately 47 million people). The CAT refused to issue a CPO for a number of reasons, including that the level of pass-on and individual spend were not common issues; that it was impossible to see how the payments to individuals could be determined; and that there was no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated.

The Court of Appeal overturned the CAT's decision (*Merricks v Mastercard* [2019] EWCA Civ 674), and that judgment was upheld on appeal to the Supreme Court (*Mastercard and others v Merricks* [2020] UKSC 51). The Supreme Court found that the CAT made five errors of law.

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First, the CAT failed to recognise that the merchant pass-on issue was a common issue. Had it done so, this would, or should, have been a powerful factor in favour of certification under rule 79(2). Second, the CAT treated the suitability of the claims for aggregate damages as if it were a hurdle, rather than just one of many factors relevant to suitability of the claims for collective proceedings. Third, the CAT should have applied a test of relative suitability. If the forensic difficulties would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not, in principle, have been sufficient to lead to a denial of certification for collective proceedings. Fourth, the CAT did not take into account the general principle that the court must do what it can with the evidence available when quantifying damages. The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts wrestle on a daily basis. This was not a good reason for a court refusing a trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established breach of statutory duty. Fifth, the CAT was wrong to require Mr Merricks's proposed method of distributing aggregate damages to take account of the loss suffered by each class member. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss.

Following the outcome of Mastercard's appeal in the UK Supreme Court, the CAT has proceeded to certify 10 CPO claims, with 14 awaiting certification and five that are either discontinued or on appeal.

Amongst the 10 claims thus far certified by the CAT is *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others*, concerning follow-on proceedings from a European Commission decision regarding a cartel in the deep-sea carriage of new motor vehicles. The CAT certified the claim to proceed with a CPO on 18 February 2022 ([2022] CAT 10). An appeal to the Court of Appeal ([2022] EWCA Civ 1701) was partially successful on the grounds that the CAT had failed to take into account the differences in the parties' competing pricing theories and should have gone on to address the ramifications of the challenges to the PCR's proposed representative's methodology, as at the CPO stage it was clear that this was the pivotal dispute in the case. The Court of Appeal remitted the case to CAT and emphasised that the duty on the CAT as gatekeeper in collective proceedings is proactive as well as reactive; once the CAT has decided to make a CPO, that is not the end of the gatekeeper role. The court emphasised that a CPO is neither the beginning nor the end of measures whereby the CAT may case manage collective proceedings; a PCR might not have to overcome a very high hurdle to obtain a CPO, but the CAT should nonetheless ensure that from the certification stage the case proceeds efficiently to trial. The CAT's role might well entail imposing substantial case management burdens on the parties at an early stage as a result.

While the UK Supreme Court judgment in *Merricks* effectively lowered the bar to certification for many claims, the CAT has so far refused certification in four claims, which are described further below.

In *O'Higgins/Evans v Barclays Bank and Others* [2022] CAT 16, the CAT refused to certify pending re-pleadings on an opt-out basis and stayed proceedings pending re-application for a CPO on an opt-in basis.

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In *UK Trucks Claim Limited v Stellantis NV and Others* and *Road Haulage Association Limited v Man SE and Others* [2022] CAT 25 the CAT refused certification in the UK Trucks Claim Limited application in favour of the competing Road Haulage Association application.

In *Gormsen v Meta Platforms, Inc and Others* [2023] CAT 10 the CAT refused to certify a stand-alone CPO application alleging abuse of a dominant position by Meta in breach of the Chapter II prohibition of the CA 1998. The CAT found significant problems with the pleaded claims in the CPO application and with the methodology proposed by the PCR. Specifically, the CAT found that the proposed legal basis for assessing compensation owing to the class varied materially between the three alleged abuses, whereas the proposed economic analysis sought to provide a singular response to the respondents' alleged wrongs. Furthermore, the PCR's economic analysis failed to consider the two-sided nature of the relevant market and risked incorrectly matching alleged 'excess profits' earned by Meta with alleged losses suffered by the class. The CAT considered that there were two key points to address in order to determine the CPO application: (1) whether the CPO application met the test in *Pro-Sys Consultants v Microsoft* (the Pro-Sys test); and (2) whether, under rule 79(2)(b) of the CAT Rules, the continuation of the proceedings could be justified in terms of cost/benefit. In relation to (i), the CAT found that the PCR had failed to meet the *Pro-Sys* test because of inadequacies identified in the pleading of the abuses alleged in the CPO application, and the methodology proposed by the PCR for the quantification of loss. The CAT considered that there is no effective blueprint for the efficient and effective trial of the issues raised by the PCR. In respect of (2), the CAT considered that the problems identified in respect of the application of the Pro-Sys test to the CPO application meant that no cost/benefit analysis could be properly carried out at this stage. The CAT therefore stayed the CPO application for a period of six months to enable the PCR to file additional evidence setting out a new and better blueprint for the effective trial of the proceedings. Absent a new and better blueprint, the CAT will then lift the stay and reject the CPO application.

Following *Gormsen*, the CAT refused to certify four applications for CPOs by Commercial and Interregional Card Claims I Limited and Commercial and Interregional Card Claims II Limited against Visa and Mastercard [*CICC v Visa and Mastercard* [2023] CAT 38]. The PCRs sought CPOs:

- on an opt in basis on behalf of a class of merchants with average annual turnover of £100 million or more per annum in the period 2016–2019 who have paid a merchant service charge in respect of interregional and or commercial card transactions that took place:
 - in the EU (including the UK) after 1 June 2016 and prior to 1 January 2021; or
 - in the UK on or after 1 January 2021; and
- on an opt out basis on behalf of a class of merchants with average annual turnover of less than £100 million per annum in the period 2016–2019 who have paid a merchant service charge in respect of interregional and or commercial card transactions that took place in the UK after 1 June 2016.

The CAT unanimously concluded that all four proposed collective proceedings do not meet the requirements set out in the CA 1998, and applying the *Pro Sys* test, it was unable to grant any of the applications for CPOs. In particular, the CAT noted that it was unable to grant the CPO applications for the proposed opt out proceedings in their current forms due to a defect

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in relation to the identification of the class; the absence of methodology for infringement and its counterfactual; and concerns about the practicality and proportionality of the methodology advanced for resolving acquirer and merchant pass on issues. The CAT was unable to grant the CPO applications for the proposed opt in proceedings in their current forms due to issues that flowed from the class definition and there being no adequate methodology for infringement and its counterfactual. The CAT stayed all four CPO applications and granted the PCRs a period of eight weeks from the date of the CAT's judgment to notify the CAT and the defendants of any intention to present revised proposals for any of the proposed collective proceedings.

22 | Have courts certified collective proceedings in antitrust matters?

Following the UK Supreme Court's judgment in *Merricks*, the CAT has certified 10 collective proceedings orders. These include *David Courtney Boyle & Edward John Vermeer v Govia Thameslink Railway Limited & Others*; *Road Haulage Association Limited v Man SE and Others*; *Justin Gutmann v Govia Thameslink Railway Limited & Others*; *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd*; *Consumers' Association v Qualcomm Incorporated*; *Justin Le Patourel v BT Group PLC*; *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others*; *Justin Gutmann v London & South Eastern Railway Limited*, and *v First MTR South Western Trains Limited and Another*; and *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*.

In the High Court, Emerald Supplies Limited's attempt to bring a quasi-class action was rejected at first instance, a decision that was upheld by the Court of Appeal.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Under section 47B of the CA 1998, it is possible to bring either opt-in or opt-out collective proceedings. Opt-in collective proceedings are those brought on behalf of each class member who opts in by notifying the representative. Opt-out collective proceedings are brought on behalf of each class member except those who opt out by notifying the representative or who are not domiciled in the United Kingdom (unless they opt in). Where the CAT gives a judgment or makes an order in collective proceedings, the judgment or order will be binding on all represented persons unless the CAT specifies a subclass of represented persons or individual represented persons to whom it will not apply (CAT Rule 91(1)).

In *Justin Le Patourel v BT* [2021] CAT 30, the PCR Le Patourel sought a CPO for consumers of BT residential landline services, claiming that BT charged excessive prices to these customers on the basis of a review conducted by Ofcom in 2017 of the market for stand-alone landline telephone services. The application was brought on an opt-out basis, which was challenged by BT on grounds that: (1) because all the potential claimants are, or have been in the recent past, customers of BT, they are easily identifiable; (2) the Tribunal may not have jurisdiction to enable damages to be paid out to each customer via a credit to their account or something similar, if customers could be identified; (3) that the class representative's own proposed plan for distribution of damages, if the claim succeeded, would involve filling out a claim form by each customer who may be contacted (with BT's assistance) online, by post or by telephone; and (4) that, for the proportion of customers who used their residential landlines for business

purposes, BT may have a pass-on defence, which could not properly be run on an opt-out basis as BT would not know at the outset which customers were in the potential pass-on group.

The CAT concluded that the opt-out basis was clearly more appropriate and suitable than an opt-in basis. The CAT agreed with the PCR that there is a real difference between the option to join a legal action at the outset and claiming a damages entitlement later on once the case has been won, that it did have the power, under rule 93(1), to order a claims administrator or BT to effect an account credit to the relevant customer, and that it would be for BT to try and work out which customers are using the landlines for business purposes for the identification of a pass-on group. BT appealed the CAT's judgment to the Court of Appeal ([2022] EWCA Civ 593), which upheld the CAT's decision to certify the CPO on an opt-out basis. Green LJ held that: (1) the balancing exercise of opt-in versus opt-out was well within the CAT's margin of discretion, and there was no error of law; (2) the CAT was correct to conclude that it had the power to order an account credit, and it was open to the Tribunal, following an award, to seek proposals as to how best to achieve an informal, mediated method of distributing the award, which could include any creative solution; and (3) if the CAT had sought to create a new test based on the merits of the claim, for certification on an opt-out basis, this would have been an error of law, but it did not do so. Finally the Court of Appeal suggested that there were a number of points made in the CAT Guide to Proceedings about collective proceedings that might, when the Tribunal considers that it has sufficient experience, warrant reconsideration.

In *Evans/O'Higgins v Barclays and Ors* [2022] CAT 16, the CAT also addressed the question of whether the collective proceedings subject to the carriage dispute between the parties should proceed on an opt-in or opt-out basis. The CAT found it had a discretion in determining the outcome of the opt-in versus opt-out issue, and could not simply 'rubber stamp' the applicants' choice in framing their applications. In assessing this question, the CAT was not concerned with whether the conditions for eligibility for certification as collective proceedings were met, but whether there were elements of those conditions that indicate the proper outcome of the opt-in versus opt-out issue. The CAT found that the fact that neither the O'Higgins representative nor the Evans representative was a 'pre-existing' body was a factor pointing away from certifying on an opt-out basis. If the CAT had before it a trade association, whose established purpose was to represent a specific class that had suffered alleged harm, but found it difficult to corral members of the class into opting-in, that would be a factor in favour of certifying on an opt-out basis. However, the CAT found that the fact that both representatives in this case had come forward, not at the behest of the class, but at the behest of the lawyers they instructed (who had themselves failed to 'build a book') was an indicator against certifying on an opt-out basis. The Tribunal was also concerned that there was a risk that the PCRs would effectively be forced into an early settlement because of a lack of a sufficiently large fighting fund. Although of little weight, this factor inclined the Tribunal against opt-out collective proceedings.

The Tribunal considered that the extent to which the representative was able to pay the respondents' costs was irrelevant to whether the claim should proceed on an opt-in or an opt-out basis. The CAT found that the benefit it had to look for was access to justice. The fact that the claim was brought on an opt-out basis was a factor that, in this case, weighed strongly in favour of certification on as an opt out claim. The fact that the opt-out class action would be able to recover irrecoverable costs from the undistributed damages of those who were nominally in the class but who did not claim damages, was a factor in favour of opt-out certification. In considering whether there were any separate proceedings, the existence of a separate but

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related non-collective High Court claim by Allianz indicated that there was an appetite to bring this sort of claim and supported the sense that the putative class members were choosing not to involve themselves in the proceedings the applicants wished to bring on their behalf.

When considering the nature and the size of the class in terms of identifiability, commercial sophistication and ability to look after themselves, the CAT suggested that, in light of the efforts of the claimant firms involved, there was simply no enthusiasm or desire to take this matter forward, even if it costs a class member nothing. The CAT also considered that the strength of the claims, and whether it was practicable for the proceedings to be brought as opt-in proceedings, were additional factors that apply specifically in relation to the opt-in versus opt-out issue. Consideration of strength should not involve a mini trial and should be gauged principally by reference to the plausibility of the case made in the pleadings. The Tribunal should approach this issue with a degree of trepidation and caution, particularly where the determination of this issue may cause collective proceedings not to be brought at all. As a general rule, the weaker a case, the less justification there is for certifying on an opt-out basis.

In *Evans/O'Higgins*, the CAT found that the claims pleaded were so weak that they were liable to be struck out, although it did not do so. Their lack of particularity made it effectively impossible to gauge the strength of any case that might be made by the applicants if they were to plead matters more fully. This was a powerful reason against certification. In terms of practicability, this needed to be considered from the standpoint of the members of the class concerned; it was a legal standard assessed by the reasonable class member. It required consideration of why the more obvious route of opt-in proceedings was not being taken. The CAT noted that considerable efforts had been made by one of the claimant firms having contacted some 321 firms and invested more than 6,000 hours over four years in trying to build a book of claimants, resulting in only 14 advisory retainers. Although some of these institutions had theoretical claims exceeding £1 million, it was not possible to assemble a large enough group to make a group action economically feasible on an opt-in basis. When assessing the composition of the class, it was clear that these were not *Merricks*-type claims, where the individual claims of the whole class, or substantially the whole class, are so small that one can see why members of the class would simply not be interested to sign up a claim that ought to be brought to rectify a market-wide wrong. The putative class members will, on the whole, be sophisticated potential litigants capable of looking after themselves. Nor could it be said that the putative class members will be ignorant of these potential claims. To the contrary, the efforts of the claimant law firms evidence that there appeared to be a deliberate decision not to participate. The CAT could see no reason why it was not practicable for the putative class to join on an opt-in basis, given the sophistication, the class knowledge and the potential size of claim. The inference (and the CAT considered it a strong one) was that the potential class members were not opting in because they did not want to, and not because opt-in proceedings were not practicable. These weighed strongly against opt-out certification. Overall, the CAT considered that the factors pointing towards certifying on an opt-out basis were substantially outweighed by the strength and practicability factors. The CAT has given permission for both claims to appeal to the Court of Appeal, stating that the exercise of CAT's discretion involved traversing the whole of a relatively new area of law in circumstances where one member of the Tribunal dissented. The CAT concluded that there was a real prospect of the O'Higgins and Evans PCRs persuading the Court of Appeal that the discretion exercised by the majority of the Tribunal was sufficiently flawed as to be erroneous in law.

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In *UK Trucks Claim Limited v Stellantis NV and Others and Road Haulage Association Limited v Man SE and Others*[2022] CAT 25, the CAT considered two competing CPO applications made by UK Trucks Claim Ltd (UKTC), a special purpose vehicle, and the Road Haulage Association Limited (RHA), a trade association. There were a number of key differences between the applications, including that UK Trucks Claim Limited (UKTC) sought to bring collective proceedings on an opt-out basis, whereas the RHA sought to bring collective proceedings on an opt-in basis. UKTC sought an award of aggregate damages, whereas the RHA did not. UKTC sought damages in respect of only new trucks, and the RHA claim covered both new and used trucks. The UKTC claim covered trucks acquired in the UK, whereas the RHA claimed extended to certain trucks acquired in the European Economic Area. The claims also differed in the length of the claimed 'run-off period' before prices are assumed to have returned to competitive levels; the proposed class definition in the RHA claim assumed a longer run-off period such that the class covered those who acquired trucks up to 17 May 2019, rather than December 2011 as in the UKTC claim. Both proceedings comprised claims by those who acquired trucks for use in providing carriage either as a haulier for third parties or in their own business and both proceedings exclude truck dealers, however defined the proposed class differently in terms of exclusions. The claims also approached the estimation of loss by very different methodologies. The CAT held that the claims were in principle eligible for collective proceedings, and that the CAT had to determine which of the two applications was preferable. However, the CAT concluded that the RHA opt-in proceedings were preferable to the UKTC opt-out proceedings, or even to the UKTC proceedings on an opt-in basis. The CAT felt more confidence in the robustness of the method proposed by RHA's expert economist, in part because the use of regression analysis that is well tested and widely acknowledged. Addressing whether proceedings should be brought as opt in or opt out, the Tribunal noted that RHA is proposing opt-in proceedings, which would give the RHA access to a significant volume of data from the class members to be deployed for the purpose of sophisticated analysis that takes more account of the heterogeneity of the trucks market. The CAT also found that it was practicable for the proceedings to be brought as opt-in proceedings, given the RHA established a website dedicated to the proceedings, which provided information for class members to register their interest. The Tribunal dismissed the proposed defendants' argument that the RHA application was unsustainable because the inclusion of claimants for both new and used trucks in the class would give rise to an irreconcilable conflict of interest on the part of the RHA and its legal advisors.

The CAT considered that there were two important and related distinguishing features of the RHA action: (1) the RHA sought certification of opt-in proceedings and this distinction was fundamental because in opt-out proceedings the class representative had no direct engagement with the class members it was representing and they would nonetheless be bound; and (2) it was very relevant that there was a substantial overlap between class members who acquired new trucks and class members who acquired used trucks - these are not two discrete categories. On this basis, the CAT dismissed the UKTC application in favour of the opt-in RHA application, subject to an amendment to the proposed run-off period described above.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

In general terms, settlement agreements entered into between parties to litigation do not require the consent of the court or the CAT. In normal circumstances, the claimant can then

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withdraw (discontinue) the claim unilaterally. However, in proceedings brought by more than one claimant, if a settlement is entered into with one of the claimants, the consent of either the other claimants or the court is required to discontinue the claim ([CPR 38.2\(2\)\(c\)](#)). Settlements should include a provision for payment of costs or state that each party is to bear its own costs. In the High Court, where a claimant discontinues the claim, it is required to pay the defendant's costs (CPR 38.6). In the CAT, a claimant may only withdraw the claim prior to the hearing with the consent of the defendant or with the permission of the CAT (or if no tribunal has been constituted, with the permission of the president (CAT Rule 44(1)). Where a claim is withdrawn, the CAT may make any consequential order it thinks fit (CAT Rule 44(2)).

The CRA 2015 introduced a new opt-out collective settlement regime for competition law in the CAT. Any opt-out settlement must be judicially approved. Section 49A of the CA 1998 applies to cases where a collective proceedings order has been made and where the CAT has specified that the proceedings are on an opt-out basis. An application for approval of a proposed collective settlement must be made to the CAT by the representative and the defendant (or where there is more than one, those defendants who wish to be bound by the proposed settlement) in the collective proceedings (CAT Rule 94(1)).

The CAT may approve the settlement only if it is satisfied that its terms are just and reasonable. In determining whether the terms are just and reasonable, under CAT Rule 94(9), the CAT will take into account all relevant circumstances, including:

- the amount and terms of the settlement, including the payment of costs, fees and disbursements;
- the number or estimated number of persons likely to be entitled to a share of the settlement;
- the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement;
- the likely duration and cost of the collective proceedings if they proceeded to trial;
- any opinion by an independent expert and any legal representative for the applicants and, in certain circumstances, the views of any represented person or any class member; and
- the provisions regarding the disposition of any unclaimed balance of the settlement.

The settlement will bind all persons falling within the class of persons described in the collective proceedings order who were domiciled in the United Kingdom and did not opt out or who opted into the collective proceedings. The CAT may also make an order in relation to cases where a collective proceedings order has now been made (section 49B of the CA 1998). Any CAT-approved collective settlement order will be binding on all persons falling within the class except those who opt out or are not domiciled in the United Kingdom (and do not opt in) (CAT Rule 94(9)).

National collective proceedings

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

The United Kingdom is divided into three jurisdictions: England and Wales, Scotland and Northern Ireland. Claims can be brought separately, and simultaneously, in more than one

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jurisdiction, but the courts of one jurisdiction cannot order the claims brought in one or both of the other jurisdictions to be consolidated.

However, if simultaneous proceedings are commenced across the different jurisdictions, it is open to the defendants to challenge the jurisdiction of one of the courts on the basis that the other one is the more appropriate forum for resolution of the dispute. It is also likely to be in the claimant's interests (in terms of both costs and expediency) to bring their claims in one jurisdiction.

Under the Competition Appeal Tribunal Rules (SI 2015 No. 1648), the CAT may, at any stage of the proceedings, on the request of a party or of its own initiative, and after the observations of the parties, direct that all or part of a claim brought under section 47A of the CA 1998 be transferred to the High Court or a county court in England and Wales or Northern Ireland, or the Court of Session or a sheriff court in Scotland (CAT Rule 71).

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

There are an increasing number of claimant firms in England and Wales. Such is the strength of the claimant bar, we have also now seen two cases in which different claimant firms sought to bring claims on behalf of competing PCRs for the same or similar classes of potential class members in *UKTC/RHA* (Trucks) and *O'Higgins/Evans* (Forex).

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Follow-on actions are based on the tort of breach of statutory duty, and damages are awarded on the tortious basis (ie, the amount of the loss, plus interest). This is in line with European Court of Justice (ECJ) case law (*Manfredi v Lloyd Adriatico*, Case C-295/04, [2006] ECR I-6619), which requires injured persons to be able to seek compensation not only for actual loss but also lost profit and interest. How damages might be calculated in a competition law claim will depend on the facts of the case and the nature of the infringement. In relation to a cartel, the damages should be the cartel overcharge, adjusted as necessary for passing on. In relation to exclusionary abuses, the damages should be the profit that the claimant would have made had it not been excluded from the market or marginalised by the infringing conduct. The Damages Directive outlined that it was presumed that cartel infringements cause harm, although the infringer will have the right to rebut that presumption.

Establishing the counterfactual and quantifying loss

In *Arkin v Borchard Lines Limited* (No. 4) [2003] EWHC 687 (Comm), the judge considered that an assessment of damages would involve considering what loss, if any, the infringement had as a matter of 'common sense' directly caused to the claimant (although he held that, on the facts, there had been no breach of the competition rules). For this purpose, it would be

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necessary to consider the 'counterfactual' (ie, what the market conditions would have been like without the infringement), and the likely difference between the price actually paid and the price that would have been paid in such a competitive market. In *Enron Coal Services v English Welsh and Scottish Railways* [2009] CAT 36, the CAT concluded that there was no loss at all because on the counterfactual the claimant would have been no better off.

BritNed Development Ltd v ABB and Others [2018] EWHC 2616 (Ch) was a claim for damages arising out of a restriction of article 101 of the Treaty on the Functioning of the European Union (TFEU). The claim was a follow-on damages claim relating to the European Commission's decision in high-voltage submarine and underground cable projects. In assessing damages, Marcus Smith J said that at the quantification exercise, English law moved away from the balance of probabilities and involved the taking into account of all manner of risks and possibilities. Quantification of loss was not a question of mathematical calculation, but turned on developing a robust understanding of what would have happened in the counterfactual case. The court preferred an approach that focused on the specific project in relation to which compensation was sought rather than alternative projects that were not subject to the infringement. In considering the overcharge, the court found that it was necessary to have regard to the object and scope of the statutory duty imposed.

To require a claimant to show monetary harm to found a cause of action was to ignore the purpose of article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the 'gist' of the damage, was that the unlawful conduct of the defendant had, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. Consumer benefit was a broad concept, but it might take the form of an increased price payable or a reduction in the number of suppliers properly participating in a tender process. Marcus Smith J concluded that the common costs for the project did not contain an overcharge owing to the direct influence of persons aware of the cartel. However, the effect of the cartel was to insulate the defendants from inefficiencies in their own product, and this was an overcharge arising out of this 'baked-in' inefficiency. In addition, there was a 'cartel saving' in the defendants' common costs owing to the saving attributable to the cartelists not having to compete. In a later unreported judgment, Marcus Smith J also ordered that the defendants and the claimant must each pay their own costs.

Both BritNed and ABB appealed the High Court judgment. The Court of Appeal dismissed BritNed's appeal, and held that the High Court was correct that there was no direct overcharge in relation to the project, and was correct to dismiss BritNed's claim for lost profits, and in reducing the damages to reflect the existence of a regulatory cap. However, the Court of Appeal allowed ABB's appeal, overturning the High Court's finding on cartel savings (that there was a cartel saving in the defendants' common costs for not having to compete). The court concluded that the award of damages on the basis of savings made by the cartel, rather than loss to the victim of the cartel, constituted an error of law as it did not comply with the principle that cartel damages should be compensatory in nature. In any event, the court held it had not been established that cartel savings had affected the price of the BritNed project.

In the CAT, an order for interim relief was made in *Healthcare at Home v Genzyme* [2006] CAT 29. The case involved a margin squeeze by the supplier of a particular drug; the CAT's judgment specified the percentage discount that should have been applied to the supplier's pricing to ensure a reasonable profit margin. A purchaser claimed the value of the percentage discount against the amount purchased, plus exemplary damages. The CAT considered that,

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if the claimant could demonstrate that the effects of the infringement had continued past the period of infringement found, damages could extend for that longer period. The CAT accepted that the lost profit margin was an appropriate measure of damages, and made an interim award based on the likely percentage discount that it would find should have been charged. The case settled before final judgment.

In *Albion Water Limited v Dwr Cymru Cyfyngedig* [2013] CAT 6, Albion brought an action for damages against Dwr Cymru for losses resulting from Dwr Cymru's abuse of its dominant position. The CAT had previously determined that the access price at which Dwr Cymru was offering a common carriage service to carry water through its pipes from a pumping station to the premises of Albion's customer, Shotton Paper, was an abuse of its dominant position. Albion claimed compensatory damages on the basis that if Dwr Cymru had not abused its dominant position, Albion would have accepted the offer of a reasonable price for common carriage and would have supplied water to Shotton Paper more profitably than it had done and Albion would have won a contract with another company, Corus. It also claimed exemplary damages (a claim permitted as Dwr Cymru had not been subject to a fine for its infringement of the Chapter II prohibition ([2010] CAT 30)).

The CAT granted compensatory damages. In relation to the first compensatory claim, the CAT considered the counterfactual scenario, what would have happened absent the abuse of a dominant position. Dwr Cymru argued that the counterfactual scenario should assume that the dominant undertaking would have charged as high a price as was lawfully possible. The CAT rejected that submission as 'wrong in principle' and 'entirely impracticable'. The correct approach was to assume that Dwr Cymru would have offered a reasonable access price. There was a range of lawful access prices that Dwr Cymru could have offered and the figure in the middle of that range should be taken. Regarding the second compensatory claim for loss of a chance, the CAT also awarded damages as it found that it was highly likely that Corus would have awarded Albion a supply contract. The damages for loss of a chance were, however, reduced by a third as the CAT could not hold that it was a certainty or near certainty that Corus would have awarded Albion the contract.

Exemplary damages, restitutionary damages and an account of profits

For claims where the loss or damage suffered was wholly on or after 9 March 2017, under paragraph 36 of the Regulations, a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was suffered before, there are circumstances in which exemplary damages may be awarded.

In *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 (Ch), the High Court held on a preliminary issue that the claimants were not entitled to exemplary or restitutionary damages, or to an account of profits, in circumstances where fines had been imposed by the regulator for competition law infringements (or reduced or waived in the case of leniency and immunity applicants). On appeal, the Court of Appeal confirmed that the claimants were not entitled to restitutionary damages or to an account of profits ([2008] EWCA Civ 1086). However, in *2 Travel Group plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19, the CAT held that 2 Travel was entitled to both compensatory and exemplary damages.

In *Albion Water*, the claimants also claimed exemplary damages. The CAT stated that evidence was required that Dwr Cymru knew that the way the price was calculated was unlawfully

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excessive or that it did not care whether it was excessive or not. Despite criticising Dwr Cymru, stating that there was ‘a conspicuous and reprehensible failure of corporate governance’, the claim for exemplary damages was dismissed on the basis that the evidence did not establish that Dwr Cymru’s failures followed a deliberate decision to close its eyes to the likely result of such an exercise. Nor could it be concluded that the failures evidenced a decision taken in cynical disregard of Albion’s rights, or that Dwr Cymru was reckless in respect of the risk that the common carriage price might be unlawful. There was insufficient evidence to show that the access price was either clearly or probably unlawful, and there was no evidence that Dwr Cymru had weighed the risks of going ahead with the access price against the likely downside in terms of future compensation payments to Albion.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

High Court

Aside from damages, claimants can seek injunctions in the High Court in respect of either an ongoing or anticipated breach of competition law ([Civil Procedural Rules \(CPR\) 25](#)). Prohibitory injunctions (requiring the defendant to refrain from conduct), mandatory injunctions (requiring a defendant actively to do something) and quia timet injunctions (restraining the defendant from engaging in future actions) are all available. To succeed in being awarded an interim injunction, the applicant must show it has a good arguable case, that damages would be inadequate to remedy its losses and that the balance of convenience favours an injunction being granted (*American Cyanamid v Ethicon Ltd* [1975] AC 396). Where an interim injunction is sought, it is necessary for the applicant to give a cross-undertaking in damages to cover any loss suffered by the defendant as a result of the injunction in the event of the applicant losing the case.

Timing is a critical issue. In *AAH Pharmaceuticals v Pfizer Limited & Unichem Limited* [2007] EWHC 565 (Ch), the High Court refused to award an interim injunction in circumstances where eight wholesalers sought to prevent Pfizer terminating supply agreements with them but brought their injunction application a month before implementation of Pfizer’s proposals, even though they knew of Pfizer’s proposal six months in advance. The last-minute nature of the application and the complexity of the analysis required to establish whether Pfizer’s actions were anticompetitive caused the court to refuse the wholesalers’ application.

An example of a prohibitory injunction is *Adidas v ITF* [2006] EWHC 1318 (Ch), in which Adidas successfully argued that the International Tennis Federation’s restriction on the size of logos applied to tennis players’ uniforms was an abuse of its dominant position and obtained interim relief against the application of the restriction at that year’s tournaments. From Adidas’s point of view, this allowed it to pursue its objective (ie, changing the rules rather than receiving damages).

An example of a mandatory injunction is *Software Cellular Network Ltd v T-Mobile Limited* [2007] EWHC 1790 (Ch), in which Truphone obtained an injunction obliging T-Mobile to purchase services on the basis that T-Mobile’s refusal to activate relevant numbers amounted to an abuse of a dominant position (even though T-Mobile had only a 20 to 30 per cent market share

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and there was no precedent for such a refusal to purchase a service being characterised as an abusive refusal to supply).

The High Court can also award security for costs (CPR 25).

CAT

Following the introduction of the Consumer Rights Act 2015, the CAT has the power to grant injunctions. An injunction granted by the CAT has the same effect as an injunction granted by the High Court and will be enforceable as if it were an injunction granted by the High Court (section 47D(1) of the Competition Act 1998 (CA 1998)). In deciding whether to grant an injunction, the CAT must apply the principles that the High Court would apply. The CAT can also make interim injunctions at any time (CAT Rule 68(1)). An application for an interim injunction must be supported by evidence unless the CAT directs otherwise (CAT Rule 69(2)). An application for an interim injunction can be made without notice if it appears to the CAT that there are good reasons for not giving notice that must be stated as part of the evidence in support of the application (CAT Rule 69).

Interim relief in the form of interim payments may be sought from the CAT (CAT Rule 66). Such an order would require the defendant to make a payment on account of any damages (excluding costs) for which the CAT may hold the defendant liable (CAT Rule 66(1)). The conditions for such an award to be made are: the defendant against whom the order is sought has admitted liability to pay damages to the claimant or the claimant has obtained judgment against the defendant for damages to be assessed or for a sum of money (other than costs) to be assessed; and the CAT is satisfied that, if the claim were to be heard, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant. In *Healthcare at Home v Genzyme Ltd* [2006] CAT 29, the CAT ordered an interim payment of £2 million to be made to the claimant in the context of proceedings brought following on from an Office of Fair Trading (OFT) (as it then was) finding that Genzyme had operated an unlawful margin squeeze in breach of Chapter II of CA 1998.

The CAT can also order security for costs (CAT Rule 59), in circumstances similar to those set out in CPR 25 for claims in the High Court. Indications to date suggest the CAT will consider in particular whether a costs order is ultimately likely to be made, whether a costs order would stifle the case, and the reason for the request for a costs order. In *BCL Old Co v Aventis* [2005] CAT 2, the CAT declined to award security for costs primarily because it was not satisfied there was a substantial likelihood that the defendants would in due course benefit from a costs order. In *Commercial Buyers Group Limited v Associated Lead Mills Limited and Others* [2023] CAT 17, the CAT declined to award security for costs against the claimant on the basis that the claimant did not have the funds to provide security for costs and so an order would stifle a genuine claim.

CAT Rule 59 prescribes a procedure for a defendant to obtain an order for security for costs from the CAT. The CAT may make an order for security for costs if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and one or more of the conditions set out in the Competition Appeal Tribunal Rules (SI 2015 No. 1648) (the CAT Rules) or another enactment apply (CAT Rule 59(4)).

Punitive damages

29 | Are punitive or exemplary damages available?

For claims where the loss or damage suffered was wholly on or after 9 March 2017, under paragraph 36, Schedule 8A of the CA 1998 (as amended), a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was before 9 March 2017, punitive and exemplary damages are available in certain limited circumstances in England and Wales.

Section 47C of the CA 1998 provides that the CAT may not award exemplary damages in collective proceedings.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

The ECJ in *Manfredi v Lloyd Adriatico* (Case C-295/04 [2006] ECR I-6619) held that interest should be available in respect of claims for damages based on infringements of competition law (the principle of equivalence). The English courts have discretion to order simple interest on damages awarded. The applicable rate is normally the claimant's borrowing rate, as assessed by the court. In the absence of such evidence, a fair commercial rate would be applied. In addition, the claimant can obtain compound interest if it can prove actual losses (eg, if it can show that it has in fact had to borrow money and pay interest on it).

Sainsbury's v Mastercard [2016] CAT 11 was the first time that compound interest has been awarded in a judgment regarding competition law. Following *Sempra Metals*, it found that interest losses are in principle recoverable, but subject to proof of loss and any other relevant rules relating to the recovery of damages. A claim for interest is a loss like any other, recoverable according to the usual rules. Precisely what must be pleaded and proved for a claim for interest to succeed depends on the facts of the individual case.

The CAT noted that Sainsbury's factual witnesses provided evidence in respect of what would have happened if the interchange fees applied by Mastercard had been lower as well as a detailed description of Sainsbury's budget process and the way in which it monitored costs and adjusted prices. It found that had the overcharge not been made, Sainsbury's cash balances would have been higher, and Sainsbury's would have received interest on these sums. In addition, had the overcharge not been made, Sainsbury's borrowing needs would have been less, and it would not have incurred the costs of borrowing.

Applying a 'broad axe', the CAT found that had there been no overcharge, 50 per cent of an amount equivalent to the overcharge would have been passed on to Sainsbury's customers (albeit not in a manner sufficient to reduce the damages due to it) and 50 per cent would have been retained by Sainsbury's. Sainsbury's would have received interest on this second 50 per cent.

In *Royal Mail Group Limited v DAF Trucks Limited and others, BT Group PLC and Others v DAF Trucks Limited and Others* [2023] CAT 6, the CAT followed the approach in *Sainsbury's v*

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Mastercard [2016] CAT 11 and awarded compound interest. The CAT noted that a claim for compound interest can better reflect a claimant's actual interest losses and that it is perhaps surprising that compound interest is not ordered more often.

The CAT may also order that interest is payable on damages awarded by it for all or any part of the period between the date when the action arose and the date of decision of the award for damages, or, if the sum has been paid before the decision making the award, the date of payment (CAT Rule 105(3)). Unless the CAT directs otherwise, the rate of interest must not exceed the rate specified by any order made under section 44 of the Administration of Justice Act 1970.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

The High Court's judgment in *Devenish Nutrition Limited v Sanofi-Aventis and Others* [2007] EWHC 2394 (Ch) shows that where fines have been imposed by competition authorities (or not imposed because the defendant was a leniency applicant), neither punitive or exemplary damages, nor restitution or account of profits, will be available in follow-on damages claims. The Court of Appeal upheld the judgment in respect of restitution or account of profits ([2008] EWCA Civ 10). However, the CAT awarded exemplary damages in *2 Travel* ([2012] CAT 19) where the defendant had been granted immunity by the OFT (as it then was) on the basis of conduct of minor significance. Section 47C of CA 1998 provides that the CAT may not award exemplary damages in collective proceedings.

For claims where the loss or damage suffered from an infringement takes place before 9 March 2017, there are no provisions protecting leniency or immunity applicants from follow-on damages claims brought in England and Wales. However, for claims where the loss or damage suffered from an infringement takes place on or after 9 March 2017, paragraphs 15 and 16 of Schedule 8A (CA 1998) apply to undertakings that have been granted immunity from financial penalties under a cartel leniency programme. Paragraph 15 states that an immunity recipient is not liable (either alone or jointly) to pay damages in respect of loss or damage suffered by a person as a result of the cartel infringement (whatever the legal basis of liability) except in certain circumstances.

Where loss or damage arising from competition law is the subject of a consensual settlement between an infringer and a complainant, the complainant has no cause of action against the infringer in respect of the loss or damage. However, this does not apply where another infringer is liable to the settling complainant but is unable to pay, and the settling infringer's liability is not expressly excluded by the terms of the consensual settlement (paragraph 40, Schedule 8A of the CA 1998).

As the normal measure of damages in the English court is compensatory, the fact that fines have been imposed by the competition regulator would not normally lead to a reduction in the damages awarded.

Legal costs

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

High Court

The rules on costs in the High Court are set out in [CPR 44 to 48](#) and the accompanying Practice Directions. The general rule is that costs follow the event, namely that the unsuccessful party pays the costs of the successful party (CPR 44.2). However, the courts have a general discretion in awarding costs and will have regard to all the circumstances of the case, including the conduct of the parties, whether a party was partially successful, and any payment into a court or settlement offer that is drawn to the court's attention. Even where a costs order is made, the successful party is generally only likely to recover around two-thirds of its costs.

In exceptional cases, a successful party may seek a costs order against a third party, for example, if a third party has helped to fund litigation on behalf of the losing party. However, following *Arkin v Borchard Lines Limited* [2005] EWCA Civ 655, it is necessary in this regard to distinguish between 'pure funders' (who have no interest personally in the litigation and do not stand to benefit from it) and professional funders. The court in *Arkin* held that costs orders would not be made against pure funders; against professional funders, costs orders may be made to the extent of the funding provided.

In rare cases, a 'wasted costs' order may be made to hold legal representatives personally liable for costs. Wasted costs orders are imposed to punish lawyers for wasting the court's time; for example, in cases of serious improper, unreasonable or negligent acts or omissions in the course of the litigation.

CAT

CAT Rule 104 addresses the issue of costs. It provides that the CAT may, at its discretion, make any order it thinks fit in relation to the payment of costs. In contrast to the provisions in relation to the High Court, in the CAT, there is no general rule that costs follow the event. However, the CAT Rules provide a number of factors that the CAT may take account of when determining the amount of costs. These factors are set out in CAT Rule 104(4) and include, for example, whether a party has succeeded on part of its case and any admissible offer to settle that has been made. While CAT case law sets out that the starting point is that the successful party is entitled to recover its reasonable costs (*The Racecourse Association v OFT* [2006] CAT 1), the CAT acknowledges that a balance must be struck between ensuring that costs awards do not undermine the effectiveness of the competition regime whilst ensuring a just result for both parties (*CMA v Flynn Pharma* [2020] UKSC 12).

The CAT Rules also include specific cost consequences relating to the acceptance or rejection of a settlement offer that are similar to those applicable in the High Court under the rules on offers to settle in [CPR Part 36](#). Under the CAT Rules, an offer to settle is labelled a 'Rule 45 Offer'. In addition, CAT Rule 57(1)(d) states that if any party fails to comply with any direction, the CAT may order that the party (or his or her representative) be subject to an order for costs as the CAT sees fit.

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The CAT also has the power to impose a cost-capping order on the parties (Rule 19(2)(r) and 53(2)(m)). This power is only used in exceptional circumstances, with costs budgeting usually preferred (*Durham Company Limited v Durham County Council* [2023] CAT 14).

In *Merricks v Mastercard* [2017] CAT 27, the respondent sought an order for costs in their favour, following an earlier judgment by the CAT that dismissed an application for a collective proceedings order (CPO). The applicant contended that the CAT had no jurisdiction to make an order for costs concerning an application for a CPO that was unsuccessful. They argued that CAT Rule 98 provides that costs may be awarded to or against the class representative but may not be awarded to or against a represented person who is not the class representative. The CAT rejected that submission as fundamentally misconceived. If a CPO application is unsuccessful, then Rule 98 is not engaged, but the general power concerning costs (CAT Rule 104) continues to apply.

In deciding its approach to awarding costs, the CAT said that, in private litigation, its practice is that the appropriate starting point is that the successful party should be awarded its costs (following *Albion Water v Dwr Cymru Cyfngedig* [2013] CAT 16). The CAT was not persuaded that, in relation to a contested CPO application, there were good grounds why the CAT should not adopt as a starting point that the loser is, in principle, liable for the relevant costs of the successful party. When considering the conduct of the parties under CAT Rule 104(4) the CAT said that where neither party has behaved unreasonably, the net effect of their conduct is neutral. Adopting a broad-brush approach, after deducting the fees of specialist costs counsel, the CAT considered that the respondent should be awarded 80 per cent of their costs. However, in relation to interest on those costs, the CAT considered that the applicant was correct that the CAT Rules in their current form did not enable the CAT to award interest on costs. The CAT recognised that this was a lacuna in the rules that required urgent attention.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Although the point has not been decided, it is generally understood that in cases before both the CAT and the High Court, liability is likely to be joint and several in respect of defendants in a cartel action.

Under paragraph 12 of Schedule 8A (CA 1998), small or medium-sized enterprises (SMEs) are liable only to their direct or indirect purchasers if their share in the relevant market was below 5 per cent at any time throughout the infringement, and the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value. This exception does not apply if the SME led the infringement, coerced others to participate or has been found to have previously infringed competition law.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

For claims where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, paragraphs 16 and 38 to 41 (Schedule 8A of CA 1998) apply in relation to

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contribution. The amount of contribution that one person may recover from another must be determined in light of their relative responsibility for the whole of the loss or damage caused by the infringement. That amount must take into account any damages paid by the other person in respect of the loss or damage in accordance with a consensual settlement between an infringer and a claimant. Where loss or damage arising from an infringement is the subject of a settlement between the infringer and a claimant, it is also the subject of a damages claim by the settling complainant, and an undertaking other than the settling infringer is liable to pay damages to the settling complainants, that undertaking may not recover contribution from the settling infringer. This applies regardless of the terms of the settlement.

In England and Wales, there is provision for contribution proceedings to be brought under the [Civil Liability \(Contribution\) Act 1978](#), which allows any person liable for damage suffered by another to recover a contribution from a third party who is also liable in respect of the same damage. Contribution proceedings may be brought by a defendant joining another party or parties to the action, or by bringing contribution proceedings against them after judgment has been made. In *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch), British Airways was sued in the High Court for damages allegedly sustained by the claimants in relation to a cartel in which British Airways and a number of other airlines were alleged to have infringed competition law. British Airways sought to join 32 other airlines to this action, not all of which were ultimately addressees of the Commission decision (British Airways later discontinued its attempts to join the airlines that were not addressees of the Commission decision).

How liability is apportioned between defendants is a matter for the court, which will make such award as it considers just and equitable in light of each person's actual responsibility. It remains to be seen whether the court will consider parties to a cartel to be liable in equal proportions, or whether damages will be apportioned, for example, according to 'culpability' in relation to the operation of the cartel (eg, if one party was the ringleader) or according to the amount of sales each party made to the claimant.

If a claim is settled, the defendant can still seek to bring a claim for contribution against another party. Section 1(4) of the Civil Liability (Contribution) Act 1978, states that a person who has agreed to make any payment in bona fide settlement of any claim made against him or her shall be entitled to recover contribution without regard to whether he or she is or ever was liable in respect of the damage, provided that he or she would have been liable, assuming that the factual basis of the claim against him or her could be established.

This was considered in *WH Newson v IMI plc* [2015] EWHC 1676 (Ch), where Delta sought to challenge the Part 20 claim made against it by IMI on the basis that the claimants' claims were time-barred. In dismissing Delta's appeal, the Court of Appeal considered the application of section 1(4) of the Civil Liability (Contribution) Act 1978 (*WH Newson v IMI* [2016] EWCA Civ 773). The court found that section 1(4) must also be read as a whole, and its major part makes clear that a contribution claim by IMI against Delta made in the wake of IMI's bona fide settlement of WH Newson's claim does not require any investigation into whether IMI was actually liable. The court noted that it was open to Delta to argue that the settlement was not a bona fide one, for example that it was collusive, corrupt or dishonest, and if such a case was made good, then section 1(4) would not apply. However, there was no suggestion of that in this case. IMI had to prove that it would have been liable to WH Newson assuming that the factual basis of the claim could be established. Therefore, all IMI needed to prove was that such factual basis

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would have disclosed a reasonable cause of action against IMI such as would make IMI liable in law to WH Newson in respect of the damage.

Passing on

35 | Is the 'passing-on' defence allowed?

It is generally understood that the passing-on defence, if it can be proved in fact (and perhaps with the assistance of expert evidence), is available to defendants. In broad terms, the damages suffered by the purchaser of a cartelised product may be reduced if the defendant can prove that the purchaser passed on the overcharge to his or her own customers. For claims where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, paragraphs 8 to 11 of Schedule 8A (CA 1998), which deal with passing on, apply. The burden of proving the passing-on defence lies with the defendant.

Prior to *Sainsbury's v Mastercard* [2016] CAT 11, there was no case under English law substantively dealing with the passing-on defence, although the existence of the defence had been previously recognised. The CAT considered whether Mastercard could benefit from the defence of passing on. The CAT found that the passing-on defence was in reality not a defence at all; instead, its thrust was to prevent the over-compensation of a claimant and to ensure that the defendant does not pay damages for the same wrong twice. The CAT considered that, whereas an economist might define passing on more widely (ie, to include cost savings and expenditure), the passing-on defence was only concerned with identifiable increases in prices by a firm to its customers. The increase in price must be causally connected with the overcharge and demonstrably so. The CAT considered that the passing-on defence ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimants in the action, to whom the overcharge has been passed on. In its judgment, the CAT found that Mastercard's defence failed because no identifiable increase in retail price had been established, still less one that was causally connected with the infringement. The Court of Appeal upheld the CAT's decision (*Sainsbury's v Mastercard and ors* [2018] EWCA Civ 1536).

Mastercard (and Visa) appealed the judgment on a number of grounds, including whether the Court of Appeal found and, if so, did it err in law in finding, that a defendant has to prove the exact amount of loss mitigated to reduce damages? The Supreme Court upheld that aspect of the appeal (*Sainsbury's v Visa and Mastercard and ors* [2020] UKSC 24). It found that Visa and Mastercard had the legal burden of establishing that the merchants have recovered the costs incurred, but once defendants had raised the issue of mitigation, in the form of pass-on, there was a heavy evidential burden on the merchants to provide evidence of how they have dealt with the recovery of their costs in their business. In applying the compensatory principle, the court was charged with avoiding under-compensation and over-compensation but the court must also have regard to the principle that legal disputes should be dealt with at proportionate cost. The law does not require unreasonable precision in the proof of the amount of the prima facie loss that the merchants have passed on. The Supreme Court did not interpret the Court of Appeal's judgment as having held that the defendants had to prove the exact amount of the loss mitigated. Insofar as the Court of Appeal required a greater degree of precision in the quantification of pass-on from the defendant than from the claimant, the court erred. However, applying the Supreme Court's judgment, the CAT in *Royal Mail Group Limited v DAF Trucks Limited and Others* [2021] CAT 10 stated that there must be some plausible basis in fact

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for alleging that the claimant would have acted in a manner that amounts to legal mitigation for the application of the broad economic theory of pass-on. In that case, the CAT held that it is necessary to prove a proximate causative link between the overcharge and a reduction in other input costs, so as to constitute mitigation in accordance with the principles set out by the Supreme Court.

In *Stellantis NV and Others v NTN Corporation and Others* [2021] CAT 14, the CAT applied the test as set out in *Royal Mail* to an application by the defendants to plead an additional defence of mitigation. The CAT held that a defendant must establish a sufficient causal connection between the overcharge and the steps that are relied upon as amounting to the relevant mitigation. If a defendant can only point to what might be regarded as ordinary financial operations and budgetary control processes, this will generally be insufficient to establish the necessary connection between the overcharge and the relevant steps. There are some cases where a combination of factors may nevertheless permit a defendant to establish a plausible case of causation, notwithstanding the ordinariness of the financial operations and budgetary processes relied upon. However, in the absence of such factors, a defendant who only points to ordinary operations and processes for controlling costs is unlikely to demonstrate a realistic prospect of succeeding at trial in showing proximate causation.

The CAT also held that there must be some basis other than pure theory for believing that a defence of mitigation has some factual basis for it, and the relevant facts relied upon must give rise to a plausible case of causation that carries a degree of conviction. It is possible for facts to exist from which a reasonable inference of proximate causation can be inferred. In *Stellantis*, the CAT found that the facts did not give rise to a plausible case of causation that carries any degree of conviction. There was no suggestion in NTN's submissions that the setting of targets could be regarded as being in any way an unusual business approach, but was an ordinary and run-of-the-mill budgetary control process. It was not introduced in consequence of the (alleged) overcharge, and operated independently and in ignorance of an overcharge. The necessary linkage between that process and the overcharge was absent and certainly implausible, at least unless there are some particular facts that plausibly give rise to the inference that the necessary causal connection existed. On appeal, the Court of Appeal upheld the CAT's judgment; the court found that the CAT applied the correct test to the pleadings. It did not misconstrue the judgment in *Sainsbury's*, nor did it misapply the relevant policy considerations. The CAT made no errors of law in its analysis of the pleadings and in its conclusion that they failed to meet the appropriate test. The pleaded off-setting defence lacked particularisation or evidential underpinning, was hypothetical and theoretical and, in some respects, counterintuitive, and there were no policy considerations that justified permitting this defence to continue to trial.

This was built upon by the CAT in *Royal Mail Group Limited v DAF Trucks Limited and others, BT Group PLC and Others v DAF Trucks Limited and Others* [2023] CAT 6. This case consisted of the trial of follow-on claims brought by the claimants following the European Commission's decision in *Case AT.39824* that five truck manufacturers had carried out a single and continuous infringement of Article 101 of the TFEU and Article 53 of the Agreement on the European Economic Area between 1997 and 2011. The CAT found that, in order to establish causation following this decision, the claimants needed to show on the balance of probabilities that they suffered some monetary harm as a result of the infringement. The CAT found that, on the balance of probabilities, the evidence pointed to the existence of a cartel overcharge. It noted that there are a priori reasons for expecting that a concerted attempt by all the major

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European truck suppliers to restrict price competition over a 14-year period would to some extent succeed in materially affecting transaction prices. The CAT therefore found that the claimants had established the necessary causation to complete their cause of action.

The defendants had argued that any damages should be mitigated using a pass-on form mitigation defence. The CAT clarified that the legal test for causation in relation to a pass-on form mitigation defence required the defendant to prove a direct and proximate causative link between the overcharge and any increase in prices by the claimants. It was not sufficient for the defendant to say that all costs, including increases in costs are fed into the claimants' business. In order to demonstrate this link, the CAT suggested four relevant factors that the defendant could rely on. These were:

- knowledge of the overcharge or the specific cost increase in question;
- the relative size of the overcharge against the claimants' overall costs and revenue;
- the relationship or association between what the overcharge is incurred on and the product whose prices have been increased; and
- whether there are identifiable claims by identifiable purchasers from the claimants in respect of losses caused by the overcharge.

The CAT found that the defendant was not able to satisfy the legal test for causation here; as none of these four factors were present, the evidence of factual causation would need to be even stronger and the defendant was not able to establish this. The defendant also sought to rely on supply pass on and complements defences, each of which failed.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In English law, the *ex turpi causa* doctrine means that a person may not benefit from relief (eg, damages) where to do so would enable him or her to benefit from his or her own illegality. This would prevent a claimant from recovering damages in respect of his or her own illegal activity. In *Gibbs Mew v Gemmell* [1999] ECC 97, the court held that a party to an anticompetitive agreement under what is now article 101(1) of the TFEU is prevented from recovering damages in respect of loss suffered as a result of that agreement. That judgment predates the ECJ's judgment in *Courage v Crehan* (Case C-453/99, [2001] ECR I-6297), which held that a party to a contract that infringes article 101(1) of the TFEU can rely on a breach of that provision to obtain relief before a national court, despite the existence of a national rule denying a person the right to rely on his or her own 'illegality' to obtain damages in circumstances where the parties are not in positions of equivalent bargaining power.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Alternative dispute resolution (ADR) is available in England and Wales. [CPR 1.4\(2\)\(e\)](#) specifically refers to ADR and requires the court to further the overriding objective by actively managing cases, with active case management including 'encouraging the parties to use an

alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure’.

Competition law issues are arbitrable if the claim alleging an antitrust infringement falls within the ambit of a contractual arbitration clause. In *ET plus SA v Welter* [2005] EWHC 2115 (Comm), the High Court considered that there was no realistic doubt that antitrust claims were arbitrable, and the Court of Appeal in *Attheraces Limited v British Horseracing Board* [2007] EWCA Civ 38 has also emphasised the positive benefits of arbitrating competition disputes. In *Microsoft Mobile v Sony* [2017] EWHC 374 (Ch), the High Court considered the application of an arbitration clause in a tortious claim arising from allegations of anticompetitive conduct and determined that the claim should be stayed under section 9 of the [Arbitration Act 1996](#).

The CAT appears to be less willing to embrace arbitration. In *Claymore Dairies v OFT* [2006] CAT 3, the CAT emphasised the public law nature of the CA 1998 (ie, that proceedings before the CAT are there also to protect the public interest). Where parties in the CAT wish to withdraw their dispute and transfer to private arbitration, it is necessary to obtain the Tribunal’s consent to a stay of the proceedings, although proceedings can be withdrawn without the Tribunal’s permission, provided the defendant gives consent (CAT Rule 44(1)(a)).

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

A number of collective proceedings brought in the Competition Appeal Tribunal (CAT) had been stayed pending judgment of the Supreme Court in *Merricks v Mastercard*. The CAT is now proceeding to certify these stayed claims, whose progression continues to give greater clarity to what is required of claimants when bringing collective proceedings before the CAT. In *O’Higgins/Evans* and *UKTC/RHA*, the CAT has dealt with the first two carriage disputes in which competing proposed class representatives (PCRs) seek to manage the same or similar claims on behalf of the same or similar classes. In addition, the CAT has begun to refuse to certify claims on the basis of the strength of their pleading, economic expert evidence and methodologies for determining liability and quantum at trial. In the coming year, we will continue to see the CAT clarify its approach to determining the extent to which PCRs bear a substantial evidential burden at certification stage, rather than at trial, and whether this could develop into a meaningful barrier to new and more innovative claims (in particular stand-alone claims) coming forward.

On 22 April 2022, the UK government announced a consultation to reform the CAT rules governing procedure of cases in the Tribunal. This included a technical review of the CAT rules, working with the Tribunal and other interested parties, to encompass updating and improvement of case management procedures including in the context of private actions and with a view to enhancing the Tribunal’s ability to conduct proceedings by electronic means. Following this, the UK government intends to expand the CAT’s jurisdiction to include the ability to grant declaratory relief, and give it and other courts discretion to award exemplary damages for breaches of competition law.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Private antitrust litigation is steadily gaining prominence in Europe. Most European countries report recent increases in case numbers. One of the key drivers is legislative change: the EU Damages Directive ([EU Directive 2014/104/EU](#)) was adopted in 2014 and has now been implemented in all member states. National legislators continue to foster the development through additional legislative reforms. For example, in Germany, an amendment passed in January 2021 further facilitated disclosure requests and introduced an additional evidentiary presumption that benefits plaintiffs.

Private antitrust litigation relates to a variety of contractual and non-contractual issues. However, it is cartel damages claims (ie, damages claims relating to violations of the cartel prohibition) that are growing exponentially. According to statistics, from 2014 to 2019 the number of European civil court judgments concerning cartel damages claims more than quadrupled from 50 to 239. In the majority of cases, plaintiffs are successful and courts either establish liability or award damages. Customers of cartelists now typically consider potential damages claims whenever the European Commission (EC) or a national competition authority imposes fines on a cartel. There may even be obligations under corporate law to enforce damages claims.

EC cartel decisions regularly lead to claims being made in the courts of several European countries. In almost all such cross-border cases, claims are filed in at least one of the three European jurisdictions that are traditionally preferred by claimants for cartel damages: the United Kingdom, Germany and the Netherlands. For instance, damages claims relating to the EC's *Air Cargo* and *TV/Computer Monitors* decisions are pending in all three countries. Damages claims relating to the EC's *Car Glass* decision have been filed in Germany and the United Kingdom. Damages claims relating to the *Gas Insulated Switchgear* cartel have been filed at courts in the United Kingdom and the Netherlands. Currently, the EC's 2016 *Trucks* decision dominates the antitrust litigation landscape in Europe. Truck manufacturers face claims in practically all European countries, with a focus on the three core jurisdictions as well as Spain.

Along with cartel-related damages claims, those relating to abuses of a dominant position are increasing. The trend has been triggered by a decade-long uptick in the number of both EU and national investigations into potential abuses of a dominant position, particularly in the tech sector and the pharmaceutical sector. For instance, in 2017, the EC fined Google in the

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Shopping case for abusing its dominant position. Although the decision has been appealed, many related civil damages claims against Google are already pending before national courts.

Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions are mandated by statute across Europe. Decisive for the development of private antitrust actions in Europe were two judgments by the European Court of Justice (ECJ) in *Courage/Crehan* (C-453/99 of 2001) and *Manfredi* (C-295/04 of 2006), in which the court held that the cartel and abuse of dominance prohibitions under European law are directly applicable and hence afford 'any individual' the right to claim damages. Following these judgments, the European and national legislators created or improved the legal frameworks for private antitrust actions.

Standing to bring a claim is extensive under European law and national laws must be construed accordingly. European law is based on the principle of full compensation, as the ECJ held in *Manfredi* (C-295/04; also see article 12(1) EU Damages Directive). Anyone who has suffered loss that has a causal connection with a competition law infringement may claim damages, irrespective of whether they are a direct or an indirect purchaser. Two ECJ judgments concerning the EC's *Elevators and Escalators* cartel decision confirm just how broad standing is. According to the ECJ's judgment in *Kone* (C-557/12 of 2014), compensation may be sought in relation to losses resulting from higher prices charged by non-cartelists who acted independently from the cartel and increased their prices under the umbrella of the cartel (umbrella damages). In *Otis* (C-435/18 of 2019), the ECJ even granted persons the right to claim damages where they were neither active as suppliers nor customers on the market affected by the cartel. The plaintiff, a public body, had subsidised construction projects by granting loans. It argued that the elevators and escalators cartel had increased construction costs and correspondingly the amount of loans required. Absent the cartel, the plaintiff would have been able to invest the additional amounts more profitably (lost interest profits).

In practice, however, even with a relatively broad legal concept of standing to bring a claim, standing may not always actually be proven in individual cases. Thus, following the ECJ's *Otis* judgment, the Austrian courts must now determine whether there actually was a causal link between the cartel and the alleged lost opportunities to invest the money more profitably. Indirect purchasers often struggle to prove the causal link between a potential overcharge at the first market level and higher prices at their downstream market level. Moreover, a generous approach to standing leads to practical issues. For instance, allowing indirect claims creates the risk of duplicative damages awards in all cases in which direct and indirect customers claim damages at the same time.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Private antitrust claims are governed by the two general provisions under European law prohibiting cartels and abuses of a dominant position, article 101 and article 102 TFEU, as well as the Council Regulation (EC) No. 1/2003 implementing these provisions. In addition, the

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European legislator has issued a far-reaching directive concerning civil damages claims, the EU Damages Directive (EU Directive 2014/104/EU).

Some issues are not specifically addressed by European law and therefore are regulated by national laws, namely procedural questions such as the provision of evidence and substantive questions such as the quantification of harm. However, European law has primacy over national laws (ECJ in *Costa/ENEL*, C-6/64 of 1964). According to the ECJ, national rules must respect two basic principles: the principle of equivalence and the principle of effectiveness. Applicable national laws governing cross-border cases must not be less favourable than those governing similar domestic cases (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise EU rights (principle of effectiveness).

The relevant courts and tribunals are primarily national civil courts. Claimants must file civil claims at national courts. The European institutions may, nevertheless, become involved in private antitrust litigation in two ways:

- National courts can refer questions on the interpretation of EU law that arise in the context of private antitrust litigation to the ECJ. Many rulings by the ECJ on crucial private antitrust litigation questions, such as the rulings in *Kone*, *Skanska* and *Otis*, derive from national court referrals. Preliminary rulings are binding on all courts in EU member states.
- The EC may become involved in national civil proceedings by way of *amicus curiae* briefs. These are opinions on the interpretation of EU law (article 15 Council Regulation (EC) No. 1/2003). Usually, national courts take the initiative and consult the EC, but the EC may also proactively issue an opinion. In contrast to rulings from the ECJ, the EC's opinions are not binding. In *National Grid/ABB*, a follow-on damages claim relating to the gas insulated switchgear cartel, the English High Court consulted the EC on a question around the disclosure of leniency material, but ultimately decided not to follow the EC's arguments. While the EC had rejected disclosure to protect its leniency regime, the English court ordered the disclosure of extracts of certain documents containing leniency material. Another example concerns the trucks cartel. The German Regional Court of Hanover decided to ask the ECJ for a preliminary ruling on how to interpret the EC's decision in the *Trucks* case and explained that the court opted against approaching the EC because an *amicus curiae* brief would not be binding (matter *Landkreis Northeim*; the ECJ has ruled on this in the meantime, see C-588/20 of 2022). Often, however, the EC's opinion has de facto authority. Recently (in October 2022), in a dispute over damages arising from the bitumen cartel, the Dutch District Court of Rotterdam indicated its preference for referring certain questions related to the statute of limitation to the EC and asked the parties for comments.

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PRIVATE ACTIONS

Availability

- 4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available in all types of antitrust infringements, according to the European Court of Justice (ECJ) (judgments *Courage/Crehan* (C-453/99 of 2001) and *Manfredi* (C-295/04 of 2006)).

A finding of infringement by a competition authority is – de jure – not required to initiate a private antitrust action, but – de facto – most claims follow decisions by the EC or a national competition authority (follow-on claims). Prominent examples are damages claims relating to the trucks and air cargo cartels. A finding of infringement by a competition authority has the following effect:

- decisions by the EC bind national courts and irrefutably establish proof of the infringement, according to article 16 Council Regulation (EC) No. 1/2003 and article 9 EU Damages Directive (EU Directive 2014/104/EU); and
- decisions by national competition authorities are generally only binding in the respective home jurisdiction while, in other countries, they constitute prima facie evidence of an infringement, according to the EU Damages Directive. In two member states, Germany and Austria, infringement decisions by a competition authority of another member state are also binding.

Details of the interpretation of decisions by the EC can be unclear. As these are acts of union law, a referral to the ECJ is conceivable. Thus, in a case before the Regional Court of Hanover, the court submitted the question to the ECJ as to whether the EC's decision on the cartel concerning medium and heavy trucks also covered special vehicles (eg, waste collection vehicles). The ECJ answered the question in the positive, referring in particular to the EC's statement of reasons for the decision (C-588/20 of 2022).

Following Brexit, decisions by the EC issued after 1 January 2021 do not bind courts in the United Kingdom. This means that claimants cannot simply rely on a decision by the EC to prove an infringement but rather must prove it separately. However, even though an infringement decision by the EC is not binding, it could have significant evidential value. Moreover, if the EC's decision was rendered before 1 January 2021 or if the EC initiated its investigation before that date, decisions by the EC still have a binding effect in the United Kingdom.

EU law can still be relevant generally. In *JJH Enterprises v Microsoft* (April 2022), the UK High Court continued to apply the ECJ's definition of 'undertaking' for the purposes of competition law, arguing that the greater part of the period relevant to the claim was before Brexit. The High Court also relied on the principles developed by the ECJ in its *Sumal* decision. Standalone civil claims, brought without any prior infringement decision, are rare. Prominent examples are the damages actions launched in the United Kingdom and Germany against MasterCard and Visa concerning inflated interchange fees charged in the context of their card payment

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systems. While no infringement decisions were ever issued against the defendants, the EC did close its investigation on the basis of commitments that removed its competition concerns. Such commitment decisions are not binding on civil courts, but they help plaintiffs to substantiate a competition law infringement. Thus, in proceedings before the German Regional Court of Berlin by a total of eleven plaintiffs including petrol station operators and large retailers against leading associations of the banking industry concerning alleged fixed merchant fees for electronic cash card payments, four plaintiffs were partially successful. Although this practice of fixed card fees had never been officially prohibited by the German Federal Cartel Office, the court ruled in March 2023 that it constituted an infringement of competition law. However, the court held that claims before 2009 were already time-barred because the banks' fee practices were known from the beginning. For the period afterwards, the court only awarded low damages or in some cases no damages at all. Two further examples are damages claims filed in Germany relating to a log wood cartel that was investigated but not sanctioned by the German Federal Cartel Office, as well as ValueLicensing's claim against Microsoft pending at the English High Court alleging anti-competitive contractual practices and an abuse of a dominant position.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

European law, namely [Council Regulation \(EU\) No. 1215/2012](#) (Brussels I), provides a jurisdictional regime for all cases with links to more than one country in the EU. It is directly applicable in all member states. In private antitrust actions and, in particular, cartel damages actions, plaintiffs often have the option to choose between different venues.

First, under the general rule in article 4(1) Brussels I, a defendant may be sued in the courts of a member state in which the defendant is domiciled.

Secondly, under the special rule concerning tort claims in article 7(2) Brussels I, claimants may bring a claim in the courts of the member state 'where the harmful event occurred'. This notion covers both the place where the event giving rise to the damage took place and the place where the resulting damage occurred (ie, it can open up two different venues). The claim can be brought in either of the available venues:

- The place where the event giving rise to the damage took place, the first alternative, is the place where the anticompetitive conduct was implemented (ie, where the cartel was concluded) (ECJ in *CDC/Hydrogen Peroxide*, C-352/13 of 2015) or where the abusive conduct occurred (eg, predatory prices were offered (ECJ in *flyLAL Lithuania*, C-27/17 of 2018)).
- Four ECJ judgments deal with the second alternative, the place where the damage occurred. In *flyLAL Lithuania* (C-27/17 of 2018), an abuse of dominance case, the ECJ held that the damage occurs in the member state whose markets were affected by the abuse. According to the judgment in *CDC/Hydrogen Peroxide* (C-352/13 of 2015), the damage caused by a cartel in general occurs at the claimant's registered office. Finally, the *Tibor-Trans* (C-451/18 of 2019) case is another cartel damages case (related to the trucks cartel), but the claimant was an indirect purchaser of the cartelist. In its decision, the ECJ did not refer to the claimant's registered office, but, in line with the principles previously established for abuse of dominance cases, considered the place where the damage

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occurred to be the member state whose markets were affected by the cartel and where the claimant had suffered damage due to distortion of market prices. The ECJ specified the *Tibor-Trans* ruling in *RH/AB Volvo* (C-30/20 of 2021), another case related to the trucks cartel. The ECJ held that, in damages claims related to cartels, the member state where the damage occurred is the member state where the claimant bought cartelised goods. In cases where the claimant bought cartelised goods in several member states, jurisdiction should be concentrated at the claimant's main seat according to the ECJ – a pragmatic principle. Finally, the ECJ confirmed that article 7(2) Brussels I not only regulates international but also local jurisdiction within the respective member state.

Third, under article 8(1) Brussels I, in cases in which there are multiple defendants (as often in cartel damages claims), claimants can use one of the defendants as an 'anchor' and bring a claim against several of the defendants in any jurisdiction where the anchor defendant is domiciled. The precondition is that the claims against all defendants are so closely connected that it is expedient to hear and determine them together. This typically is the case for cartel damages claims, as confirmed by the ECJ in *CDC/Hydrogen Peroxide* (C-352/13 of 2015). In this matter, the ECJ moreover held that, even if the defendant serving as the 'anchor defendant' reaches a settlement with the claimant, jurisdiction remains with the competent court unless the settling defendant colluded with the claimant to artificially establish jurisdiction.

Fourth, the parties can agree on a forum under article 25 Brussels I. The ECJ provided guidance on the enforceability of jurisdiction clauses (eg, contained in supply agreements) in the context of private antitrust litigation in two cases. In the judgment *CDC/Hydrogen Peroxide* (C-352/13 of 2015), which concerned a cartel damages claim, the ECJ held that jurisdiction clauses only apply to cartel damages claims if the clauses specifically refer to them; generic jurisdiction clauses that refer merely to disputes arising from a contractual relationship do not suffice. In *Apple Sales International* (C-595/17 of 2018), the ECJ came to a different conclusion for abuses of a dominant position. In this case, the ECJ considered the generic jurisdiction clause to also cover claims based on the abuse. The ECJ explained that the abuse might already have occurred when the contract was entered into so that it had the required direct link with the contractual relationship.

Brexit has changed the rules for claims filed in the UK. Brussels I does no longer apply and the EU Commission has rejected the UK's application to accede the Lugano Convention of 2007, which followed similar principles. Therefore, in the UK, jurisdiction in private antitrust matters is determined by national law. Antitrust matters fall in the category of tort claims, for which UK courts have jurisdiction if an action is permissibly served on a defendant. This typically requires a prior permission to serve, which, in turn, is granted if the claimant is able to show that damage could have been sustained or an infringement committed in the UK.

In practice, based on this legal framework, European law often gives claimants the option to choose between different jurisdictions for their claim. Which jurisdiction a claim is filed in often has a significant impact on the course and the outcome of proceedings. Despite the EU Damages Directive defining a common standard on many aspects, differences in national regimes remain and practical approaches by national courts differ on questions such as disclosure, provision of evidence, damages estimation or scope of the passing on defence. Other factors such as the admissibility of litigation funding, the duration of proceedings or the availability of collective proceedings also play a role. 'Forum shopping' is, therefore, a frequent occurrence. For instance, in the *Trucks* case, a large number of Spanish freight forwarders

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decided to bring their claims in Germany. Another example is a German car manufacturer that decided to file its damages action relating to the roll-on roll-off vehicle shipping cartel in England.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Articles 101 and 102 of the Treaty on the Functioning of the European Union prohibit anticompetitive behaviour by corporations, not by individuals. Individual liability is therefore determined by national laws. As regards for instance Germany, the Netherlands, Spain and the United Kingdom, private antitrust actions may also be brought against individuals, including those domiciled in other jurisdictions (provided national courts have jurisdiction).

The ECJ dealt with the question of the liable entity for the first time in *Skanska* (C-724/17 of 2019). The case concerned a damages claim filed against a defendant who had acquired and subsequently dissolved a company involved in a cartel. The defendant claimed it was not liable for damages since it was not involved in the cartel, but the ECJ held that a defendant cannot escape liability through restructuring. The ECJ relied on the concept of 'undertaking' under EU law, which is not limited to the respective legal entity, but rather refers to the economic entity with all legal entities belonging to it (ie, usually the whole group of affiliated entities).

The ECJ widened its approach in *Sumal* (C-882/19 of 2021). The case concerned a different set of facts. No restructuring had occurred and claims were filed against a subsidiary of the entity involved in the cartel. The ECJ held that actions can nevertheless be brought against the subsidiary. According to the ECJ, liability may be attributed to the subsidiary if both entities belong to the same economic unit and therefore form a single undertaking. In addition, a specific link between the subsidiary's economic activity and the subject matter of the infringement must exist, namely, the subsidiary must be active on the market affected by the infringement.

The *Sumal* jurisprudence of the ECJ is being adopted at national level. For example, in the *Steel Abrasives* case (July 2022) the German Federal Court of Justice applied the factual presumption of cartel-related price increases not only when the affected goods were acquired from the parent company participating in the cartel, but also when they were purchased from its subsidiary that is part of the same economic unit.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

At a European level, there are no binding rules on litigation funding or contingency fees. The European Commission (EC) has, however, established a series of non-binding principles in its 2013 Recommendation on collective redress mechanisms and in its 2018 report on progress

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made in the practical implementation of that Recommendation. Overall, the EC has urged member states to impose restrictions to avoid abusive litigation and conflicts of interest.

National regimes differ and courts regularly deal with the admissibility of litigation funding structures. The topic is particularly controversial in Germany. Here, the most common approach is the 'assignment model': claimants assign their claims to a claims vehicle, which then files the action, bears all costs and fees of the proceedings and disburses a certain percentage of any awarded damages to the claimants. On the one hand, the German Federal Court of Justice adopted a relatively liberal approach in *LexFox*, *AirDeal* and *financialright*. On the other hand, there have been several decisions by German first and second instance courts declaring claims vehicles inadmissible. In 2015, the Higher Regional Court of Düsseldorf dismissed a damages claim by Cartel Damages Claims (CDC) relating to the cement cartel after a 10-year court battle and ruled that the assignment of claims to CDC was void because the vehicle was not sufficiently funded. This issue was corrected by CDC in a subsequent claim filed at a different court, which has been settled in the meantime. In February 2020, the Regional Court of Munich rejected a large claim seeking more than €600 million in damages from truck manufacturers. It identified several potential conflicts of interest in the funding structure, similar to the EC in its 2018 report. For instance, the court considered that profitability considerations by the litigation funder could ultimately risk early settlements that might not be in the claimants' best interests. In May 2020, February 2021, January 2022 and October 2022, the Regional Courts of Hanover, Stuttgart and Mainz dismissed damages claims concerning the sugar cartel and the log wood cartel because they considered assignments to be invalid. All decisions have been appealed. In contrast, the Regional Court of Dortmund questioned the aforementioned position and put forward the principle of effectiveness in European law. It issued a resolution in June 2022 that it is considering a referral to the European Court of Justice (ECJ) on this issue.

At the same time, claimants are exploring new funding structures. In December 2020, the claims vehicle TransAtlantis, a joint venture between two US investment funds, filed a mass damages claim at the Regional Court of Munich and offered claimants that assign their claims to the vehicle an upfront cash payment instead of a participation in any damages ultimately awarded by the court. The vehicle filed a parallel claim in the Netherlands. As of now, significant legal uncertainty surrounding claims vehicles remains in Germany, but a ruling by the Federal Court of Justice providing more clarity is expected.

In the Netherlands, collective actions have succeeded in two recent cases. Both claims, one brought by Cartel Damage Claims relating to the sodium chlorate cartel and one brought by Stichting Cartel Compensation relating to the air cargo cartel, were considered as admissible by the Amsterdam Court of Appeal (decisions of February and March 2020, respectively).

In the UK, finally, third-party litigation funding is quite common and the Competition Appeal Tribunal has, for instance, approved the funding of two applications for collective proceedings following the trucks cartel – one by UK Truck Claims Limited (in 2019) and the other by Road Haulage Association Limited (in 2020). Both decisions have been appealed.

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Jury trials

8 | Are jury trials available?

Jury trials are not available at the two European courts nor do any rules at European level exist on the availability of jury trials in the member states.

Discovery procedures

9 | What pretrial discovery procedures are available?

The EU Damages Directive (EU Directive 2014/104/EU) harmonised the rules on discovery in Europe and lowered the threshold for disclosure requests, by both plaintiffs and defendants. Upon the plaintiff's request, national courts may order the defendant or third parties to disclose evidence that plausibly supports the claim for damages (eg, allows plaintiffs to quantify damages). Defendants can counter this by requesting that plaintiffs or third parties provide evidence that supports defence arguments such as the pass-on of potential damages to the plaintiff's customers (article 5(1)). In the *AD/PACCAR* judgment of November 2022 (C-163/21), the ECJ interpreted article 5 (1) broadly and stated that it may also cover evidence which the defendant must create anew by gathering or classifying information, knowledge or data within its control. The decision was preceded by an action related to the trucks cartel brought by AD and 44 other claimants against the defendants PACCAR and DAF before the Commercial Court in Barcelona. Against the request for disclosure of evidence, the defendants argued that some of the documents requested had to be produced specifically for that purpose and that such an obligation would constitute an excessive burden on them, going beyond a mere order to disclose evidence.

In the *RegioJet* decision (C-57/21 of 2023), the ECJ further strengthened the right to disclosure in civil courts and ruled that a parallel investigation by the EC into the same infringement does not prevent the right to disclosure of evidence to civil claimants.

Moreover, in contrast to previous discovery regimes in most jurisdictions that limited requests to items specified by the applicant, article 5(2) EU Damages Directive allows requests for the disclosure of relevant categories of evidence, as long as these categories are described as precisely as possible on the basis of reasonably available facts.

Despite these broad basic principles, to avoid excessive disclosure (in particular, fishing expeditions), article 5(3) EU Damages Directive requires courts to conduct a proportionality assessment before ordering the disclosure of evidence. The EU Damages Directive (article 6(6)) further expressly excludes leniency statements and acknowledgements in connection with settlement discussions from disclosure, which includes verbatim quotations of such statements in other documents. However, once a competition authority has closed its investigation, certain parts of the competition authority's file are no longer out of reach for courts (article 6(5)).

The majority of the member states have implemented the new rules literally or almost literally. However, for legal systems unfamiliar with disclosure, this new framework brings about fundamental changes and national courts might need time to acclimatise:

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- Spanish courts, for instance, have already applied the new rules and ordered the disclosure of documents in the *Trucks* case. The Commercial Court of Barcelona, however, had doubts in relation to a disclosure request relating to the *Trucks* case and referred certain questions to the European Court of Justice (ECJ) for a preliminary ruling.
- In Germany, courts so far hesitate to make use of the new rules. The Munich Regional Court, in a case related to the trucks cartel, denied a disclosure request targeting documents that the claimant had owned but did not possess anymore. According to the ruling, such documents are out of scope of the new disclosure rules. In contrast, in a case related to the car battery recycling cartel, the Hanover Regional Court granted a claimant's request to disclose the full confidential version of the Commission's infringement decision. Upon appeal by the defendant, however, the Celle Higher Regional Court suspended the enforcement of the disclosure request until the appeal proceedings are final. The court saw potential grounds for the defendant to successfully appeal the ruling of the Hanover Regional Court because the Commission's infringement decision mentions names of individuals, and their disclosure could violate privacy laws.
- The English courts, finally, continue to grant extensive disclosure. Thus, in its first judgment applying the EU Damages Directive related to a follow-on claim relating to the *Trucks* case, the English High Court ordered the disclosure of the entirety of the EC's file and only excluded leniency and privileged documents.

Admissible evidence

10 | What evidence is admissible?

European law does not provide binding rules on the admissibility of evidence in national civil litigation proceedings. The EC has, however, issued non-binding guidelines for national courts covering two topics: the quantification of damages (Communication on quantifying harm in antitrust damages actions and accompanying Practical Guide, 2013) and the quantification of a potential pass-on of damages to indirect purchasers of the cartelists (Passing-on Guidelines, 2019).

If national courts involve the ECJ by way of a request for a preliminary ruling, the ECJ usually relies on the facts established by the national court. Notwithstanding this, the ECJ has indicated that the taking of evidence (eg, hearing a witness) is in theory possible in a preliminary ruling procedure (*Bosman*, C-415/93 of 1995). To date, this has not become relevant. As an alternative to taking evidence itself, the ECJ can request clarification from the referring court (article 101(1) Rules of Procedure of the Court of Justice).

Legal privilege protection

11 | What evidence is protected by legal privilege?

According to article 5(6) EU Damages Directive, member states must ensure that national courts give full effect to applicable legal professional privilege under EU or national law when ordering the disclosure of evidence. The rules regarding legal privilege differ considerably in Europe.

- In common law jurisdictions with extensive disclosure procedures, such as the UK, Ireland and Cyprus, legal privilege is typically more relevant. The more documents that

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are potentially subject to disclosure, the greater the practical relevance for protection of privileged content. Legal privilege in these countries protects documents that have been created for the purpose of giving or obtaining legal advice or in preparation for litigation.

- In comparison, in civil law jurisdictions such as Germany, disclosure requirements have traditionally been much narrower, which is why the protection of legal advice is of less practical relevance or does not exist at all. It remains to be seen whether jurisdictions with narrower or no existing concepts of legal privilege will introduce additional protection for defendants now that a practical need has arisen following the introduction of broad disclosure possibilities.

With regard to trade secrets, the EU Damages Directive establishes that they need to be protected appropriately. National courts should have at their disposal a range of measures to protect confidential information from being disclosed during proceedings (Recital 18). According to the EC, measures could include the redaction of confidential information, confidentiality rings, the appointment of experts to review confidential information or *in camera* (ie, closed) hearings (Guidance for national courts on how to protect confidential information when handling disclosure requests, 2020).

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions are available regardless of whether there has been a criminal conviction or not.

Contrary to the approach in the United States, criminal sanctions for antitrust infringements (imprisonment or financial penalties) do not play a major role in Europe. European law does not provide for criminal sanctions (article 23(5) Council Regulation (EC) No. 1/2003). While most European jurisdictions have criminal sanctions for at least some types of antitrust infringements (eg, in Germany, bid-rigging is a criminal offence), in practice they focus on administrative sanctions such as fines.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence or findings in criminal proceedings are typically of no or only limited relevance in private actions because criminal sanctions are rare in Europe. Where criminal sanctions have been imposed, whether evidence and findings from the criminal case are admissible in civil actions depends on the national regime.

Leniency applicants are (only) partially protected from follow-on litigation. They are not immune to civil damages claims, unlike in the United States, but are exempt from joint and several liability for damages caused by the other cartellists (article 11(4)-(6) EU Damages Directive). Leniency applicants are thus only liable to their own direct and indirect purchasers. Two exceptions exist to this basic principle:

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- where purchasers cannot obtain full compensation from the other cartelists (eg, because they are insolvent), leniency applicants are jointly and severally liable for harm caused by the cartel; and
- regarding other cartelists, leniency applicants may be required to pay contribution for claims related to damages caused by cartel outsiders, namely umbrella effects.

Private claimants usually rely on the (administrative) decision by the EC or a national competition authority, which establishes irrefutable proof of the infringement. The EC publishes its decisions on its website. Since certain passages must be redacted before publication, the publication of these EC decisions can, in some cases, take a long time, and in rare instances (*Air cargo*) up to five years. In *Evonik Degussa* (C-162/15P of 2017), the ECJ dealt with the question of which parts of an EC decision must remain confidential. The ECJ ruled that the following parts cannot be considered as confidential: quotations from leniency statements; and quotations from documents provided by the defendant in support of its leniency statement unless the defendant or a third party can claim legitimate interests of confidentiality such as business and trade secrets.

In practice, plaintiffs in addition often request access to a version of the EC's decision with fewer redactions, the full confidential version of the EC's decision or documents from the EC's file. Obtaining access to these documents is difficult. To protect the effectiveness of their leniency programmes, the EC and national competition authorities are reluctant to disclose documents and evidence obtained in their investigations to private claimants. European courts have established high hurdles for national courts. Thus, in its controversial decisions *Pfleiderer* (C-360/09 of 2011) and *Donau Chemie* (C-536/11 of 2013), the ECJ held that European law does not per se preclude private damages claimants from obtaining access to leniency statements. However, the ECJ stressed that, before ordering the disclosure of documents, national courts must carefully weigh the goal of compensating potential damages against the effectiveness of leniency programmes. Following the *Pfleiderer* judgment, the German national court that had referred the question to the ECJ rejected the plaintiff's request to access the defendant's leniency statements.

The EU Damages Directive (article 6(6)) expressly excludes leniency statements and settlement submissions from disclosure (blacklist) so that a case-by-case assessment is no longer required for these documents.

Defendants threatened with the publication of details they consider to be confidential can seek interim relief with the ECJ pending a decision on the merits (ECJ's orders in the matters *AGC Glass Europe* (C-517/15P) and *Evonik Degussa* (C-162/15P)).

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The ECJ dealt with the question of a stay of private antitrust actions in its *Masterfoods* judgment (C-344/98 of 2000), which was the basis for article 16(1) Regulation 1/2003. The judgment concerned a follow-on damages claim filed at a national court that was based on a decision by the EC that was, at the same time, being appealed to the General Court. Such situations arise regularly in follow-on damages claims. An example is the *Trucks* case where

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one manufacturer has appealed the EC's decision to the European courts, while claimants have already filed civil damages claims involving trucks sold by this manufacturer at national courts. Another example – an abuse of dominance case – is the civil damages claims filed against Google in Germany, the Czech Republic and the United Kingdom based on the EC's decision in the *Shopping* case, which Google has appealed.

In *Masterfoods*, the ECJ held that any national civil action should not proceed to trial if the outcome of the civil dispute depends on the validity of the EC's decision. The ECJ stated that rulings by national courts must be consistent with decisions from European institutions. Thus, in follow-on damages claims that rely on an appealed infringement decision, the ECJ ruled that national courts should stay the private proceedings pending a final judgment in the appeal proceedings. In compliance with this ruling, many German courts have stayed proceedings relating to the *Trucks* case where they involve the manufacturer that has appealed the EC's decision.

Standard of proof

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

European law defines requirements that national regimes must meet with regard to the standard and burden of proof. For the core prerequisites of a damages claim, namely competition law infringement, causation, damages amount and pass-on, the requirements are as follows:

- To prove a competition law infringement, the plaintiff can, in follow-on damages cases, rely on the decision by the competition authority, which is binding on the court. In standalone claims, which are rare in practice, the plaintiff needs to provide separate proof.
- With regard to causation, the EU Damages Directive (article 17(2)) establishes a legal presumption that cartel infringements cause harm. This legal presumption goes further than the factual presumption that has, for instance, been established in German jurisprudence. While the factual presumption in German jurisprudence only constitutes one factor in the overall assessment of causation and must be weighed against all other available factors, the legal presumption (that also applies in Germany for cartel damages after 1 January 2017) applies unless the defendant is able to prove the contrary.
- For the quantification of harm, neither the burden nor the standard of proof must render the exercise of the right to damages practically impossible or excessively difficult (article 17(1) EU Damages Directive). More specifically, national courts must be entitled to *estimate* the amount of damages where it is impossible or excessively difficult to precisely *calculate* that harm. European law neither prohibits corresponding national rules nor imposes any type of presumption in this regard. The Romanian legislator in October 2020 introduced a rebuttable presumption that cartels lead to a cartel overcharge of 20 per cent. In *Tráficos* (C-312/21 of February 2023), in a ruling related to the trucks cartel, the ECJ stressed that courts may only estimate the damages amount if it is practically impossible or excessively difficult to quantify the amount accurately. This assessment must take into account all relevant circumstances including, in particular, evidence disclosed by the parties. The referral was made by the Valencia Commercial Court, also in light of the practice by many

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other Spanish courts to apply a 5 per cent or 10 per cent overcharge rate caused by the trucks cartel by way of a broad-brush approach.

- The burden of proof for passing-on lies with the claimant or the defendant, depending on whether, respectively, the pass-on is used as an offence (indirect purchaser claims damages) or a defence (cartelist rejects damages claims by direct purchaser) (articles 13 and 14 EU Damages Directive). Claimants and defendants can request the disclosure of evidence from the other party or third parties. Article 14 EU Damages Directive creates a certain asymmetry in the standard of proof between the offensive and defensive use of the pass-on, as it grants indirect purchasers a rebuttable presumption of a pass-on.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The duration of civil proceedings in national courts differs across Europe. This factor plays an important role when determining where to file a civil claim (forum shopping):

- In Germany, cartel damages actions involving the usual two appellate stages take on average five to six years. The trend is towards longer proceedings, especially where claims are bundled.
- In Spain and the Netherlands, the situation is similar, with very long durations in particular for bundled claims. Thus, in Dutch courts, several bundled claims are pending inter alia relating to the air cargo, trucks, gas-insulated switchgear, escalators and elevators, cathode ray tubes, bitumen, beer and sodium chlorate cartels. None are resolved yet, even though the first claim relating to the air cargo cartel, for instance, was filed in 2010.
- In the United Kingdom, proceedings are even longer (but often also even larger). For instance, many of the follow-on damages claims relating to the trucks cartel were filed in 2016 or 2017. The first instance trials for these claims are now taking place. Further, there is the possibility of appeals to the Court of Appeal and possibly the Supreme Court. Another example is the *Merricks v Mastercard* case, in which the English Supreme Court in December 2020 issued its long-awaited decision on the admissibility of collective proceedings. This case was filed in 2016 and the Supreme Court's decision concerns only one of many issues under dispute.

If national courts involve the ECJ and request a preliminary ruling, the current average duration of such proceedings before the ECJ is 15.5 months according to the court's annual report for 2019. It is not possible to accelerate proceedings before the ECJ in antitrust matters.

Limitation periods

17 | What are the relevant limitation periods?

The relevant ECJ precedent on limitation rules is *Cogeco* (C-637/17 of 2019). It relates to a follow-on damages claim filed by Cogeco in Portugal based on an abuse of dominance by a national TV sports channel, which was sanctioned by the Portuguese competition authority. The Lisbon District Court considered the claim to be time-barred under the national three-year limitation period. The court concluded that the period had started to run in 2009 with the initiation of the infringement proceedings and had thus expired before Cogeco filed the

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damages action in 2015. The court was of the opinion that the running of the statute of limitation was not suspended during the Portuguese competition authority's investigation, but referred the question to the ECJ. The ECJ considered the Portuguese limitation rules to be too restrictive. It concluded that the combination of a three-year limitation period and no suspension rule made it practically impossible for Cogeco to exercise its damages rights and thus undermined the full effectiveness of EU law. The Lisbon District Court nevertheless dismissed the claim on the basis that it was time-barred. The court noted that the ECJ had overlooked that, even though the running of the statute of limitation was not suspended *ex lege*, Cogeco could, under Portuguese law, have applied for a suspension.

The EU Damages Directive, which was not yet applicable at the time of *Cogeco*, provides detailed rules on limitation periods (article 10 EU Damages Directive) that have now been implemented in all member states (but may not apply retroactively):

- the limitation period for cartel damages claims is five years;
- the limitation period does not begin to run before the infringement has ceased and, cumulatively, the claimant has knowledge (or can reasonably be expected to have knowledge) of:
 - the behaviour constituting the infringement;
 - the fact that the infringement caused harm; and
 - the identity of the infringer; and
- the running of the limitation period is suspended for the duration of the competition authority's investigation and any subsequent appeal process plus an additional period of one year after the infringement decision has become final.

As regards a potential retroactive application of this new regime, the ECJ ruled in June 2022 in *Volvo/DAF* (C-267/20) that limitation rules are substantive provisions within the meaning of article 22 (1) of the EU Damages Directive. Therefore, a retroactive application of these limitation provisions for conduct that was terminated before the implementation of the EU Damages Directive into national law is only ruled out if the previously applicable limitation period had already expired at the time the period for the implementation of the Damages Directive ended (26 December 2016). This was not the case in the dispute in which the referral was made.

In cases related to the *Euribor* cartel (C-198/22, C-199/22), the ECJ ruled in March 2023 that national law defining the publication of the EC's decision as the event triggering the limitation period does not violate European law, provided that it can be assumed that the injured party was aware of the essential elements of its claim for damages. As the ECJ added, this interpretation applies independent of the fact whether the injured party is a business or a consumer.

The EU Damages Directive does not prevent member states from maintaining absolute limitation periods (ie, limitation periods that start to run independently of the claimant's knowledge (Recital 36 EU Damages Directive)). Thus, in Germany, an absolute limitation period of 10 years exists, starting on the day on which the damage occurred (for all damages until 26 December 2016) or, respectively, the infringement ended (for all damages from 27 December 2016 onwards). The situation is similar in the Netherlands, where an absolute limitation period of 20 years exists that begins to run from the moment the damage occurred (for all damages until 9 February 2017) or the day after the infringement ended (for all damages from 10 February 2017 onwards). There are no equivalent absolute statutes of limitations

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in Spain and the United Kingdom. In accordance with the ECJ's judgment in *Cogeco*, the EU Damages Directive states that absolute limitation periods must not render it practically impossible or excessively difficult to exercise damages rights (Recital 36).

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Appeals available before national courts are determined by national procedural laws. Next to appeals at national level, a request for a referral of selected questions to the ECJ may be an option. Such referrals are only admissible if they relate to legal questions, namely the interpretation of EU law.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Since 2008, the European Commission (EC) has been advocating collective proceedings for antitrust claims (White Paper on Damages actions for breach of the EC antitrust rules). However, the EU Damages Directive of 2014 (EU Directive 2014/104/EU) did not include provisions on collective proceedings. Several member states had expressed concerns that such a mechanism would result in US-style class actions, or the emergence of a 'claims industry' in Europe. Collective proceedings in respect of antitrust claims will not become available under the recently adopted [EU Representative Actions Directive](#) ((EU) 2020/1828) either. While an earlier version included collective proceedings for antitrust infringements, they are no longer part of the final version, which entered into force on 24 December 2020.

There is, therefore, no harmonisation in national legislative frameworks. Collective proceedings have been introduced in a number of European jurisdictions, including the UK and the Netherlands:

- The [English Consumer Rights Act 2015](#) introduced opt-out and opt-in collective proceedings allowing a class representative to bring an action on behalf of all those harmed by an antitrust infringement. While opt-out class actions are only available to UK-domiciled claimants, opt-in collective proceedings can be brought by claimants located abroad as well. In both cases, the class representative must apply for a collective proceedings order (CPO) from the Competition Appeal Tribunal before proceeding to trial. This certification process ensures that the class members have sufficient common interest to constitute a suitable class of claimants. While the framework was created in 2015, only the landmark judgment by the English Supreme Court in *Merricks v MasterCard* of 11 December 2020 provided clarity on fundamental questions. Based on this judgment, the first ever CPO was awarded to Mr Merricks in August 2021, followed by additional CPOs in cases of abuse of a dominant position (*Justin Le Patourel v BT Group PLC*, 2021; *Gutmann v First MTR South Western Trains Limited et al.*, 2021) and in cartel damage claims (*McLaren v MOL et al.*, 2022).
- The Dutch legal system also provides for collective proceedings for private antitrust litigation. Claimants may unite themselves through associations or foundations (Stichting),

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which may litigate on behalf of the injured parties. On 1 January 2020, the [Act on Collective Damages in Class Actions](#) entered into force, which introduced opt-out class actions and, moreover, allowed foundations to claim damages instead of, as previously, merely declaratory judgments. The new regime is not limited to antitrust infringements; it allows class actions based on violations of consumer, environmental and data protection laws. To date, the cases filed under this regime do not include antitrust claims.

In comparison, a number of other European countries, such as Germany, do not provide for collective proceedings in competition law matters. Claimants nevertheless bundle claims by other means, such as the assignment of claims to a claims vehicle, or the joint launch of an action by several plaintiffs.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

At a European level, collective proceedings are not mandated by statute. The new EU directive on collective proceedings that entered into force on 24 December 2020 (the Representative Actions Directive) does not cover private antitrust actions.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no European legal framework for collective proceedings with regard to private antitrust actions.

22 | Have courts certified collective proceedings in antitrust matters?

There is no European legal framework for collective proceedings in antitrust matters. However, collective proceedings have been introduced in a number of European countries, including the United Kingdom and the Netherlands.

- In the United Kingdom, since their introduction in 2015, several collective proceedings have been launched. The judgment by the English Supreme Court in *Merricks v MasterCard* of 11 December 2020 appears to constitute the breakthrough for the new regime – since then, several collective proceedings have been certified. The case relates to a collective damages claim of approximately €16 billion filed by Mr Merricks against MasterCard on behalf of a class of over 46 million consumers for losses resulting from anticompetitive multilateral interchange fees (MIF). Mr Merricks alleges that the infringement resulted in merchants paying higher MIFs, which merchants then passed on to consumers. In the first instance, the Competition Appeal Tribunal (CAT) refused to certify the claim. Upon appeal, the Court of Appeal overturned the CAT's decision. The Supreme Court, upon further appeal, confirmed this ruling and identified a number of errors in the CAT's assessment. The case was therefore referred back to the CAT, who granted a CPO in 2021.
- The Dutch legal system also provides for collective proceedings for private antitrust litigation, but no antitrust claims have yet been filed under the Act on Collective Damages in Class Actions since its introduction on 1 January 2020. In the Netherlands, a majority

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of the bundled antitrust damages claims have been based on an assignment of claims to a claims vehicle, which then files the claim. In February 2020, the Amsterdam Court of Appeal in *CDC/Kemira* confirmed the validity of the assignments made to the claims vehicle Cartel Damages Claims in relation to the sodium chlorate cartel. In March 2020, the Amsterdam Court of Appeal also confirmed the validity of the claims vehicle Stichting Cartel Compensation in relation to the air cargo cartel.

In countries where no collective proceedings have yet been introduced, such as Germany, claimants have launched a number of bundled claims, often via claims vehicles using assignment models. The most frequent model is similar to the above-mentioned model used in the Netherlands – injured parties assign their claims to a claims vehicle, which then launches the action. Another common strategy is to combine individual actions into one collective action. In two recent decisions, however, German first instance courts have adopted a relatively strict stance towards such alternative models; both decisions have been appealed.

Opting in or out

23 | Can plaintiffs opt out or opt in?

There is no European legal framework for collective proceedings in antitrust matters.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

There is no European legal framework on collective settlements. Such mechanisms are equally rare at national level. One prominent example would be the Netherlands where the Dutch [Act on Collective Settlements of Mass Claims](#) facilitates collective settlements. The law allows the Amsterdam Court of Appeal to declare settlements as binding on all class members. The court may reject the settlement if the terms are unreasonable (eg, compensation is inadequate). The declaration binds all class members and is not limited to the parties to the proceedings. However, it is possible for class members to explicitly opt out of the settlement and pursue damages individually.

Since the Dutch Act on Collective Settlements of Mass Claims' entry into force in July 2005, nine collective settlement agreements have been declared binding. None of these cases concerned antitrust matters – instead, they dealt with claims from large numbers of individuals concerning, for example, violations of securities laws.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Collective proceedings are available in some European countries such as the United Kingdom and the Netherlands. If different legal proceedings in respect of the same matter are brought in more than one jurisdiction, article 29 Regulation (EU) No. 1215/2012 gives priority to the court first seized with the matter to avoid irreconcilable judgments. The court then has the

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exclusive power to establish whether it is competent to rule on the matter. Other courts seized with the matter must stay their proceedings until this is established. If the court first seized confirms its jurisdiction, then the other courts must decline jurisdiction in favour of that court (*lis alibi pendens* rule).

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

EU law pursues the principle of full compensation. Full compensation places a person in the position in which that person would have been had the infringement of competition law not occurred (article 3(2) EU Damages Directive (2014/104/EU) and European Court of Justice (ECJ) judgments in *Courage/Crehan* (C-453/99 of 2001) and *Manfredi* (C-295/04 of 2006)).

Forms of damages in cartel damages cases include:

- overcharges paid by customers of cartel members or undercharges in case of a buyers' cartel;
- umbrella damages (ie, overcharges paid by customers of cartel outsiders (ECJ judgment *Kone* (C-557/12 of 2014)); and
- overhang damages (ie, higher prices paid after the end of the cartel. In abuse of dominance cases claimants typically claim lost profits, for instance, if a company was foreclosed from the market by the dominant undertaking.

The EU Damages Directive (article 17) sets binding standards for all national regimes concerning the quantification of harm. In addition, the EC has published non-binding guidelines for national courts on how to quantify damages caused by competition law infringements (Communication on quantifying harm in antitrust damages actions, 2013). A Practical Guide accompanying the report explains various economic and econometric methods of estimating damages. Even though the Practical Guide is not binding, it is frequently referred to by parties in national proceedings.

Despite these common, Europe-wide legal standards for the quantification of damages, substantial differences remain between the legal frameworks at national level as well as the practical approaches taken by national courts:

- In Germany, there have been a number of judgments awarding damages. The median rate of damages awarded in Germany is 6.5 per cent according to the statistics, with the amounts of damages awarded ranging from 5 per cent to 33.5 per cent. Notable recent precedents are four judgments of the Regional Court of Dortmund concerning the rails cartel in which

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the court estimated cartel overcharges of 15 per cent and 10 per cent, without consulting an economic expert or applying the established econometric methods. In 2021, the Higher Regional Court of Celle, in a decision concerning the chipboard cartel, equally proceeded to estimating damages without involving an economic expert and awarded damages of 12 per cent based on a simplistic comparison of average prices during and after the cartel. Similarly, the judges at the Regional Court of Berlin estimated damages related to the rails cartel on their own based on the expert analyses presented by the parties and awarded damages of €4.4 million (March 2023). The Regional Court of Munich, in contrast, refused to estimate the cartel overcharge without instructing an economic expert in a decision of February 2021 related to the *Trucks* case. Finally, lump sum damages clauses in supply contracts are permissible according to a ruling of the German Federal Court of Justice of February 2021. The court held that lump sum damages clauses of up to 15 per cent can be acceptable, but also clarified that the defendant may prove that the damage actually caused was lower than that or that no damage occurred at all.

- In the Netherlands, decisions awarding damages are rare. In *TenneT/ABB*, the District Court of Gelderland in 2017 awarded damages of €23 million plus interest to TenneT. It was the first decision to award cartel damages in the Netherlands. The decision has been appealed by the defendant to the Court of Appeal of Arnhem-Leeuwarden, which has appointed an independent expert to assess the damages amount as well as a potential pass-on. Dutch courts often stagger proceedings and adopt interim judgments on fundamental issues of a claim. For instance, the District Court of Amsterdam adopted an interim judgment in 2021, according to which the truck cartel principally caused damages. The court will now assess the amount of damages separately. Another example is a ruling on the applicable law by the Court of Appeal of Amsterdam in a case concerning the air freight cartel.
- In the United Kingdom, damages have been awarded in several cases so far: *BritNed v ABB*. BritNed claimed damages including interest in excess of €200 million based on the EC's decision in the *Power Cable* case. In February 2018, the High Court awarded BritNed only a part of the damages sought (€11.7 million plus interest). Following ABB's appeal, the Court of Appeal in December 2019 further reduced the damages amount awarded and ordered BritNed to repay approximately €5 million to ABB. In *Royal Mail/BT v DAF* (February 2023), the UK Competition Appeal Tribunal estimated the cartel-related price overcharge at 5 per cent after evaluating expert reports. Counterarguments by the defendants – such as a potential pass-on – were rejected by the Tribunal.
- The Spanish courts have regularly awarded damages. Most of the judgments relate to the trucks cartel. According to statistics, there are more than 3,000 judgments by first instance courts and 1,185 judgments by appellate courts in Spain relating to the trucks cartel. These have awarded damages of between 5 per cent and 15 per cent of the purchase price plus interest. This relatively broad-brush approach has recently been criticised by the Valencia Court of Appeal (judgment of November 2022). The court stressed that there is no automatic right to damages and required proper evidence to support damage calculations. These questions should at some point be settled by the Spanish Supreme Court, before which many cases are now pending.

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Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

According to the ECJ in *Factortame I* [C-213/89 of 1990], national courts have the power to grant interim relief in matters concerning rights derived directly from EU law (such as articles 101 and 102 of the Treaty on the Functioning of the European Union), even if national procedural rules do not allow it. In this case, an English court found an infringement of EU law, but noted that English law did not allow interim relief. It therefore referred the question to the ECJ, which held that national courts may base interim measures directly on European law because the protection of rights under EU law required the immediate availability of a remedy.

The specific procedural requirements for seeking and obtaining interim relief, such as the standard of proof, are a matter of national procedural rules.

Punitive damages

29 | Are punitive or exemplary damages available?

No. The EU Damages Directive is based on the principle of full compensation and explicitly states that damages regimes must not lead to overcompensation, whether by means of punitive or exemplary damages (article 3(3)).

In practice, the question of overcompensation often becomes relevant in the context of the pass-on of damages. Simultaneous claims from different market levels can lead to overcompensation. The EU Damages Directive (article 15 and Recital 39) aims to protect defendants from multiple liability towards claimants from different levels of the supply chain and limits claims at each market level to the actual loss. In certain cases, even though goods have been sold over various market levels, simultaneous claims at different market levels can be excluded for practical purposes, for instance where indirect customers only suffered 'micro-damages' and are unlikely to assert them. The German Federal Court of Justice held in a judgment of 23 September 2020 that in such cases a deviation from the principle of full compensation can be justified and an award of the full amount made to the direct customer, even if it might have been able to pass on parts of its losses to indirect customers.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

The ECJ dealt with the right to interest in the matter *Manfredi* (C-295/04 of 2006). The court referred to the principle of full compensation and held that the payment of interest constitutes an 'essential component' of such compensation. The EU Damages Directive further specifies this right and stipulates that interest is due from the time when the harm occurred until the time when compensation is paid (article 3(2) and Recital 12 of the EU Damages Directive).

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National regimes differ significantly, but interest is usually a very significant factor. Since damages claims often relate to cartels that took place 10 or more years before, large sums of interest accrue and often make up more than half of the damages amount:

- One of the most generous regimes is that of the Netherlands, where the interest rate amounts to seven percentage points above the European Central Bank (ECB) base rate. Moreover, in a departure from most other European jurisdictions, compound interest is owed.
- In Germany, the interest rate is also relatively high, at five percentage points above the ECB base rate. Compensatory interest is available as a separate head of loss.
- In England, judges have relatively wide discretion and, in practice, often award interest at a rate of one to four percentage points above the Bank of England base rate. In the case *BritNed v ABB*, compound interest was claimed but rejected by the English High Court.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

European law requires full compensation. Therefore, claimants are entitled to full compensation, even in cases in which the cartel has already paid a substantial fine. By the same token, substantial fines do not necessarily imply high damages; even though the impact of the cartel may play a certain role when setting the fine, the methodology used to determine fines follows different principles and criteria.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

There are no rules under EU law on legal costs in national civil proceedings; this is determined by national law. If the ECJ issues a preliminary ruling at the request of a national court, it is for the referring court to decide on the costs of the proceedings before the ECJ (article 102 Rules of Procedure of the Court of Justice).

Joint and several liability

33 | Is liability imposed on a joint and several basis?

According to article 11(1) EU Damages Directive, cartelists are jointly and severally liable for the full harm caused by the infringement to which they are a party. The claimant thus has the right to claim full compensation for the damages caused by the infringement from any infringer. Only immunity recipients enjoy certain privileges.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

The EU Damages Directive (article 11(5)) provides for the possibility of contribution among defendants. A defendant liable for damages caused by other members of a cartel may recover the corresponding amounts from them. These European rules are supplemented by national laws that regulate the details of how contribution can be claimed:

- Under German and Spanish law, for instance, contribution claims must be asserted subsequent to a judgment in the damages proceedings. To ensure that the findings of the court in the damages proceedings are binding on the court dealing with the subsequent contribution claim, defendants typically serve third-party notices in the damages proceedings and invite other cartelists to join them as third-party defendants.
- In the Netherlands and the United Kingdom, contribution claims can either be introduced in the damages proceedings or raised subsequent to a judgment awarding damages.

Contribution shall, according to article 11(5) EU Damages Directive, be allocated among the cartelists according to their 'relative responsibility'. The EU Damages Directive does not provide a definition and thus leaves this to national laws. In Germany, the Federal Court of Justice, in a ruling on the calcium carbide cartel, mentioned a number of possible criteria for determining the relative responsibility: the share of supplies affected by the cartel, the cartelists' market shares, the role of the respective cartelist in the cartel, the cartel-related profit or simply a pro rata allocation. In the United Kingdom, Netherlands and Spain, there is no case law on this point. However, similar criteria are under discussion in legal literature.

Finally, the EU Damages Directive regulates the effect of a partial settlement on any subsequent damages actions. According to article 19(1), the claim of the settling injured party is reduced by the settling co-infringer's share. In addition, article 19(2) provides that non-settling co-infringers cannot claim contribution from the settling co-infringer. This concept is based on the German concept of the *beschränkte Gesamtwirkung* (limited overall effect).

Passing on

35 | Is the 'passing-on' defence allowed?

The regime established by the EU Damages Directive pursues the idea of full compensation at all market levels. Correspondingly, under article 13 EU Damages Directive, the passing-on defence is available to defendants to reduce or eliminate the plaintiff's damages claim by showing that the plaintiff passed on (parts of) the overcharge to its customers. Mirroring this, indirect purchasers have the right to claim damages from the defendant by showing that they suffered (parts of) the overcharge due to a pass-on by intermediate upstream suppliers. The EU Damages Directive even grants indirect purchasers a rebuttable presumption that a pass-on occurred.

Cartelists may thus face damages claims from different market levels. Article 15 EU Damages Directive foresees certain procedural safeguards to protect the defendant from multiple liabilities towards claimants from different market levels.

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To assist national courts in estimating the amount of a pass-on, on 9 August 2019 the EC published comprehensive guidelines (Passing-on Guidelines). However, the approaches of national courts differ:

- Spanish courts seem particularly restrictive, as the passing on defence has not yet been accepted by any court.
- English courts, in contrast, consider pass-on to be a valid defence (Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC*, 2020). While the burden of proving a pass-on generally lies with the defendant, once the defendant has substantiated a pass-on, the plaintiff must disclose how it has dealt with increased costs due to cartelised prices.
- The framework in Germany was established by the *ORWI* decision of the Federal Court of Justice of 2011 and refined in newer decisions of 2020 and 2021. Overall, the Federal Court of Justice takes a restrictive stance towards the pass-on defence. In a decision of 2020 relative to the rails cartel, the Federal Court of Justice barred a pass-on defence by cartelists per se. Even though the claimants could have passed on parts of potential damages to the next market level, namely public transport passengers, the latter would be highly unlikely to claim such damages. Allowing a pass-on defence would therefore unduly benefit the cartelists in the court's opinion. In a decision of 2021 relative to the trucks cartel, the Federal Court of Justice principally allowed a pass-on defence, but set high standards. The defendant must substantiate a potential pass-on for each aftermarket separately (eg, market for construction services where trucks are deployed). The court also noted that, in principle, double payments by the cartelists due to damages claims from different market levels must be avoided, but at the same time indicated that a pass-on defence could be restricted if, at the indirect market level, only minor claims are anticipated.
- In the Netherlands, the passing-on defence has been explicitly recognised by the Supreme Court (*TenneT/ABB*, 2016). Nevertheless, in the first judgment in the Netherlands awarding cartel damages, the District Court of Gelderland rejected the argument. It referred to the fact that customers on the next market level might not claim damages because the damages amounts at this level were too small (scattered damages). The judgment has been appealed.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In addition to the defences such as relating to the limitation of claims, the quantification of damages or the 'pass on', a number of further defences exist. In all cases in which there is no binding infringement decision (standalone claims), defendants may contest the alleged conduct. In follow-on damages cases, defendants typically defend themselves by showing that parts or all of the products do not fall within the product scope, geographic scope and period of the infringement, which means that they were not affected. Often, defendants also object to the plaintiff's standing to bring a claim or the defendant's liability. Whether the court has jurisdiction is also a regular issue. Additional defences are available depending on the circumstances of the individual case.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

The EU Damages Directive notes that alternative dispute resolutions are desirable and mentions out-of-court settlements, arbitration or mediation as possible mechanisms (Recital 48). The directive contains provisions that are aimed at facilitating such mechanisms, including the suspension of court proceedings for the duration of any consensual dispute resolution process (article 18). Correspondingly, in the case *Microsoft Mobile/Sony*, the English High Court in 2017 stayed follow-on damages proceedings relating to the lithium-ion batteries cartel to give effect to an arbitration clause.

Out-of-court settlements are common in cartel damages cases. Arbitration and mediation, in contrast, are used less often. This is, among other things, due to the fact that cartel damages claims typically involve a large number of defendants. Unless all of them submit to the dispute resolution process, which is highly unlikely, practical problems will arise. For instance, in proceedings before state courts, the parties to the action may serve third-party notices to ensure that the ruling is binding on non-involved parties (eg, in the context of subsequent contribution claims); this is not possible in arbitration proceedings.

Following the ECJ's ruling in *Eco Swiss* (C-126/97 of 1999), the arbitrability of competition law is accepted in most countries. The ECJ provided guidance on the enforceability of jurisdiction clauses in *CDC/Hydrogen Peroxide* (C 352/13 of 2015) and might adopt a similar approach concerning arbitration clauses. The ECJ held that jurisdiction clauses only apply to cartel damages claims if the clauses specifically refer to them. National case law on arbitration clauses is divided: courts in some countries, including the English High Court in *Microsoft Mobile v Sony Europe* (2017), have adopted a more liberal approach and ruled that common arbitration clauses also cover antitrust damages claims. Courts in other countries, such as in the Netherlands, are more restrictive and exclude antitrust damages claims unless they are expressly referred to in the arbitration clause.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

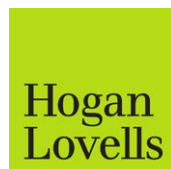
There is an emerging trend of a greater number of judgments awarding damages. The vast majority of judgments on cartel damages so far relate to procedural issues and questions of liability, whereas judgments on quantum (ie, the damages amount) are rare. This is currently changing. Spanish courts, in particular, regularly award damages. More than 3,000 judgments have been rendered by Spanish first instance courts, mostly concerning the trucks cartel, in which damages have been awarded assuming overcharge rates of between 5 per cent and 15 per cent. In Germany, the focus is slowly shifting from liability to quantum. While German courts have to date preferred to issue judgments on liability only (in the form of declaratory or interlocutory judgments), recent decisions by the Federal Court of Justice have restricted the scope for such judgments. Many courts have, therefore, instructed economic experts

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to calculate the damages amount and the number of judgments awarding damages will increase accordingly. Several courts have even estimated damages without instructing their own economic experts and awarded damages.

A hot topic in many European jurisdictions remains the admissibility of collective proceedings. Class actions such as those in the United States are not available in Europe, but plaintiff firms are exploring alternative models. In the United Kingdom, several collective proceedings have been admitted since the landmark judgment by the English Supreme Court in *Merricks v MasterCard*. In the Netherlands, courts have recently accepted the validity of two bundled claims using assignment models (ie, the assignment of claims to a claims vehicle acting as plaintiff). In Germany, the topic is particularly controversial. On the one hand, the Federal Court of Justice accepted the validity of claims vehicles bundling claims from consumers (*LexFox*, *AirDeal*, *financialright*). On the other hand, several first-instance courts rejected other bundled claims, including claims relating to cartel damages (*Trucks*, *Sugar*, *Log Wood*).

A third controversial topic in Europe is 'forum shopping' (ie, the question of where a plaintiff may file its claim). Popular jurisdictions among plaintiffs continue to be England, the Netherlands and Germany. It remains to be seen whether Brexit will make claims in England less attractive, as decisions by the EC concerning competition law infringements issued after 1 January 2021 are no longer binding on English courts (ie, plaintiffs must separately prove an infringement). Moreover, issues may arise as certain procedural rules, for example, those relating to the service of claims on defendants located abroad, have ceased to apply. Spain has recently started to see an uptick in cases – plaintiffs have been attracted by the fact that proceedings move quickly to trial and courts regularly award damages. Now that the EU Damages Directive (2014/104/EU) has led to the implementation of more plaintiff-friendly rules across Europe, additional jurisdictions could become interesting to plaintiffs.



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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 | How would you summarise the development of private antitrust litigation in your jurisdiction?

Private antitrust actions have existed in France long before the transposition of [Directive 2014/104/EU](#) of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (Damages Directive), but were essentially a matter of ordinary liability law, which has a long-standing tradition in France.

In 2014, the [Hamon Law](#) (Law No. 2014-344 of 17 March 2014) introduced the group action in French law. It aimed to facilitate private actions by consumers through approved associations. Its scope was however relatively limited.

In 2017, the Damages Directive was implemented in French law by Order No. 2017-303 of 9 March 2017 and Decree No. 2017-305 of the same date. This gave a new impulse to private antitrust litigation.

The new procedural rules (including the provisions relating to disclosure and production of exhibits), deemed now more favourable, are declared applicable to proceedings commenced on or after 26 December 2014.

The new substantive rules are applicable to liability where the event giving rise to the damage has occurred on or after 11 March 2017. Claims related to practices prior to that date remain subject to the previous rules. In practice, however, the case law had already provided solutions very similar to that of the new rules. The French Competition Authority, like the European Commission, communicates frequently on the possibility for victims of anticompetitive practices that it has sanctioned to seek damages in court. This further incentivises plaintiffs.

Victims of anticompetitive practices can bring both follow-on and stand-alone actions, in other words, with or without a prior decision by a competition authority finding an anticompetitive practice.

The Paris Commercial Court has been particularly active in handling antitrust damages actions. For litigation with a foreign element (eg, foreign-based parties), it has created an international chamber with specific rules aimed at facilitating the proceedings (use of the

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English language, shorter time frames, etc). In April 2018, a second degree of jurisdiction was added with the creation of a specialised international chamber within the economic division of the Paris Court of Appeal.

New operating procedures both at the level of the Paris Commercial Court and the Paris Court of Appeal have been drawn up in collaboration with the Paris Bar. These rules of procedure, which were developed within the framework of the existing rules (the French Code of Civil Procedure) were enshrined in two protocols signed between each jurisdiction and the Paris Bar in the presence of the French Minister of Justice, in February 2018. The rules defined in these protocols aim at meeting the expectations of international economic operators who wish to benefit from an efficient and attractive judicial system. These rules introduce, as the Code of Civil Procedure allows, more flexibility and interactivity in the conduct of hearings.

Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

The specific rules applicable to private antitrust actions are now set out in the [French Commercial Code](#) (FCC), whereas general procedural rules and rules for injunctive relief are laid down in the French Code of Civil Procedure.

Both direct and indirect purchasers (as well as affected competitors) are entitled to bring a claim, subject to proving the damage suffered and the causal link with the antitrust infringement, as well as the fault (when not established by presumption). Specific rules and presumptions apply in relation to the passing on of the overcharge borne by direct and indirect purchasers (articles L 481-4 and L 481-5 of the FCC), intended to facilitate their action.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Relevant legislation

The Order and the Decree of 9 March 2017, transposing the Damages Directive into French law, inserted into the FCC new legislative and regulatory provisions which became effective on 11 March 2017. Actions introduced prior to that date remain subject to the ordinary rules of civil liability contained in the French Civil Code.

With regard to civil liability:

- tort liability is covered by articles 1240 et seq of the French Civil Code;
- contractual liability is covered by articles 1231-1 et seq of the French Civil Code;
- injunctions are covered by articles 834 and 873 of the French Code of Civil Procedure (FCCP);
- court orders requesting the production or preservation of evidence are covered by articles 138 to 145 of the FCCP; and
- civil party petitions are covered by article 85 of the French Criminal Procedure Code.

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A valid claim must be based on one of these provisions and on the relevant antitrust provisions the infringement of which is alleged, namely, for actions involving a violation of French competition law, articles L 420-1 of the FCC on anticompetitive agreements and concerted practices and L 420-2 of the FCC on abuses of a dominant position or of a state of economic dependency, and for actions involving a breach of EU competition law, articles 101 and 102 of the [Treaty on the Functioning of the European Union](#). If relevant, claimants may cumulatively invoke French and EU competition law.

Relevant courts

A limited number of specialised courts deal with antitrust cases. The French legal system has the specificity of being dualist. On the one hand, administrative courts have sole jurisdiction over disputes relating to the operation of state entities and public services. On the other hand, judicial courts have a statutory competence for hearing all the other cases.

Regarding judicial courts, depending on rules governing territorial jurisdiction for the claim, and at first instance, competition law litigation is subject to the jurisdiction of specialised commercial and civil courts (article L 420-7 of the FCC). The Decree of 30 December 2005 designates eight civil courts (article R 420-4 of the FCC) and eight commercial courts (article R 420-3 of the FCC) competent in the first instance. On appeal, the Paris Court of Appeal has sole jurisdiction over judgments rendered by these courts (article R 420-5 of the FCC). The French Supreme Court has jurisdiction as the ultimate judge only on points of law.

Administrative courts may be competent in a limited number of cases to rule on actions for damages based on a violation of antitrust laws prohibiting anticompetitive practices, namely, when the public entity is the author or the victim of a competition law infringement. The French Highest Administrative Court has jurisdiction as the ultimate judge, excluding factual questions.

PRIVATE ACTIONS

Availability

- 4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

A system of private actions exists for all antitrust matters (cartels, abuse of dominance, restrictive agreements, etc). In a broader sense, breach of certain specific provisions of French law relating to restrictive commercial practices may also give rise to private actions. However, to the extent they are not covered by articles 101 and 102 of the Treaty on the Functioning of the European Union (and the corresponding French law provisions), they do not follow the specific rules transposing Directive 2014/104/EU (the Damages Directive).

Two types of private litigation coexist in French law. The first type of action is follow-on litigation, which is brought following a decision by the French Competition Authority (FCA), or by the European Commission, finding an antitrust infringement. In the second type of

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private litigation, known as standalone litigation, national courts are seized without any prior decision by competition authorities. Consequently, a prior decision of a competition authority is not necessary to initiate a private action in France, although having one considerably facilitates the burden of proof.

According to article L 481-2 of the French Commercial Code (FCC), an irrebuttable presumption is attached to the decisions of the FCA, which cannot be appealed in the ordinary way for the part relating to this finding, pronounced by the competition authority or the appeal court. If a national competition authority of an EU member state, or appellate court, finds an anticompetitive practice, that decision constitutes evidence of the commission of the practice. Finally, in accordance with article 16, paragraph 1 of [Regulation \(EC\) No. 1/2003](#), French national courts cannot take a decision that would run contrary to a final decision of the European Commission establishing an infringement and imputing the liability for that infringement to natural or legal persons forming an undertaking.

Under the regime prior to the transposition of the Damages Directive, decisions rendered by the FCA, or a national competition authority of another member state, are devoid of any binding effect in private actions for antitrust matters before the French courts. However, in practice, the FCA's decision finding an anticompetitive practice implicitly entailed a presumption of civil fault.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

Actions for damages arising from anticompetitive practices are brought before specialised courts designated in articles R 420-3 and R 420-4 of the FCC and appeals are lodged with the Paris Court of Appeal. Consequently, in the event of a dispute submitted to a French court, victims must refer to one of the 16 specialised jurisdictions designated by the Decree of 30 December 2005 (and codified under articles R 420-3 and R 420-4 of the FCC). However, these courts must also have personal, territorial, and subject matter jurisdiction.

Personal jurisdiction

The listed commercial courts have jurisdiction over litigation between commercial parties, while the listed civil courts have jurisdiction over cases involving non-trading litigants (eg, a non-commercial association, organisation or civil undertaking). Concerning group actions under the Hamon Law, only civil courts have jurisdiction (since these actions must be brought by approved consumer associations).

Territorial jurisdiction

According to article 42 of the French Civil Procedure Code (FCCP), the court with territorial jurisdiction is the court where the defendant has its place of residence or place of business. The place where the defendant lives is the place where a natural person has its registered address or, failing that, its residence (article 43 of the FCCP). In the case of a legal person, the place where the defendant is domiciled is the place where it is established. The plaintiff may choose between different courts if there are several defendants.

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Depending on the type of action, other courts may also have jurisdiction according to article 46 of the FCCP. Tort actions can be brought before the court that is located where the anti-competitive practice occurred or where the damage was suffered. In a contractual action, action can be brought before the court that is located where the products were delivered, or where the main obligation of the contract was performed.

Administrative actions must be brought before the administrative court located where the public contract was performed.

As a matter of public policy, referral to a non-specialised court is sanctioned as ground for dismissal. No derogatory jurisdiction clause can remove a private action from the specialised court. This applies both to contracts concluded between professionals and to consumer contracts. Clauses attributing territorial jurisdiction are deemed void in contracts to which consumers are party (article 48 of the FCCP in conjunction with article L.212-1 of the French Consumer Code).

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes. Article L 481-1 of the FCC, which affirms the principle of liability for the commission of an anticompetitive practice, refers to 'any natural or legal person forming an undertaking, or a body mentioned at Article L 464-2 of the FCC' (including associations of undertakings). Thus, private actions can be brought against both corporations and individuals if they form an undertaking within the meaning of competition law.

In addition, article L 420-6 of the FCC provides that if a natural person fraudulently played a personal and decisive role in the design, organisation, or transposition of the anticompetitive practice, he or she risks criminal penalties.

In practice, most private actions involve corporations and not natural persons.

Provided that French courts have jurisdiction in accordance with the relevant conditions of French private international law, private actions can be brought against corporations from other jurisdictions.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

The concept of financing a judicial or arbitral procedure is unknown to French law (except for specific cases, such as legal insurance). A decision in 2006 has characterised this type of contract as *sui generis*, since it is unknown in the European legal culture, except in Germany.

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In another case, where a third party employed a natural person to conduct on its behalf all the legal proceedings and to bear the costs in the event of failure, the French Supreme court ruled that the remuneration provided for was excessive, even though it was determined in consideration of the risk borne by the third party. This decision could be interpreted as stopping the excessive remuneration of the litigation funder (French Supreme Court, 1st civ., 23 Nov. 2011, No. 10-16.770).

In France, contingency fees as exclusive remuneration are forbidden (article 10 of the law of 31 December 1971 reforming certain judicial and legal professions). It is impossible for lawyers to only receive a percentage of the monetary amount their client receives when winning or settling the case. This prohibition is reflected in the national rules of procedure for lawyers. The French Supreme Court ruled that this prohibition extends to all lawyers' fees, without distinction between judicial and legal activities.

However, performance fees are allowed by these provisions, provided that such fees, linked to the success of the action undertaken, are complementary to the remuneration of the service provided. In practice, courts tend to limit them to a rate of 10 to 20 per cent of the savings or gains achieved.

In practice, victims can sell their claims to a third company, which will bring the action for damages to court. This possibility is mentioned in the Damages Directive (recital No. 31). In this situation, the buyer of the claim will generally take all the risk and fund the entire litigation.

Jury trials

8 | Are jury trials available?

There are no jury trials available in France in civil, commercial or administrative law matters. Jury trials are only for the criminal court that convicts felonies. In France, trial is decided by a single judge or a three-judge panel, depending on the court before which the action is brought and the importance of the case.

Discovery procedures

9 | What pretrial discovery procedures are available?

Communication of pieces of evidence or exhibits between the parties, obtaining exhibits held by a third party and the production of exhibits held by a party are dealt with in articles 132 to 142 of the French Civil Procedure Code (FCCP). The forced production of exhibits is subject to articles 138 and 142 of the FCCP. Measures of investigation *in futurum* (pretrial) (article 145 of the FCCP) and possibilities of judicial communication (articles 11 and 138 et seq of the FCCP) are also available.

Production of exhibits before the trial

Although there is no procedure in French law equivalent to the discovery procedure of Anglo-Saxon legal systems, the measures of investigation *in futurum* of article 145 of the FCCP come closest to that procedure.

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Article 145 of the FCCP applies before any trial, to establish or preserve evidence by means of an investigative measure. If these conditions are met, the judge hearing applications for interim measures may order the communication of documents before any litigation. In practice, the judge ensures that the use of this procedure does not become a form of civil raid.

The French Supreme Court considers that article 145 of the FCCP can also be used for evidence held by third parties.

Law resulting from the Damages Directive

The new procedural provisions resulting from the transposition of the Damages Directive are applicable for instances introduced on or after 26 December 2014. The parties now have the possibility of requesting disclosure of a category of exhibits identified as precisely as possible (articles L 483–1 and R 483–1 of the French Commercial Code (FCC)). To claim access to information from the potential defendant, a plaintiff must credibly demonstrate that it is plausibly harmed by an anticompetitive practice and specify the information sought as precisely as possible.

For proceedings commenced on or after 26 December 2014, in addition to the general regime, the new provisions set out a specific scheme for the competition authority case file. The judge may ask a competition authority to produce a document of its case file only if one of the parties or a third party cannot reasonably provide such document (article L 483-4 of the FCC). However, certain documents may never be communicated or produced, for example declarations made to a competition authority pursuant to a leniency procedure (article L.483-5 of the FCC). In addition, certain documents may not be communicated or produced until the proceedings are closed (article 483-8 of the FCC).

Documents obtained solely through access to the French Competition Authority's file may be used only by the person who had such access or their successor (article 483-10 of the FCC).

Admissible evidence

10|What evidence is admissible?

In accordance with the common French rules on the burden of proof, it is up to the victim to prove the damages for which it seeks compensation and the causal link between each of these damages and the anticompetitive practices.

In commercial cases, any evidence is admissible under the principle of freedom of evidence in commercial matters (article L.110-3 of the FCC), subject to respecting the principle of fairness of the evidence. For example, the recording of a telephone communication made by a party without the knowledge of the author of the remarks recorded as evidence constitutes an unfair process, making its production inadmissible as evidence. In civil cases, while no specific type of proof is required to demonstrate facts, written evidence must be submitted to prove the existence of any contract whose value exceeds €1,500 (article 1341 of the French Civil Code).

The following are examples of possible ways to convey evidence:

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- written proof;
- oath: one party waives its claim if the other party swears to the contrary. This oath puts an end to the dispute, but only concerns the party;
- judicial confession: this is a statement made during the proceeding before the judge which must favour the opposing party, be voluntary, and relate to legal facts in the broadest sense;
- testimony: a declaration by the author of the statement that he or she has personal knowledge of a past event, the truth of which he or she affirms. It can be oral or written. The testimony may be set aside by the judge;
- beginning of proof by writing;
- presumptions; and
- out-of-court confession.

In addition, when a decision of the FCA, the national competition authority of another member state, or the European Commission has become final, the claimant can rely on the findings of the relevant authority instead of providing evidence for the competition law infringement (article L 481-2 of the FCC).

Legal privilege protection

11 | What evidence is protected by legal privilege?

Scope of legal privilege

Legal privilege in French law only concerns exchanges between the client and its external lawyer. In-house counsel do not benefit from the legal privilege. Nevertheless, recent case law has extended the scope of exchanges, to cover documents exchanged between in-house counsel summarising or reporting internally on a defence strategy elaborated by an external lawyer, including comments made by in-house counsel and points not part of the external lawyer's advice (Cass Crim, 26 Jan 2022, No. 17-87.359).

Trade secrets

The [law on the protection of trade secrets of 30 July 2018](#) (the Trade Secrets Protection Law), implementing [Directive \(EU\) 2016/943](#), established general measures for the protection of trade secrets before civil and commercial courts. The definition of the information that can benefit from this protection is restrictive and must meet the conditions listed in article L 151-1 of the FCC, namely:

- not be generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

There is, however, a special procedure that allows parties to share confidential documents and information protected by the trade secrets law during a trial, without compromising the adversarial principle (ie, the confidential documents and information that are relevant to the resolution of the dispute are shared only in confidentiality circles, in which only selected

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persons have access to these documents and information). The Trade Secrets Protection Law requires these selected persons to respect a confidentiality obligation prohibiting them from using or disclosing the information they had access to (article L 153-2 of the French Commercial Code (FCC)).

At a minimum, the Trade Secrets Protection Law requires the inclusion of a representative of the other party in the confidentiality circle in addition to the lawyers and economic experts. However, French courts have accepted in some cases that only lawyers and economic experts could be in the confidentiality circles. In these cases, the parties agreed to exclude a representative of the other party – aside from lawyers and economic experts – because they all had to produce confidential information and they did not want to grant access to someone other than the lawyers and economic experts.

This special procedure is laid out in articles L 153-1 and R 153-2 et seq of the FCC.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

As a matter of principle, anticompetitive practices are sanctioned by the civil courts. However, an incrimination is possible under article L 420-6, paragraph 1, of the FCC for any natural person who fraudulently takes a personal and determining part in the conception, organisation or implementation of anticompetitive practices. Sanctions can go up to four years in prison and a fine. In practice, prosecutions on this basis are rare. To date, only around 20 convictions have been handed down as a principal offence for personal and decisive participation in an anticompetitive agreement (often in bid-rigging cases).

In addition, the criminal judge may decide upon civil claims arising from a criminal case. Article 2 of the French Criminal Procedure Code provides that the civil action for compensation for damage caused by a felony, misdemeanour or contravention belongs to all those who have personally suffered damage directly caused by the infringement. Article 4 of this code provides that the civil court has full discretion to decide whether to stay the proceedings when a case pending before a criminal court is likely to affect the potential outcome of the case pending before the civil court.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence from criminal proceedings is only admissible in certain circumstances in commercial or civil litigation and, as a matter of principle, the content of criminal investigations is confidential. However, once closed, the criminal ruling is likely to influence the civil court's proceeding. Therefore, it is possible in practice to use the evidence obtained in criminal proceedings in civil or commercial matters. The court may also decide that such evidence be produced.

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Leniency applicants are not protected from follow-on litigation, as specified in the FCA's general guidelines on leniency of 3 April 2015. According to article L 481-11 of the FCC, the beneficiary of total immunity from financial penalties under a leniency procedure is jointly and severally liable to compensate the harm suffered by victims other than its direct or indirect contractors only if such victims have not been able to obtain full compensation for their harm from the other joint and several debtors, after having previously and unsuccessfully sued them.

Information obtained during the FCA's investigation phase is not systematically disclosed. Some documents in the file of the FCA are radically excluded and cannot be communicated or produced, such as leniency submissions or settlement documents (article L 483-5 of the FCC). Article L 483-8 of the FCC further specifies the documents that may not be disclosed or produced until the proceedings are closed. Documents obtained solely through access to the FCA's file may only be used by the person who had access to the file or his or her successor.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

It is possible and common in French law to ask courts to order a stay of proceedings while awaiting the outcome of other events that may affect the judgment. A civil court may order a stay of proceedings (article 377 of the FCCP), which interrupts the proceeding. Where the stay of proceedings is not mandatory, its appropriateness is determined by the court. In general, applications for a stay of proceedings while an investigation by an administrative or a regulatory authority is in progress are accepted.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

To obtain damages for the harm suffered, the victim must demonstrate the following elements, in accordance with French civil liability law:

- a fault, namely, the commission of an anticompetitive practice mentioned in articles L 420-1, L 420-2; L 420-2-1, L 420-2-2 and L 462-5 of the FCC, as well as in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU);
- a damage suffered by the victim; and
- a causal link between the fault and the damage suffered by the victim.

As a matter of principle, the burden of proof lies with the plaintiff, in other words, the victim of the practice (article 1353 of the French Civil Code). The defendant can produce any evidence to the contrary. In commercial matters, the principle is that of freedom of evidence.

Following the transposition of the Damages Directive into French law, a series of legal presumptions have been introduced, making it easier for the victim to demonstrate its claim.

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First, there is an irrebuttable presumption of fault arising from the breach of the antitrust rule (article 101 or 102 TFEU or their French equivalents) found by a decision of the FCA that has become final (article L 481-2 of the FCC). A final decision of a national competition authority or of an appeal court of another EU member state only constitutes evidence of the commission of that practice. The court to which the claim has been brought will in this case retain its role in the characterisation of the facts and their imputation to the defendant.

Second, a rebuttable presumption of prejudice exists in the case of agreements between competitors (article L 481-7 of the FCC). No such presumption exists for unilateral conduct (ie, cases of abuse of dominance).

Third, a rebuttable presumption is established that the direct or indirect purchaser of goods or services has not passed on the overcharge to its direct contractors. This changes previous case law that placed the burden of proof on the claimant, who had to prove, on the one hand, that an overcharge was paid for the purchases and, on the other hand, that this overcharge was not passed on to its own customers. Since the implementation of the Damages Directive, the burden is on the author of the practice who must adduce evidence of total or partial passing on of the overcharge to avoid or mitigate its liability (article L 481-4 of the FCC).

Fourth, a direct or indirect purchaser who claims to have suffered the application or passing on of an overcharge must prove its existence and extent (article L 481-5 of the FCC). However, indirect purchasers of goods or services are deemed to have provided proof of this pass-on when they can demonstrate that:

- the defendant has committed an anticompetitive practice;
- the practice resulted in overcharge to the defendant's direct contractor; and
- the claimant purchased goods or used services involved in the anticompetitive practice or purchased goods or used services derived from or containing them.

In its defence, the defendant can always prove the contrary by showing that the overcharge was not passed on to the indirect purchaser or was only partially passed on by its previous contractor.

Fifth, the presumption of a failure to pass on the overcharge also applies to the direct or indirect suppliers of the author of the anticompetitive practice claiming a prejudice resulting from a reduction in the price of the goods or services concerned by this practice (article L 481-6 of the FCC).

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

It is difficult to provide a typical timetable for civil proceedings. It depends on several factors, such as the complexity of facts, the availability of evidence, and the level of specialisation of the court dealing with the case.

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Civil litigation before French courts will in most cases require 18 to 24 months of proceedings before the court of first instance. However, these can be extended due to procedural incidents, and in exceptional circumstances can go beyond five years or more.

An accelerated proceeding can be sought before the president of the court on the basis of article 858 of the FCCP. The claimant must demonstrate that there is an emergency to have its case settled rapidly. The calendar of the procedure is much shorter, between four and 12 months, and there is normally only one exchange of briefs. However, in principle, if the claimant decides to respond to the defendant's brief, it loses the benefit of the accelerated procedure.

Limitation periods

17 | What are the relevant limitation periods?

Claims for compensation arising from anticompetitive practices are limited to five years (article L 482-1 of the FCC). This time limit begins from the day on which the applicant knew or should have known:

- the acts or facts constituting a prohibited practice, and the fact that they constitute an anticompetitive practice;
- the fact that this practice causes it damage; and
- the identity of one of the perpetrators of the practice.

These provisions are practically identical to the rules in force prior to the transposition of Damages Directive. According to article 2224 of the French Civil Code, claims for compensation are limited to five years from the day the victim becomes aware (or should have become aware) of the following:

- the facts and that they qualify as a competition infringement;
- that such infringement caused damage; and
- the identity of one of the infringers.

Such limitation applies both to follow-on and stand-alone actions. The limitation period does not run as long as the infringement is still going on, neither does it run as regards a leniency applicant that benefitted from full immunity, as long as the victim has not been able to take action against the other infringers.

Concerning group action in competition law matters, the action cannot be brought after a period of five years from the date on which the decision was pronounced against a company by the competent national or EU authorities or courts that find the breach, and which is no longer subject to appeal for the part relating to the establishment of the breaches (articles L 623-24 and L 623-25 of the French Consumer Code).

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

It is possible to appeal the first instance decisions, namely, rulings rendered by the civil or commercial courts specialised in competition cases both on the facts and on the law. The Paris Court of Appeal has exclusive jurisdiction over these cases and the appeal should be lodged within one month of the notification of the first instance ruling made by a bailiff at the request of one party (known as 'signification').

Decisions issued by the Paris Court of Appeal can be further challenged before the French Supreme Court only on points of law.

Appeals against rulings of the administrative courts are filed with the competent administrative court of appeal within two months of the date on which the ruling was served on the parties. The French Highest Administrative Court has jurisdiction as the ultimate judge on appeal, excluding factual questions.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Joint representation action

For consumers, consumer associations can initiate joint representation actions to collectively defend the individual interests of consumers (articles L 622-1 et seq of the French Consumer Code). In this action, associations cannot represent legal entities.

The joint representation action for consumers allows any approved and recognised representative association on the national level to act in compensation for individual damages having a common origin and caused by the same professional to several consumers that are identified. To initiate such action, the association must have obtained a written mandate from at least two of these consumers.

However, consumer associations are prohibited from using advertising measures to obtain mandates. Furthermore, this action implies a burdensome administrative management, which explains why there has been little use of this mechanism so far.

Group action

Group action for disputes relating to anticompetitive practices has existed in French law since 2014. Consumer associations that are certified and representative at national level can seek compensation for individual damages suffered by consumers due to anticompetitive practices (articles L 623-1 et seq of the French Consumer Code). Neither consumers acting alone, nor professionals can initiate a group action.

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This group action can only be implemented in the context of collective follow-on after a final decision by a competition authority or a court of appeal. Therefore, the group action can only be initiated on the basis of a decision pronounced against the professional by the competent national or European authorities or courts that establishes the breach, and which is no longer subject to appeal for the part relating to its establishment (article L 623-24 of the French Consumer Code).

Group action allows consumers who are victims of anticompetitive practices condemned by a final decision of a competition authority to obtain compensation for economic damages resulting from material damages caused by the condemned practice (articles L 623-1 et seq of the French Consumer Code).

Two procedures are possible: the standard procedure and the simplified procedure. Under the standard procedure, the first phase is the judgment on the professional's liability (articles L 623-4 to L 623-11 of the French Consumer Code). In the event of a favourable decision for the victims, the judge determines the time period and the conditions for the consumers of the category concerned to join the action (article L 623-8 of the French Consumer Code). In the second phase, the judgment is implemented, involving individual compensation for the prejudice suffered by each consumer (articles L 623-18 to L 623-21 of the French Consumer Code).

A simplified procedure may be implemented where the identity and number of consumers harmed are known and where these consumers have suffered a loss of the same amount, of an identical amount per service rendered or of an identical amount by reference to a period or duration (article L 623-14 of the French Consumer Code). In this case, after having ruled on the liability of the professional, the judge may order the company to compensate consumers directly and individually, within a period of time and according to the terms and conditions set by the judge. The company that committed the infringement must inform the consumers of its intention to compensate them and obtain their consent to be compensated according to the terms and conditions set by the decision.

A reform of the legal regime for group actions is underway to unify all the different regimes; open these actions to more associations and actors; and entrust these litigations to specialised courts. This proposal for a law on the legal regime of group actions is currently being examined by the French Parliament.

Action of professional organisations

The joint representation action and the group action are reserved solely for consumers.

There is a specific provision for the benefit of businesses in article L 490-10 of the French Commercial Code (FCC). Professional organisations may bring an action before the civil or commercial courts for facts that directly or indirectly harm the collective interest of the profession or sector they represent, or the fairness of competition.

For any other collective actions, the general mechanisms of French civil procedural rules apply in consideration of the objective pursued by the Damages Directive mandating an effective redress for harm suffered as a result of anticompetitive practices.

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Applicable legislation

20 | Are collective proceedings mandated by legislation?

Collective proceedings are mandated by articles L 621-1 et seq of the FCC. According to these provisions, only a limited number of associations may introduce group actions based on these provisions.

Group actions follow the French rules governing civil liability and anticompetitive practices.

The action of professional organisations is mandated by article L 490-10 of the FCC.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no equivalent in French Law of the opt-out class action procedure.

Consumer associations

Consumer associations that can conduct joint representation and group actions must be accredited (articles L 621-1 and L 623-1 of the French Consumer Code).

Consumer associations can be certified after receiving the opinion of the public prosecutor (article L 811-1 of the French Consumer Code). Associations must prove their seniority, their effective and public activity in defending the interests of consumers, and the number of members paying individual contributions (articles R 811-2 et seq of the French Consumer Code). They must also prove their representativeness at national or local level, as well as their independence from all forms of professional activities. There is accordingly a national and a local approval.

A reform of the legal regime for group actions is underway to open these actions to more associations and actors, including specially created ad hoc associations of at least 50 victims or at least five companies or five local authorities. This proposal for a law on the legal regime of group actions is currently being examined by the French Parliament.

Certification of a group

The group is defined after the defendant is found liable. The court defines the group, sets the criteria and determines a period during which claimants concerned must apply to join the group (articles L 623 and L 623-8 of the French Consumer Code).

22 | Have courts certified collective proceedings in antitrust matters?

Not applicable.

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Opting in or out

23 | Can plaintiffs opt out or opt in?

The French group action is an opt-in system. In the event of group action, during the second phase of the normal procedure, consumers may express their wish to be represented in the action (article L 623-26 of the French Consumer Code). The simplified procedure is also an opt-in action (articles R 623-12 to R 623-14 of the French Consumer Code). A judgment of the relevant court defines the conditions to be met by the consumers to be able to join the collective action.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

If a collective settlement attempt is successful, the parties may refer the matter to the court for approval of their agreement (articles 1565 et seq of the French Code of Civil Procedure), but this is not mandatory.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable. France is not divided into multiple jurisdictions.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

French civil procedure law does not formally provide for collective proceedings in competition law matters. It is organised on an ad hoc basis through general civil procedure rules.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

The obligation to repair the damage is subject to the principle of full reparation, often translated as 'all the damage, nothing but the damage'. This refers to the idea that compensation tends to restore the victim to the situation they would have been in had the harmful act had not occurred. Consequently, punitive damages are not awarded in France.

Different forms of compensation are available, and damages are the principal remedy sought in private enforcement actions in France.

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Victims of the infringement are compensated with damages for the harm suffered, which can be pecuniary (overcharge suffered, loss of opportunity, lower profits) or non-pecuniary (damage to reputation for instance).

French law of civil liability is characterised by its flexibility as to the damages that may give rise to a right of compensation. Its wide conception allows compensation for all types of economic loss, such as loss of profit or opportunity.

It is also possible to compensate moral losses, if they have the characteristics required to be compensable. These broad categories are set out and illustrated, in the specific case of anticompetitive practices, in article L 481-3 of the French Commercial Code (FCC), which specifies that the list is not exhaustive.

The courts rely on soft law tools to assess damages, such as the European Commission's practical guide on the quantification of harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union and the [guide-lines](#) on compensation for economic loss provided by the Paris Court of Appeal.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Interim relief

Pursuant to articles 834 et seq and 484 of the French Code of Civil Procedure (FCCP), any plaintiff can file a claim with the president of a civil court or of a commercial court to request an interim order.

Either to prevent an imminent damage, or to stop a manifestly unlawful disturbance, the President of the court can order precautionary or rehabilitation measures (article 835 of the FCCP for the judicial courts and article 873 of the FCCP for the commercial courts).

In case of emergency, the president of the court can also order in summary proceedings all measures that are not seriously contested or that are justified by the existence of a dispute (article 834 of the FCCP for the judicial courts and article 872 of the FCCP for the commercial courts). Thanks to these provisions, the judge can also order the payment of an advance (known as a 'provision') to the victim if the existence of the obligation is not seriously disputed.

The exercise of the powers given to the interim relief judge is subject to the meeting of certain conditions determined by articles 834 and 835 of the FCCP for the judicial courts, and articles 872 to 873-1 of the FCCP for the commercial courts.

Injunctions on the merits

French courts seized on the merits can, along with the reparation of the harm done, pronounce injunctions to either cease the infringing practice, or annul clauses or contracts that are causing the infringement.

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The judges can also take any measure they deem necessary to repair the harm done, including imposing measures to inform the customers or publish the ruling.

Punitive damages

29 | Are punitive or exemplary damages available?

French tort law has a long-established principle of full compensation. This principle is opposed to the award of punitive damages, a concept also opposed by article 3(3) of the Damages Directive.

Consequently, reparation must be assessed solely with regard to the extent of the harm suffered by the victim, and not in any way according to the seriousness of the faults attributed to the author of the damage.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

The starting date for the calculation of interest is when the damages become due, which in French liability law is in principle the date of the judgment. According to article 1231-7 of the French Civil Code, a legal interest rate automatically applies to damages granted by a judicial decision. The victim does not have to prove any loss or formulate a specific request to receive this legal interest.

The legal interest rate is increased by five points after a period of two months following the notification of the judgement made by a bailiff at the request of one party (known as 'signification') if the judgement is provisionally enforceable.

However, the court can decide that interests begin to run from an earlier time, for example when the unlawful act was committed, when the victim issued a formal notice to repair damages or when the claim was filed in court.

The court can also decide to apply a different interest rate, in the form of damages to the victim for the loss caused by the fact that part of its cash flow was not at its disposal due to the illicit practices (for example, because it paid overcharges). This type of damages could correspond to a different interest rate such as one set at the level of the Weighted Average Cost of Capital (WACC), provided that the victim proves that the unavailability of the funds led it either to restrict its activity without being able to find alternative financing through loans or equity, or to abandon duly identified investment projects that were likely to yield the equivalent of the average cost of capital. In the absence of proof of a specific prejudice resulting from the unavailability of the sums allocated, the WACC cannot be retained. The legal interest rate should then be used.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

The role of competition and public authorities in France is to sanction the infringing party, while the French courts award damages to the victims in antitrust actions. These are two separate actions, which do not pursue the same goals.

Therefore, fines paid by the infringing party are not considered for the calculation of the damages awarded to the victims. Fines imposed by the French Competition Authority (FCA) take into account the public interest affected (what used to be accounted for as the 'damage to the economy' as a whole), while actions for damages only consider the individual damage suffered by each of the victims of the infringement.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Costs are the expenses incurred in the proceedings, for which the winner may be reimbursed by the loser, unless the judge decides otherwise, according to articles 695 et seq of the FCCP. Legal costs are listed in article 695 of the FCCP. They include, among other things, court experts and translators, but do not include lawyers' fees.

The principle is that the losing party must be ordered to pay costs (article 696 of the FCCP). Nevertheless, and exceptionally, by reasoned decision, the judge may order all or part of the costs to be paid by the winning party.

Article 700 of the FCCP allows the judge to order the losing party to pay to the winning party a sum corresponding to the reimbursement of any fees not covered by article 695. Known as 'irrecoverable costs', these types of fees are set out in article 700, which is non-exhaustive. In practice, this amount is freely determined by the judge and is generally granted. While it does not usually cover the reality of the fees, there is an increasing trend, particularly for the Paris Commercial Court and the Paris Court of Appeal, to grant significant amounts, provided the legal fees claim is solidly documented.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Joint liability has always existed in ordinary French civil law. In antitrust actions, the joint liability of multiple offenders has been specifically provided for at article L.481-9 of the FCC following the implementation of the Damages Directive. This applies to multiple authors of collective practices (cartels, vertical agreements, etc), as well as to several legal persons adopting a unilateral behaviour (in the case of a group of companies) which could therefore be jointly and severally liable for having jointly contributed to the anticompetitive practice.

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Consequently, where several persons have contributed to a single and indivisible damage through a joint anticompetitive behaviour, any of the authors of such behaviour can be obliged to pay full compensation for the damage caused. According to the government circular of 23 March 2017 providing guidance on actions for damages arising from anticompetitive practices, courts will apply articles 1313–1319 of the French Civil Code relating to the effects attached to joint liability.

As for the apportionment of liability, the court will determine the amount to be borne by each defendant according to the seriousness of their respective faults and the degree of their contribution to the damage suffered by the victim.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Possibility of contribution/indemnity among defendants

Article L 481-9 of the FCC provides certain criteria for the final contribution to the debt, concerning the contributory share of each of the parties liable. The distribution is made in proportion to the seriousness of their respective faults and their causal role in causing the damage. Even if fines and damages are quite distinct in terms of their respective purposes, the decision of a competition authority can be used by the judge when it comes to apportioning the burden of damages between the co-responsible parties.

There are therefore two criteria for the distribution of the contribution to the debt that are considered: (1) the intensity of the fault and (2) the causal intensity. Some of the elements that could be taken into account are the personal role played in the infringement (as leader or instigator), or the fact that the participation in the infringement was limited.

As the FCC makes no provision for the relationship of co-perpetrators with the victim, the general provisions of articles 1313 et seq of the French Civil Code apply. Since defendants can be jointly and severally liable, they may be obliged to pay the full compensation of damages to the victims. In this case, the defendant or defendants that paid the damages can subsequently file an action for contribution against the other defendants who did not participate in the initial payment.

Assertion of claims

The corollary of this principle of French civil liability is the recourse of the co-debtor who has paid the victim against his co-obligors to the debt of reparation (article 1317 of the French Civil Code). This recourse action may be exercised by principal action, namely, once the victim of the damage has been paid, or by accessory action when the co-debtor sued by the creditor calls his co-obligated parties as guarantors in the case.

There are three adaptations to this rule.

Firstly, concerning small or medium-sized enterprises (SMEs): following the Damages Directive, article L 481-10 of the FCC introduces a derogation from the principle of joint

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liability to limit the liability of SMEs. An SME is jointly liable to compensate only the damage suffered by its direct or indirect contractors. As far as the other victims are concerned, it will only be liable for its share of the damage to the extent of its contribution.

Secondly, concerning leniency, articles L 481-11 and L 481-12 of the FCC provide for a double exemption from the principle of solidarity for those who have benefited from a total exemption from a financial penalty pursuant to a leniency procedure. This excludes those who have only obtained a reduction of the penalty under a leniency programme and those who have unsuccessfully applied for leniency.

Lastly, concerning settlement, in accordance with article L 481-13 of the FCC, the co-debtor or co-debtors who have entered into a settlement with the victim may only claim from the other co-debtors who are not parties to the settlement the amount of their loss less the share of the loss attributable to the co-debtor who is party to the settlement. The other co-debtors will not have any contributory recourse against the settling co-debtor. However, the victim may claim from the co-debtor party to the settlement agreement an additional sum corresponding to the balance of its damage attributable to the other joint and several co-debtors, provided that it has previously and unsuccessfully sued them. In France, most private antitrust litigation is settled out of court.

Passing on

35 | Is the 'passing-on' defence allowed?

A person whose civil liability is sought for damages caused by an anticompetitive practice may argue that the claimant (the direct contractor) has in fact passed on all or a part of the price increase (or decrease) caused by the anticompetitive practice to its own contractors (the indirect contractors). This defence, referred to as the 'passing-on defence' has clearly been accepted in French law.

Since the implementation of the Damages Directive, article L 481-4 of the FCC creates a presumption according to which direct or indirect purchasers from victims of a competition law breach are deemed not to have passed on the overcharge resulting from the infringement.

It belongs therefore to the perpetrator of the practice to provide proof of total or partial passing-on of the extra cost to avoid or mitigate its liability (article L 481-4 of FCC), which may prove difficult in practice.

The direct or indirect purchaser that claims to have been passed on the surcharge has to prove its existence and its value (article L 481-4 of FCC). However, indirect purchasers do not need to prove they have suffered this overcharge if:

- the defendant has committed an antitrust infringement;
- the anticompetitive practice has generated an overcharge for the direct contractor of the defendant; and
- the indirect purchaser has purchased goods or used services affected by the anticompetitive practice, or has purchased goods or used services derived from or containing them.

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It is then up to the defendant to prove that the overcharge was not passed on to the indirect purchaser or that it was only partially passed on by its previous contractor.

The same evidentiary rules apply respectively to direct or indirect suppliers of the perpetrator of the practice who claim a damage resulting from a lower price of the goods or services concerned by the anticompetitive practice (article L 481-6 of FCC).

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

For situations that are not governed by special rules, and in the absence of other defences specifically provided for in the context of antitrust damages litigation, the general mechanisms of the French Civil Code apply. Defendants may attempt to show that the conditions for civil liability are not met.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

In French civil procedure law, conciliation can be initiated both outside and within the proceedings, and it can also be initiated by the parties alone, or suggested by the judge, at any point in the proceedings.

Outside the proceedings, conciliation, which is referred to as 'conventional', aims to reach an agreement outside of any legal proceedings with the help of a court conciliator.

In principle, the steps taken with a view to amicable resolution of the dispute or the justification for dispensing with such an attempt must be included in the document initiating the proceedings. However, the absence of these steps in the document initiating the proceedings can only lead the judge to propose conciliation or mediation, subject to the agreement of the parties.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

France has a long-standing tradition and well-developed case law in civil liability matters. Private litigation in antitrust matters had started developing long before the implementation of the Damages Directive; nevertheless, the introduction of the new legislation transposing the directive gave a new impulse to the matter. The overlapping rules during the transition period before the new rules become fully applicable are currently giving rise to some interesting cases on the application of the different rules (procedural and substantive) over time. Among the many other hot issues being currently dealt with by courts is the award and

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calculation of the different types of damages arising from antitrust infringements. As the case law develops, so are the awards. This is specifically the case for damages for moral prejudice and for applicable interest for discounting the damage over time.

Application of law over time

Courts are often faced with questions regarding the application over time of the rules resulting from the transposition of the Damages Directive. In the context of a follow-on, the Paris Court of Appeal implemented a solution closely following the Court of Justice advocate general's opinion in the *Volvo and DAF Trucks* case as regards rules of evidence and presumption (Paris Court of Appeal, 5 January 2022, *Carrefour v Vania*, No 19/22293). The Paris Court of Appeal considered that the rule establishing a presumption of prejudice for cartel practices has a substantive nature as it directly affects the legal situation of the author of the infringement concerned. Therefore, the court held that the legal presumption established by article L 481-4 of the French Commercial Code cannot be applied to unlawful practices committed prior to the date of transposition of the Damages Directive.

Moral prejudice

French law allows for compensation for moral prejudice caused by an anticompetitive practice, and French courts have already set precedent in that matter.

Non-material damage is one of the losses that a victim may suffer as a result of the acts of a wrongdoer, and for which it may claim compensation in the form of damages, provided that the conditions for civil liability are met.

Moral prejudice can be defined as any damage to non-pecuniary values. The French Supreme Court established the existence of moral prejudice for companies in a judgment of 15 May 2012, where moral loss was characterised by the internal and external deterioration of the company's image.

Certain types of behaviour are looked at particularly closely by the judge when assessing the possible moral prejudice: the misappropriation of the image, vexatious behaviour or behaviour undermining the brand image, the quality of services or the seriousness of the activity. This damage may be reflected in a deterioration of the brand image, the trivialisation or vulgarisation of the product, or a loss of the employees' confidence in the company's future.

For example, the Paris Court of Appeal held in a case that the foreclosure practices had harmed the victim's image and reputation in the eyes of the public, damaging the confidence and the momentum of the evicted competitor and undermining its ability to attract and retain new talent. Accordingly, it granted compensation of €100,000 (Paris Court of Appeal, 23 February 2022, RG No. 19/19239). In 2021, the Paris Court of Appeal also held that a cartel for a period of one year concerning contractual good faith caused moral prejudice and granted compensation of €30,000 (Paris Court of Appeal, 23 June 2021, RG No. 17/04101). The same year, the Paris Court of Appeal confirmed a judgment of the Paris Commercial Court that granted compensation of €1 million for moral prejudice due to the degradation of the image of the victim (Paris Court of Appeal, 15 October 2021, RG No. 18/15689).

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Discounting interest

In line with EU case law, the award of interest is an essential component of compensation. Accordingly, the harm suffered must include the reparation of the adverse effects resulting from the lapse of time since the occurrence of the harm caused by the infringement. These effects are monetary devaluation and the lost opportunity for the injured party to have the capital at its disposal. French courts have considered different ways to account for this. The weighted average cost of capital (WACC) is used only if the company can demonstrate that the unavailability of the sums of which it was deprived led it either to restrict its activity without being able to find alternative financing by loans or equity, or to abandon investment projects duly identified that were likely to yield the equivalent of the average cost of capital (eg, French Supreme Court, 1 March 2023, *Société Orange c/ Société Digicel Antilles françaises* No. 20-18.356 confirming Paris Court of Appeal, 17 June 2020, *Digicel c. Orange Caraïbes*, No. 17/23041, Paris Court of Appeal, 10 May 2017, *Outremer Telecom*, No. 15/05918 and French Supreme Court 1 March 2023, *Groupe Canal Plus* No.22-16.329). In the absence of proof of a specific prejudice resulting from the unavailability of the sums allocated, the WACC cannot be retained. The legal interest rate should then be used (Paris Court of Appeal, 8 June 2018, *SFR vs Orange*, No. 16/19147). Likewise, the legal interest rate should also be used in the absence of information on the loans and debts of a company and on the use it would have made of the sums of which it was deprived (Paris, 23 June 2021, *Doux*, No. 17/04101). In any event, the interest rate must be justified. The judge may also retain different rates depending on the periods considered and the nature of the indemnity. For example, in the *Outremer Telecom* case, the Court of Appeal applied the legal interest rate increased by 0.5 points from the end date of the practices and until payment of the sum to which the company had been condemned. It also granted compensation for the costs of proceedings (those engaged before the Competition Council where the case was brought prior to the judicial follow-on action), to which it applied the (simple) legal interest rate from the date of the first-instance Paris Commercial Court decision.



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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Private antitrust litigation has a long tradition in Germany, and the enforcement of competition law through litigation continues to increase. There are broadly three different kinds of private antitrust litigation:

- damages claims based on infringements of antitrust law;
- claims challenging abusive behaviour of dominant companies; and
- contractual claims being defended on competition law grounds.

Regarding claims challenging abusive behaviour by dominant companies, there is a large and established body of case law spanning more than 40 years, including, for example, refusal to supply and access to essential facilities claims.

Private antitrust litigation also has a long tradition in Germany in relation to competition law grounds being used to challenge or defend the validity of contracts in civil law cases.

Damages actions by victims of anticompetitive agreements against participants in the infringement were strengthened significantly as of 1 July 2005 (broadening of the circle of potential claimants, alleviation of the standards of proof, restriction of the passing-on defence, etc) and again as of 9 June 2017 when [Directive 104/2014/EU](#) (the Damages Directive) was implemented into German law (the codification of prima facie evidence and (rebuttable) presumptions that cartels lead to damages, the extension of limitation periods, the introduction of disclosure procedure, etc).

Even before the Damages Directive had been implemented, Germany was a favourable forum for antitrust damages claims in Europe. Most of the principles set out in the Damages Directive had applied in Germany for many years, either as part of written laws (such as the standing of indirect purchasers, the binding effect of decisions by competition authorities, and joint and several liability) or of the case law (such as availability of certain types of joint (de facto collective) actions, prima facie evidence that cartels lead to damages, and availability of the passing-on defence under certain circumstances).

By implementing the Damages Directive, the German legislator has further strengthened private damages actions. Inter alia, prima facie evidence that competition law infringements lead to damages has been explicitly implemented in the [Act against Restraints of Competition \(ARC\)](#). Further, it is confirmed that limitation periods do not start before a competition law

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infringement is terminated and both limitation periods and suspension periods have been extended significantly. In addition, a disclosure procedure has been established; however, whether this will actually facilitate or rather delay damages claims remains to be seen.

Taking into account the long-standing experience of the courts with antitrust damages claims and the recent changes as a result of the Damages Directive, it can be expected that Germany will continue to be an important forum for antitrust damages claims in Europe. The implications of Brexit may further strengthen the importance of Germany as a forum for damages claims resulting from competition law infringements covering more than one EU member state.

Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions are mandated by statute in Germany. Claims for injunctive relief are primarily based on section 33 of the ARC, and damages claims are based on sections 33a to 33h of the ARC.

In addition, claims for injunctive relief and for damages may under certain circumstances be based on sections 8 and 9 respectively of the [Act against Unfair Competition](#). A further legal basis can be found in general tort law, in other words, in section 823 et seq of the [Civil Code \(CC\)](#).

The invalidity of agreements for competition law reasons is based on section 134 of the CC in connection with section 1 of the ARC.

In a judgment of 28 June 2011 (KZR 75/10), the Federal Court of Justice held that indirect purchasers can bring damages claims against the members of a cartel. Therefore, if manufacturers engage in a price-fixing cartel and charge excessive prices, it is not only their contractual partners (eg, wholesalers or retailers) who might be able to claim for damages. Rather, anyone downstream to whom the whole or a part of the overcharge has been passed on has standing to bring a claim. If certain conditions are met, it is actually presumed that (a part of) the damage was passed on to indirect purchasers (section 33c of the ARC). However, indirect purchasers bear the burden of proof as to the amount of the damage suffered and as to the causal link between this damage and the infringement of antitrust law.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

In terms of jurisdiction, there are specific courts with specialised chambers dealing with antitrust cases.

According to section 87(1) of the ARC, regional courts have exclusive jurisdiction over civil actions based on national competition law or articles 101 and 102 of the [Treaty on the Functioning of the European Union](#), regardless of the amount in dispute. The federal states in Germany have been granted the authority to designate one or more specific regional

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courts that decide exclusively on antitrust matters within the relevant federal state (section 89 of the ARC). Almost all the federal states have exercised this authority.

Within these specific regional courts, specialised chambers have been established to deal exclusively with antitrust matters. However, as an exception to the general rule, according to section 95(2), number 1 of the [Courts Constitution Act](#), cartel damages actions are no longer heard by these specialised chambers but by the common civil chambers.

The parties can appeal to the higher regional courts. Again, the majority of the federal states in Germany have determined a single court of appeal that has exclusive jurisdiction over antitrust matters. In addition, these courts of appeal have established specialist antitrust divisions. Both the regional courts and the higher regional courts are trial courts that hear evidence on facts in addition to legal arguments.

The decisions of the higher regional courts can be appealed on points of law before the Federal Court of Justice, which also has a specialist antitrust division. Such an appeal is possible if the court of appeal grants leave to do so or if, on application by one of the parties, the appeal is admitted by the Federal Court of Justice.

PRIVATE ACTIONS

Availability

- 4** | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions (injunctive relief or damages) are available in any type of antitrust matter. Claims can be made against members of cartels as well as against companies that abuse a dominant position or any party to a potentially anticompetitive agreement.

In addition, it is possible to object to a merger if, for example, competitors or other affected market participants take the position that the respective merger should have been prohibited by the Federal Cartel Office (FCO). Those claims fall within the exclusive jurisdiction of the Higher Regional Court of Düsseldorf.

A finding of infringement by a competition authority is not required to initiate a private antitrust action. However, without a decision of a competition authority, the full burden of proof that an infringement has occurred rests on the claimant. If a competition authority investigates certain conduct, it is advisable to await the finding of the authority.

According to section 33b of the Act against Restraints of Competition, national courts are bound by a finding that an infringement has occurred once such a finding forms part of a final decision by the FCO, the European Commission or any competition authority of another EU member state.

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Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The international competence of German courts in antitrust matters is governed either by [Council Regulation \(EU\) No. 1215/2012](#) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or by the Lugano Convention 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters or by German procedural law.

According to Regulation (EU) No. 1215/2012, German courts have, for example, jurisdiction in antitrust matters if the defendant is domiciled in Germany (article 2(1)) or in cases of cartel damages actions where the harmful event occurred or may have occurred in Germany (article 7(2)). A place is considered to be the place where the harmful event occurred if only one of the essential facts constituting the offence occurred there. This is both the place where the event that gave rise to the harm occurred (the scene of the behaviour) as well as the place where the harm arose (the place of interference).

In the event of an alleged cartel activity, the scene of the behaviour and the place of interference are often different. The scene of the behaviour is the place where the cartel activities were initiated or practised. The place of interference would be the place where competition was restricted; in particular, where a potential claimant suffered a loss as a consequence of the cartel activity (regularly the operational location or registered seat of the claimant since that is the place where the overcharge was paid).

If one defendant of a group of jointly and severally liable defendants can be sued in Germany, all the defendants can be sued before the German courts if there is a sufficiently close relationship between the claims against all the defendants. In cartel cases, a claim against all the participants may, therefore, be brought against all the defendants if one defendant can be sued in Germany (the anchor defendant).

In a pending damages action regarding the Hydrogen Peroxide cartel, only one of the six defendants was based in Germany and served as the anchor defendant. The anchor defendant reached a settlement with the claimant (the professional claimant company Cartel Damage Claims SA), and none of the remaining defendants are based in Germany. The European Court of Justice found that jurisdiction remains with the German court unless the claimant and the defendant who reached the settlement colluded to artificially establish jurisdiction (decision dated 21 May 2015, C-352/13).

In the event that German procedural law applies, German courts have, in particular, jurisdiction for cartel damages actions against any cartel member if the cartel activity occurred in Germany. According to section 32 of the [Code of Civil Procedure \(CCP\)](#), jurisdiction for tort (here, illegal cartel activity) is connected to the place in which the tortious act was committed. In this regard, the same principles apply as those under Regulation (EU) No. 1215/2012. Other important provisions are sections 13, 17 and 21 of the CCP, which state that the court at the place where the defendant has its residence or where a defendant has its seat or a branch has jurisdiction. In cases where a claim against several cartel participants is brought before the court of residence of one participant, this court can be declared

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to have jurisdiction for all participants by the competent higher regional court according to section 36(1) No. 3 of the CCP.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes. Provided that German courts have jurisdiction in accordance with the relevant conditions, private actions can be brought against both corporations and individuals (including those from other jurisdictions).

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

In Germany, litigation may be funded by third parties. Most if not all the major litigation financing firms are active in Germany. They fund civil litigation costs and bear the financial risk if the claim has a sufficient chance of success. In the event of a successful outcome of the proceeding, the litigation financing firm will usually receive a certain percentage of the proceeds recovered by the claimant.

In the event of a cartel damages claim, there are further financing possibilities. Several firms and investment funds specialise in acquiring and pursuing cartel damages claims at their own risk and cost. The injured party will generally receive a certain amount of the proceeds recovered by these firms. Sometimes, litigation funds even pay a certain amount upfront when acquiring the claim. German courts only accept claims by those firms or investment funds if they are sufficiently funded to bear the procedural cost in case of defeat.

In addition, contingency fees are, at least to a certain extent, available in Germany. In 2008, the German legislature lifted the total ban on contingency fees to implement a prior decision of the Federal Constitutional Court. The Federal Constitutional Court held on 12 December 2006 that the prohibition of contingency fees was unconstitutional insofar as it did not contain any exceptions to the general rule. Therefore, contingency fees are now permitted if the claimant would be prevented from asserting his or her rights without contingency fees owing to his or her economic situation.

In addition, the agreement on contingency fees must meet certain formal requirements in accordance with sections 4(2) and (3) of the [Act on the Remuneration of Lawyers](#). The agreement must, for example, state for which compensation (estimated statutory fees or if applicable contractual fees that are not contingency fees) the lawyer would have agreed to take the case in the absence of a contingency fee and lay out the conditions that entitle the lawyer to claim compensation.

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Jury trials

8 | Are jury trials available?

No. There are no jury trials available in Germany. At first instance, damages cases are exclusively heard in one of the respective regional courts' civil chambers comprising (usually) three professional judges. All other cases may either be heard in a civil chamber or a chamber of commerce. If the cartel chamber responsible for the case is a chamber of commerce, two of the judges will be honorary lay judges who are businessmen.

Discovery procedures

9 | What pretrial discovery procedures are available?

Although German law traditionally did not provide for discovery proceedings equivalent to those in common law jurisdictions, the Damages Directive has led to the introduction of a limited disclosure procedure in connection with antitrust damages claims.

Section 33g of the Act against Restraints of Competition (ARC) introduces a right of access to information required to seek antitrust damages. To claim access to information from either the potential defendant or another third party, a claimant must credibly demonstrate to the satisfaction of the court that it has a claim for damages and specify the information sought as precisely as possible on the basis of reasonably available facts. In return, a defendant has the right of access to information from either the claimant or a third party if an action of damages is already pending (ie, not pretrial) and if the defendant specifies the information as precisely as possible on the basis of reasonably available facts and explains why it is needed (usually to quantify a passing on by the claimant).

In general, the interests of the party claiming access to information and the interests of the party that is in the (alleged) possession of the information must be balanced against each other. Particular account must be taken of:

- the extent to which the claim is based on available information and evidence;
- the scope of the evidence and the costs of surrendering the evidence, in particular where the evidence is requested from a third party;
- the exclusion of a discovery of facts that are not relevant for the enforcement of the claim pursuant to section 33a(1) of the ARC or for the defence against such a claim;
- the binding effect of decisions pursuant to section 33b of the ARC;
- the effectiveness of public competition law enforcement; and
- the protection of operating and business secrets as well as any other confidential information and the protective measures taken for this purpose.

Access to leniency statements and acknowledgements in connection with settlement discussions with competition authorities are explicitly exempted from the access to information. However, information in the possession of leniency applicants other than leniency statements is not exempted.

Various procedural aspects concerning the application of section 33g of the ARC are further specified in sections 89b to 89e of the ARC. For example, section 89b(1) of the ARC refers

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to section 142 of the Code of Civil Procedure (CCP). According to section 142 of the CCP, the judge can order the defendant or a third party to produce a certain document that it possesses that is relevant to substantiate the claim, provided that the document can be specified by the claimant and the claimant or the defendant has referred to the document during the proceedings.

In addition to requests against third parties, the claimant can request access to the records of the Federal Cartel Office (FCO) or other relevant competition authorities according to section 89c of the ARC. Section 89c of the ARC is a *lex specialis* to the general right to inspection of files according to section 406(e) of the [Code of Criminal Procedure](#), on which such requests were based before section 89b of the ARC entered into force. Leniency statements and acknowledgements in connection with settlement discussions with competition authorities are exempted as well. Requests for information against competition authorities are secondary to requests against other parties. Pursuant to section 89c(1), sentence 1, number 1 of the ARC, access to the records of competition authorities shall only be granted if the requested information cannot be obtained with reasonable effort from another party.

Section 89d(4) of the ARC explicitly stipulates that the rules contained in section 33g of the ARC and section 89b et seq of the ARC shall conclusively govern requests for access to information. In this regard, section 89d(4) of the ARC states that general civil procedural rules such as section 421 et seq of the CCP (the right to request that the defendant should produce certain documents in court proceedings) only apply if and to the extent that the claimant has a right to access to information pursuant to section 33g of the ARC.

Whether the extended rules on access to information will actually facilitate, or rather hamper damages claims, remains to be seen. Enforcing (pretrial) disclosure will likely result in significant delays and may, therefore, not always be attractive. On the other hand, defendants trying to delay cases by claiming access to information in connection with an alleged passing on may become a regular pattern. This is especially true as sections 89b(3) and (4) of the ARC provide for the possibility of a stay of proceedings and an interlocutory judgment regarding access to information.

Admissible evidence

10 | What evidence is admissible?

The claimant may base its claim on any available evidence, including:

- 1 documentary evidence (contracts, website printouts, emails, letters, attendance notes, telephone notes, etc);
- 2 evidence by witnesses;
- 3 expert evidence;
- 4 evidence by interrogation of the parties; or
- 5 evidence by inspection.

Of the above points, (1) to (3) are by far the most relevant in antitrust proceedings.

In addition, when a decision of the FCO, the European Commission or any other European competition authority has become final, the claimant can rely on the findings of the relevant

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competition authority instead of providing evidence for the competition law infringement (section 33b of the ARC and article 16(1) of [Regulation \(EC\) No. 1/2003](#)).

Legal privilege protection

11 | What evidence is protected by legal privilege?

Generally, the concept of legal privilege does not exist in Germany.

In German civil proceedings, the concept of legal privilege is of less relevance than in a number of other jurisdictions because there are no discovery proceedings equivalent to those in common law jurisdictions. Even the limited disclosure procedure pursuant to section 33g of the ARC does not contain rules on legal privilege.

In general, both (potential) claimants and defendants can request access to information in the possession of others. Restrictions only apply to leniency statements and acknowledgements in connection with settlement discussions with competition authorities.

The same applies with regard to access to the records of a competition authority. Communications between the defendant and its in-house counsel or external lawyers can be found in the FCO's file because the concept of legal privilege does not exist in the event that the FCO conducts cartel investigations and seizes documents. The FCO is entitled to seize all documents in the possession of the in-house counsel unless they concern defence correspondence. Defence correspondence is correspondence that is prepared in awareness of, and relates directly to, the actual defence in quasi-criminal cartel investigations or other antitrust proceedings that can lead to the imposition of a fine.

Documents in the possession of the defendant's external lawyer are protected by attorney-client privilege and cannot be seized. This is confirmed by section 33g(6) of the ARC.

Trade secrets are generally not privileged under German civil procedural law. However, confidentiality aspects must be considered in the context of a request for disclosure of information pursuant to section 33g of the ARC. If access to the information is granted, the court must ensure that trade or business secrets will be protected, for example, by way of redaction of the relevant documents.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions are available regardless of whether there has been a prosecution under competition or criminal law. There is no difference between private actions with regard to whether there has been a criminal conviction.

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Utilising of criminal evidence

- 13** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Pursuant to section 33b of the ARC, the claimant can rely on the findings of competition authorities.

In the case of a fining decision of the FCO or the European Commission, the claimant can introduce the decision as documentary evidence in civil proceedings. If the decision is final, the court is bound by the findings of the decision (section 33b of the ARC). In addition, the claimant has the right to access the respective authority's records in accordance with section 89c of the ARC.

Leniency applicants are only to a limited degree protected from follow-on litigation. In general, leniency applicants can be sued for damages. However, there is a modification of the concept of joint and several liability. According to section 33e of the ARC, leniency applicants only have to compensate for damages caused by their own supplies. An obligation to compensate for damages resulting from supplies of other participants in the infringement only arises if full compensation cannot be obtained from the other participants in the infringement. In addition, third parties that want to commence an action for damages against the leniency applicant will not be granted access to the leniency application.

Stay of proceedings

- 14** In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

A civil court can order a stay of proceedings pursuant to section 148 of the CCP if its findings are dependent on circumstances that are already the subject matter of either another dispute that is pending before a court or an investigation by a government authority. As a result, the courts can stay a follow-on damages action if the foregoing infringement decision of the authority is appealed against by the defendants (ie, if the decision is not final). However, in order not to undermine the private enforcement of antitrust cases, there is a strong tendency among courts not to stay proceedings despite pending appeals against the underlying infringement decision.

In addition, a stay of proceedings is possible in connection with proceedings regarding access to information.

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Standard of proof

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Standard of proof

As a general rule, the court has to be convinced that the facts as presented by the claimant are true. No absolute certainty is necessary in this regard. However, it is required that the judge does not have any reasonable doubts concerning the truth of the facts.

In relation to the amount of loss incurred by the claimant in a damages case, the standard of proof is reduced under German law as follows:

- pursuant to section 33a(2) of the ARC, a (rebuttal) presumption applies according to which cartels result in damages; and
- the court can estimate the amount of damages suffered by the claimant according to section 33a(3) of the ARC and section 287 of the CCP.

Claimants are not required to calculate exactly the damages they suffered as a result of the cartel; it is only necessary that the claimant provides a reliable factual basis for the estimate. In cartel cases, the court can, as an additional option, base its estimate of the amount of the loss incurred on the profits earned by the defendants through illegal cartel activities (section 33a(3) of the ARC).

Where the claimant asserts lost profits, the burden of proof is further alleviated by section 252 of the Civil Code (CC), according to which lost profits are, for example, those that the claimant would probably have earned in the normal course of events.

Burden of proof

In principle, the claimant must demonstrate and provide evidence for the facts forming the basis of the competition law infringement as well as of the loss incurred. However, the claimant may benefit from a shift in the burden of proof or from presumptions in certain situations.

In cartel cases, a (rebuttable) presumption applies for claims for damages that have arisen after 26 December 2016 according to which cartels result in damages (section 33a(2) of the ARC). For claims for damages that arose prior to this date, based on a decision of the Federal Court of Justice of 11 December 2018 (KZR 26/17) and in contrast to previous case law established by lower courts, there is no *prima facie* evidence but only a factual presumption that cartels result in damages. It remains to be seen, however, if and how this differentiation will have an actual impact on the standard applied by the courts.

In discrimination cases against dominant companies, the claimant only has to prove that there has been a different treatment. It is then on the defendant to demonstrate and to provide evidence that the discrimination of the claimant is justified.

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A further presumption is provided for in section 20(5) of the ARC, according to which it is presumed under certain conditions that selling below cost is illegal.

Quantitative rules

There are no quantitative rules of thumb or rebuttable presumptions of a quantitative nature in German competition law.

However, the Federal Court of Justice found in its decision of 10 February 2021 (KZR 63/18 – Rail Tracks VI) that clauses regarding liquidated damages in connection with competition law infringements are permissible in supply agreements. It is for the party that has committed the infringement to prove that the actual damage was below the percentage agreed as liquidated damage. However, the liquidated damage (ie, the percentage of the sales price) must not exceed the average damage normally occurring in the industry. In this regard, the court held that the parties may rely on available, economically sound general analyses of cartel-related overcharges, such as the Oxera study commissioned by the European Commission, based on which a contractually agreed upon damages rate of up to 15 per cent is generally acceptable. It remains to be seen whether the decision will have an accelerating effect on the estimate of the amount of damages by the courts in general in the sense that courts will increasingly rely on general analyses of cartel-related overcharges rather than on expert opinions prepared for each individual case.

Passing-on defence

The Federal Court of Justice, in a landmark ruling handed down on 28 June 2011 (KZR 75/10), held that members of a cartel are able to defend themselves against a claim for damages by raising the defence that the relevant applicants have passed on the overcharge to their customers (the passing-on defence). However, the passing-on defence is only available under the principle of 'adjustment of damages by benefits received'. As a result, the burden of proof is on the defendant that the direct purchaser passed the damage on to the next level of customers. That means the defendant must prove, first, that the overcharge has been passed on and, second, the extent to which the overcharge has been passed on.

As of 9 June 2017, the German legislature has codified these principles in section 33c of the ARC, which is applicable to claims for damages that have arisen after 26 December 2016. As a result of the introduction of section 33c of the ARC, it is unclear whether the passing-on defence is not available with regard to claims for damages that have arisen after 26 December 2016 if it leads to an unjust benefit for the defendant. This can particularly be the case if the indirect purchasers comprise a large and fragmented group in which each purchaser has only incurred minor individual damages, which makes it unlikely that the indirect purchasers will seek damages. In such a scenario and with regard to claims for damages that have arisen prior to the entering into force of section 33c of the ARC, which represent the vast majority of claims pending before German courts, the Federal Court of Justice, in a ruling handed down on 23 September 2020 (KZR 4/19), reaffirmed that the passing-on defence would not be available, since this would otherwise lead to an unjust benefit for the defendant. While the Federal Court of Justice acknowledged that the non-availability of the passing-on defence could result in an overcompensation of the claimant, it held that this result was acceptable in the interest of an effective enforcement of antitrust rules.

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Although the principle of an adjustment of damages by benefits received is only available if the adjustment (ie, the passing-on defence) does not result in an unjust benefit of the carteliser, section 33c of the ARC does not contain any wording to that effect. As a result, it may well be that based on section 33c of the ARC, the German courts will acknowledge the passing-on defence, even if it leads to a situation under which the defendant who, without doubt, caused damage will not be held liable for the overcharge. However, even if a passing on of overcharges can be demonstrated by the defendant, the claimant can claim lost profits as a result of volume effects; that is, if the higher resale price (including the overcharge) results in reduced sales volumes by the direct purchaser.

In cases where an indirect purchaser claims that the overcharge has been passed on to him or her by the direct purchaser and, therefore, aims to seek damages, the indirect purchaser can benefit from a shift in the burden of proof pursuant to section 33c(2) of the ARC. A passing on is presumed if the defendant infringed competition law, the competition law infringement led to higher prices for the direct purchaser, and the indirect purchaser purchased the cartelised products. It is then for the defendant to prove that a passing on has not occurred.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is no standard timetable for court proceedings. Generally, the duration of court proceedings is relatively short in comparison with other European jurisdictions.

According to information from the Federal Ministry of Justice and the Federal Court of Justice, civil court proceedings at first and second instance on average last nine to 10 months each and, in the event of an appeal on questions of law to the Federal Court of Justice, a further 12 to 24 months. This appears, however, a bit too optimistic if compared with the actual duration of proceedings. It is more realistic to expect 12 to 24 months for each of the first and second instances. This results in an overall duration of usually four to six years if the case is heard through all instances.

The parties in German civil proceedings have no explicit rights to accelerate proceedings. However, German procedural law contains several general provisions that aim to accelerate proceedings (eg, rules on time limits and estoppel).

In addition, every party has the possibility to accelerate the proceedings by its own conduct, such as by not requesting an extension of time limits for briefs, etc.

Limitation periods

17 | What are the relevant limitation periods?

As of 9 June 2017, there have been changes to the statute of limitations. The standard limitation period for cartel damages claims has been extended from three years to five years (section 33h (1) of the ARC). The time limit starts running from the end of the year in which the claim arose and the claimant became aware of the circumstances giving rise to the

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claim and the identity of the (potential) defendant or should have become aware without gross negligence.

In addition, there is an absolute limitation period for antitrust damages claims of 10 years from the date on which the claim arose. While it has been disputed in the past whether the limitation periods start to run from the time when the infringement was committed or only from the time when the infringement has come to an end, sections 33h(2) and (3) of the ARC now clarify that the limitation periods do not start to run before the infringement has come to an end. However, 30 years after the date on which the act causing the injury was committed, all damages claims are time-barred.

The limitation is suspended for the time of the investigations of the FCO, the European Commission or the competition authority of another EU member state or for the time of the court proceedings in connection with a request for access to information of the claimant in accordance with section 33g of the ARC (section 33h(6) of the ARC). The suspension period has been extended as well. The claims will expire no earlier than one year after the final decision of the respective authority or court.

Against the background that it had been disputed whether the preceding provision applies to claims that arose prior to the entry into force of that provision, the German legislature decided to include transitional provisions specifically on limitation periods (section 186(3), sentences 2 and 3 of the ARC).

Appeals

18|What appeals are available? Is appeal available on the facts or on the law?

The parties may appeal a decision of a regional court on the facts and on the law to the competent higher regional court. The decisions of the higher regional courts may be appealed on points of law before the Federal Court of Justice. Such an appeal is possible if the court of appeal grants leave to do so or if the appeal is, upon application of either party, admitted by the Federal Court of Justice.

COLLECTIVE ACTIONS

Availability

19|Are collective proceedings available in respect of antitrust claims?

German civil procedure law does not formally provide for collective proceedings in competition law matters.

However, despite the lack of collective proceedings, there is a possibility of submitting bundled damages claims through third parties. This possibility is of particular interest for end users and smaller companies that otherwise do not have the financial resources to assert their legal rights.

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In relation to a cement cartel in which the Federal Cartel Office imposed fines of approximately €660 million in April 2003, the Federal Court of Justice confirmed in 2009 (judgment dated 7 April 2009, KZR 42/08) the Regional Court of Düsseldorf's interlocutory decision of 21 February 2007 admitting a damages claim that was submitted by Cartel Damages Claims (CDC). CDC had bought the claims for damages of various companies, alleging an illegal overcharge by members of the cement cartel. As there is no legal basis for class action lawsuits in relation to private antitrust claims in Germany, the cartel victims assigned their individual claims to CDC in return for a payment of €100 each and a certain amount of the proceeds that will be obtained through the court proceedings. CDC pursues the respective claims on its own behalf.

However, with the first instance judgment of 17 December 2013, the Regional Court of Düsseldorf dismissed CDC's damages claim in its entirety for a number of reasons. Most notably, the court decided that the cession of the claims was contrary to public policy according to section 138(1) of the Civil Code as CDC would not have been able to cover all the expenses of the defendants in case of a complete loss of the case. In appellate proceedings, the Higher Regional Court of Düsseldorf on 18 February 2015 upheld this decision and rejected CDC's appeal in its entirety.

Another attempt by CDC in relation to the cement cartel, after sufficient funding was obtained and cession of the claims was reconducted, again resulted in a rejection of the entire claim. With the first instance judgment of 24 January 2017, the Regional Court of Mannheim found that the claims were by then time-barred. This decision deals with the question of whether the provision on the suspension of limitation periods that applied prior to 9 June 2017 also applied to claims that arose prior to the entry into force of that provision. As CDC appealed this judgment, it remains to be seen whether CDC will eventually be successful in relation to the cement cartel.

In relation to the sugar cartel, in which the Federal Cartel Office imposed fines of approximately €280 million in February 2014, with the first instance judgment of 1 February 2021 (18 O 34/17) the Regional Court of Hannover dismissed CDC's damages claim in its entirety on the grounds that the assignment of claims to CDC was invalid according to section 134 of the CC in conjunction with section 4 of the [German Act on Out-of-Court Legal Services](#). CDC had asserted claims assigned to it by both the direct and indirect purchasers of the very same sugar delivery. This has created, the court argued, an irresolvable conflict of interests, since with respect to claims assigned from direct purchasers, CDC needs to argue that a potential damage had not been passed on, while with respect to claims assigned from indirect purchasers concerning the very same particular sugar delivery, CDC needs to argue the exact opposite.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

No.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 | Have courts certified collective proceedings in antitrust matters?

German civil procedure law does not formally provide for collective proceedings in competition law matters.

However, despite the lack of collective proceedings, there is a possibility of submitting bundled damages claims through third parties. This possibility is of particular interest for end users and smaller companies that otherwise do not have the financial resources to assert their legal rights.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Not applicable.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

German procedural law does not provide for class settlements. However, if the parties agree on a settlement, no further judicial authorisation is required. For procedural reasons, however, it can be helpful to have a settlement recorded in court.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Germany is not divided into multiple jurisdictions. Once the claimant has brought a legal action before a German court, it cannot bring a claim in the same matter before any other German court (section 261(1) of the Code of Civil Procedure).

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

German civil procedure law does not formally provide for collective proceedings in competition law matters.

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However, despite the lack of collective proceedings, there is a possibility of submitting bundled damages claims through third parties. This possibility is of particular interest for end users and smaller companies that otherwise do not have the financial resources to assert their legal rights.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

As a starting point, the amount of damages follows a purely compensatory principle. German tort law does not provide for punitive damages, such as triple damages.

The calculation of damages suffered by the claimant is primarily based on section 249 of the Civil Code (CC) (principle of natural restitution). According to this provision, damages are calculated on the basis of the difference between the financial position of the claimant after the infringement occurred and the hypothetical financial position the claimant would have been in if the competition law infringement had not occurred. The financial status of the affected party must be considered as a whole; therefore, not only losses must be taken into account, but also any benefits received as a consequence of the anticompetitive behaviour. Losses incurred include, in particular, lost profits (section 252 of the CC).

However, the principle of natural restitution not only leads to pecuniary compensation but may, particularly in cases of abusive refusals to supply, lead to the defendant being ordered by the court to contract with the claimant and supply him or her with the requested goods or services at non-discriminatory terms.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Claimants can request that the defendant should refrain from an antitrust violation according to section 33(1) of the Act against Restraints of Competition (ARC). This means that the claimant can either request that the defendant end a certain behaviour or that the defendant perform a certain activity, such as supply the claimant in the future. The request is available even for imminent antitrust violations (section 33(2) of the ARC). In the event of urgency, these claims can exceptionally be enforced by way of interim measures.

German procedural law provides for different interim measures pursuant to sections 935 and 940 of the Code of Civil Procedure. In the event of an immediate risk that the financial situation of the defendant will deteriorate, the claimant can request a court to seize assets of the defendant. Furthermore, courts can issue interim measures ordering the defendant to perform a certain action, such as supplying the claimant with certain goods, if the claimant would otherwise lose important customers.

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The standard of proof is lower than for the principal claim on the merits. An applicant for interim relief must provide prima facie evidence that he or she has a claim and that the realisation of the claim is impossible or severely jeopardised without the interim remedy (urgency). As a general rule, an interim remedy will not result in the fulfilment of the final remedy.

Punitive damages

29 | Are punitive or exemplary damages available?

Punitive or exemplary damages are not available.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

To avoid a situation where compensation of the loss incurred is partially devalued, the party in breach of competition law must pay interest on pecuniary damages (section 33a(4) of the ARC). Interest is calculated from the date the loss accrued.

The obligation to pay interest is particularly important in relation to follow-on actions when the plaintiff waits until the competition authority renders a decision. The general interest rate is 5 per cent above the European Central Bank's base rate (section 33a(4) of the ARC and section 288(1) of the CC).

Owing to changes in law, interest on damages that occurred prior to 1 July 2005 follow different rules and are generally to be set at 4 or 5 per cent (ie, not linked to the base rate).

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

Fines imposed by the competition authorities are not taken into account when setting damages. Even in the event of a significant fine, the claimant is entitled to seek full compensation. On the other hand, a substantial fine does not indicate a liability for higher damages.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

As a general rule, the legal costs are borne by the losing party. If there is no full loss or win, the court allocates the legal costs between the parties on a pro rata basis according to the outcome of the case. The legal costs include the costs of the court proceedings as well as the attorneys' fees. However, attorneys' fees are calculated on the basis of statutory fees, which are usually well below the fees actually incurred in complex antitrust damages cases. Put differently, the cost risk for claimants is relatively low, and it can be determined

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upfront with certainty. According to section 89a of the ARC, in antitrust cases, the value of the matter may be adjusted if certain conditions are met.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Joint and several liability exists if two or more individuals or legal persons have caused the damage. As a result, participants in a cartel are jointly and severally liable. Each defendant is then liable for the totality of the damage incurred by the claimant, but the claimant is only entitled to claim the totality of the damage once (section 33d(1) of the ARC and sections 830, 840(1) and 421 of the CC).

With a judgment of 18 November 2014, the Federal Court of Justice held that the necessary adjustments among the jointly and severally liable cartel members themselves will take place according to section 254(1) of the CC; that is, according to the extent of their respective participation in the cartel. The German legislature has codified this principle in section 33d(2) of the ARC. It is explicitly stated that the general principles of section 421 et seq of the CC apply to the adjustments among the jointly and severally liable cartel members.

Special provisions apply to small and medium-sized enterprises with small market shares, limited financial resources and minor participation in the cartel (section 33d(3) of the ARC), leniency applicants (section 33e of the ARC) and cartel members who participated in a settlement (section 33f of the ARC). In general, small and medium-sized enterprises as well as leniency applicants only have to compensate damages of their own (direct and indirect) customers and suppliers. Cartel members who participated in a settlement are freed from liability against the party of the settlement. In all three cases, further liability is only possible if full compensation could not be obtained from the other cartel participants. This additional liability can be excluded in settlements. Adjustments among the jointly and severally liable cartel members are limited accordingly.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

The possibility of a contribution claim exists under German law. If the damage is caused by several defendants, they are jointly and severally liable, and each defendant can sue another cartel member for internal recourse. Such claims for internal contribution are subsequent to the main action. However, in cases where claimants seek damages only from selected participants in an infringement, it is usual practice that the defendants issue third-party notices on the other participants in the infringement, as such third-party notices have the effect that the factual findings of the court dealing with the main action will be binding on the courts dealing with the subsequent actions for internal contribution.

Settlements are, generally, limited to damages resulting from supplies of the parties to the settlement and do not cover damage resulting from supplies of other participants in an infringement. According to section 33f(2) of the ARC, claims for internal contribution are not possible in settlement cases as regards the settled portion of the claim.

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Passing on

35 | Is the 'passing-on' defence allowed?

The Federal Court of Justice, in a landmark ruling handed down on 28 June 2011 (KZR 75/10), held that members of a cartel are able to defend themselves against a claim for damages by raising the defence that the relevant applicants have passed on the overcharge to their customers (the passing-on defence). However, the passing-on defence is only available under the principle of 'adjustment of damages by benefits received'. As a result, the burden of proof is on the defendant that the direct purchaser passed the damage on to the next level of customers. That means the defendant must prove, first, that the overcharge has been passed on and, second, the extent to which the overcharge has been passed on.

As of 9 June 2017, the German legislature has codified these principles in section 33c of the ARC, which is applicable to claims for damages that have arisen after 26 December 2016. As a result of the introduction of section 33c of the ARC, it is unclear whether the passing-on defence is not available with regard to claims for damages that have arisen after 26 December 2016 if it leads to an unjust benefit for the defendant. This can particularly be the case if the indirect purchasers comprise a large and fragmented group in which each purchaser has only incurred minor individual damages, which makes it unlikely that the indirect purchasers will seek damages. In such a scenario and with regard to claims for damages that have arisen prior to the entering into force of section 33c of the ARC, which represent the vast majority of claims pending before German courts, the Federal Court of Justice, in a ruling handed down on 23 September 2020 (KZR 4/19), reaffirmed that the passing-on defence would not be available, since this would otherwise lead to an unjust benefit for the defendant. While the Federal Court of Justice acknowledged that the non-availability of the passing-on defence could result in an overcompensation of the claimant, it held that this result was acceptable in the interest of an effective enforcement of antitrust rules.

Although the principle of an adjustment of damages by benefits received is only available if the adjustment (ie, the passing-on defence) does not result in an unjust benefit of the cartelists, section 33c of the ARC does not contain any wording to that effect. As a result, it may well be that based on section 33c of the ARC, the German courts will acknowledge the passing-on defence, even if it leads to a situation under which the defendant who, without doubt, caused damage will not be held liable for the overcharge. However, even if a passing on of overcharges can be demonstrated by the defendant, the claimant can claim lost profits as a result of volume effects; that is, if the higher resale price (including the overcharge) results in reduced sales volumes by the direct purchaser.

In cases where an indirect purchaser claims that the overcharge has been passed on to him or her by the direct purchaser and, therefore, aims to seek damages, the indirect purchaser can benefit from a shift in the burden of proof pursuant to section 33c(2) of the ARC. A passing on is presumed if the defendant infringed competition law, the competition law infringement led to higher prices for the direct purchaser, and the indirect purchaser purchased the cartelised products. It is then for the defendant to prove that a passing on has not occurred.

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Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There is no special defence that would permit companies or individuals to defend themselves against competition law liability.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

In principle, arbitration proceedings are available under German law. However, such proceedings are only admissible if an arbitration clause in relation to antitrust damages has been validly agreed between the parties.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

Decisions handed down by the German courts in recent years have provided clarifications on many key issues of antitrust damages litigation and, in most cases, have been claimant-friendly.

In particular, the Federal Court of Justice expanded the group of claimants that is entitled to seek damages in its decision of 28 January 2020 (KZR 24/17), referring to the European Court of Justice in the cases *Manfredi* (C-295/04), *Skanska* (C-724/17) and *Otis* (C-435/18). The court made it clear that it applies the European law requirements specified by the European Court of Justice in the case at hand by way of an adjusted interpretation of the 'affected persons' criterion. This criterion is, according to the adjusted interpretation, fulfilled if the claimant proves that it has purchased goods that were covered by the cartel. The claimant, however, does not need to prove at this stage that each individual purchase has been affected.

Furthermore, the Federal Court of Justice found in its decision of 10 February 2021 (KZR 63/18) that liquidated damages for competition law infringements can be validly agreed in supply agreements. It is for the party that has committed the infringement to prove that the actual damage was below the percentage agreed as liquidated damage. However, the liquidated damage (ie, the percentage of the sales price) must not exceed the average damage normally occurring in the industry. In this regard, the court held that the parties may rely on available, economically sound general analyses of cartel-related overcharges, such as the Oxera study commissioned by the European Commission, based on which a contractually agreed upon damages rate of up to 15 per cent is generally acceptable.

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In addition, in a decision of 13 July 2021 (II ZR 84/20) the Federal Court of Justice reversed a decision of the Kammergericht Berlin by confirming the permissibility of a claims bundling model (Inkasso-Lizenz) and found that the assignment of claims to a legal services provider for debt collections (Inkassodienstleister) did not violate the German Act on Out-of-Court Legal Services. However, the decision did not concern claims for antitrust damages. Moreover, the decision only concerned a very small number of very similar claims, rather than a large number of rather heterogeneous claims in terms of chances of success, injured parties, and legal complexity, as is often the case in antitrust damages cases. Citing these differences, subsequent decisions of lower courts concerning antitrust damages cases deviated from the Federal Court of Justice's ruling of 13 July 2021 (II ZR 84/20) and found the assignment of claims to a legal services provider for debt collections to be invalid under the German Act on Out-of-Court Legal Services. It remains to be seen whether the Federal Court of Justice will also apply the principles of last year's decision to more complex antitrust damages cases.

Finally, in a decision on 28 June 2022 (KZR 46/20), the Federal Court of Justice held that the factual presumption that prices charged during the cartel period are higher than those charged in a counter-factual scenario (ie, that cartels result in higher prices) also applies if the goods in question are not purchased from the parent company participating in the cartel but from a subsidiary belonging to the same economic group, if that subsidiary's market behaviour is aligned with that of its parent. This is because it does not independently determine its own conduct on the market; instead, it essentially carries out the instructions given to it by the parent company.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In the years immediately following the adoption of the [Law of 10 October 1990, No. 287](#) (the Competition Act), the number of cases brought before civil courts in relation to infringement of competition law was rather limited: according to unofficial data, from 1990 to 2010, roughly 150 private enforcement cases were commenced. Approximately 75 per cent of these cases were standalone actions.

The limited recourse to civil action was probably related to a certain lack of awareness among undertakings and consumers over competition law issues and certain procedural burdens. Furthermore, courts were initially cautious in admitting those cases (see, for example, Italian Supreme Court, 9 December 2002, No. 17475, which denied the legitimacy of consumers to claim damages against suppliers that were part of a cartel).

An increase in actions for damages caused by antitrust infringements occurred as a result of the finding by the Italian Competition Authority (ICA) of a cartel among the main insurance companies ([ICA, 28.7.2000, Case No. 8546, I377, RC AUTO](#)), which led to several key judgments from the local courts and the Italian Supreme Court.

The interest in private antitrust litigation continued to grow when the Court of Justice of the European Union (CJEU) laid down in the landmark cases [Courage](#) (CJEU, 20.9.2001, Case No. C-453/99) and [Manfredi](#) (CJEU, 13 July 2006, Case No. C-295/04) the main principles that would later be specified and codified by the European Commission in [Directive 2014/104/EU](#) on certain rules governing claims for damages under national law for infringements of the competition law provisions of the member states and of the European Union.

The Directive was implemented in Italy with the [Legislative Decree of 19 January 2017, No. 3](#) (the Decree), which included both substantial and procedural provisions and currently offers a comprehensive legal framework for actions commenced by anyone damaged by an infringement of competition law. The Decree is already fostering private antitrust litigation in Italy, with specific regard to follow-on actions related to cartel infringement decisions, by facilitating the victims of anticompetitive practices and abusive conducts in several aspects (eg, disclosure of evidence, legal standing and standard of proof) that were considered too burdensome in the previous regime.

The Decree also raised awareness in relation to standalone actions, many of which have been brought before courts in relation to damage claims originated in the context of vertical

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agreements (see [Milan Court Judgment No. 7389 of 27 September 2022](#), concerning the selective distribution network of a primary watch manufacturer). However, actions concerning abuse of dominance did occur (see [Milan Court of Appeal Judgment No. 2979 of 15 October 2021](#), which ordered the Italian Revenue Agency to indemnify five companies supplying monitoring services, for abusing its monopoly position in the production and collection of economic and financial data by charging unreasonably high prices for the transmission of such data to those companies, without which data they were unable to carry out their monitoring activities).

Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private enforcement actions are mandated by statute in Italy. Specifically, article 2043 of the Italian Civil Code sets out the basic elements of tort liability.

Compensation for damage can be sought by anyone damaged by a competition law infringement, regardless of whether the person is a direct or indirect purchaser.

In particular, indirect purchasers can claim and obtain compensation for damages to the extent that the same is passed on by its direct purchaser (eg, by raising its prices), as was confirmed by the Court of Justice of the European Union in the [Otis II](#) judgment (12 December 2019, Case No. C-435/18). In this regard, article 12 of the Decree provides for a rebuttable presumption of the passing on of the damage, provided that the indirect purchaser is able to prove that:

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

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Legislation

The legislative framework for private antitrust enforcement currently includes the following provisions:

- general civil law principles concerning tort liability and ordinary tort actions, namely articles 2043 et seq of the Civil Code, as well as the applicable procedural rules laid down in the Code of Civil Procedure (as recently amended by the Legislative Decree of 10 October 2022, No. 149);
- article 33(2) of the Competition Act, which provides that claims for damages owing to infringements of the Competition Act can be brought before civil courts; and

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- the Decree, which lays down the specific rules concerning claims for damages owing to infringements of EU and Italian competition law.

Courts

Pursuant to the Decree, the jurisdiction to decide over actions based on the breach of EU and Italian competition law belongs to the corporate-specialised sections of tribunals and of the courts of appeal of Milan, Rome and Naples, for both standalone and follow-on actions.

PRIVATE ACTIONS

Availability

- 4** | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available in relation to damages caused by any kind of infringement of EU or national competition law by an undertaking, regardless of whether the infringement falls within the prohibition of collusive restrictive practices, such as cartels or abuses of dominant position.

The existence of a prior decision by a competition authority ascertaining the infringement is not a requirement to initiate a private antitrust claim, as the Italian legal system allows the parties to bring standalone actions, which are mainly construed as tort actions under article 2043 of the Civil Code.

Therefore, antitrust private actions can either be follow-on actions (in cases where they follow a decision by a competition authority), or standalone actions (in cases where they are initiated without following an infringement decision).

As far as follow-on actions are concerned, the effect of a finding of infringement by a competition authority is expressly regulated by article 7 of Legislative Decree of 19 January 2017, No. 3 (the Decree). This provides that the decisions of the Italian Competition Authority (ICA) and the European Commission are binding as regards national judges in relation to the finding of a competition law infringement, provided that the decisions ascertaining the existence of the infringement are final in the sense that they cannot be subject to appeal.

Before the Decree, the final decisions of the ICA were considered only as prima facie evidence of the infringement (ie, the defendants could prove the lack of infringement (see Italian Supreme Court No. 3640/2009). In this respect, with the recent [Repsol](#) judgement (CJEU, 20 April 2023, Case No. C-25/21), the Court of Justice of the European Union (CJEU) clarified that, even outside the temporal scope of the Decree, the decision of a national competition authority (which became definitive after being confirmed by the courts competent for the action of its annulment) establishes the existence of that infringement until proof to the contrary is adduced by the defendants.

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Moreover, a final decision by a competition authority or a court of another member state finding an infringement of competition law constitutes evidence in relation to the nature of the infringement and of its material, personal, temporal and territorial scope, which may be assessed together with other evidence.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The ordinary rules and principles on jurisdiction are also applicable to private antitrust disputes. In particular, [Regulation \(EU\) No. 1215/2012](#) and, on a residual basis, the Italian Law on Private International Law ([Law of 31 May 1995, No. 218](#)) apply. This was recently reaffirmed by the Court of Justice of the European Union (CJEU) in the [Booking](#) case (CJEU, 24 November 2020, Case No. C-59/19), where the CJEU held that private antitrust actions relate to 'tort, delict or quasi-delict' within the meaning of article 7, point 2, of Regulation (EU) No. 1215/2012.

As a consequence, Italian courts have jurisdiction over any private antitrust claim that meets at least one of the following criteria:

- the defendant is domiciled in Italy;
- the defendant has its place of business in Italy;
- the defendant has a legal representative formally authorised to represent it in Italian courts pursuant to article 77 of the Code of Civil Procedure;
- the harmful event occurred in Italy; or
- if the plaintiff is a consumer, the latter is domiciled in Italy.

The CJEU clarified that, in the context of an action seeking compensation for damage caused by anticompetitive conduct, the notion of 'place where the harmful event occurred' may be understood to mean either the place of conclusion of an anticompetitive agreement contrary to article 101 of the Treaty on the Functioning of the European Union (TFEU) or the place in which the abusive prices were offered and applied in cases where those practices constituted an infringement of article 102 of the TFEU (CJEU, 5 July 2018, Case No. C-27/17, [AB flyLAL-Lithuanian Airlines v Starptautiska lidosta 'Riga' VAS](#), 21 May 2015, Case No. C-352/13, [Cartel Damage Claims Hydrogen Peroxide SA v Akzo Nobel and Others](#) and 29 July 2019, Case No. C-451/18, [Tibor-Trans v DAF Trucks NV](#)).

Private antitrust litigation can also be commenced before Italian courts in cases where even just one of multiple defendants is domiciled in Italy.

The parties may contractually elect to subject the claims arising from a contract to the Italian jurisdiction, including antitrust claims. This choice of jurisdiction is valid only if made in writing.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes, as far as the jurisdiction of Italian courts can be assessed pursuant to the applicable criteria.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Third-party funding is not forbidden under Italian law and, although it is still rather uncommon, in recent times some firms proposing litigation funding or litigation management have entered the Italian market. Given the lack of special regulation for third-party funding, contracts aimed at it will be governed by general principles of Italian contract law.

Contingency fees are forbidden under Italian law. More precisely, article 13, paragraph 4 of the [Law of 31 December 2012, No. 247](#) bans agreements according to which the lawyer is granted as a fee the totality or part of the object of the dispute.

On the contrary, parties are free to arrange lawyers' fees relating them (eg, to the time taken) to a percentage of the value of the dispute, or they may charge a flat rate (see article 13, paragraph 3 of the Law of 31 December 2012, No. 247).

Jury trials

8 | Are jury trials available?

No.

Discovery procedures

9 | What pretrial discovery procedures are available?

Broadly speaking, Italy does not provide for any procedural tool such as US-style pretrial discovery. In the course of the proceedings, however, the judge can order a party or a third party to produce specific documents that he or she deems necessary for the conduct of the proceedings.

The Decree has also introduced new rules allowing the plaintiff and the defendant in antitrust private enforcement proceedings to request disclosure of certain categories of evidence.

In relation to acquisition of evidence prior to the start of the proceedings, article 696-bis of the Code of Civil Procedure entitles the claimant to request a preventive technical consultancy for the purposes of the composition of the dispute. However, the recently established

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practice of bringing antitrust actions using the procedure laid down by article 696-bis of the Code of Civil Procedure is rather controversial.

At first, some courts admitted this kind of request in the context of private antitrust litigation; however, courts in more recent cases have dismissed such requests, claiming that the procedure can only be used if the decision on the compensation does not require the prior resolution of complex legal questions or the appreciation of facts that are outside the scope of the technical investigation. According to some courts, this is not the case for antitrust actions, even in the event of follow-on actions, which require in-depth (and often complex) analysis on all aspects of liability, damage and causal link not covered by the antitrust decision.

Evidence from the defendant and third parties

If a party has presented a motivated request containing reasonably available facts and evidence sufficient to support the plausibility of its claim or its defence, the courts are able to order the counterparty or a third party to disclose relevant evidence that lies in their control (article 3 of Legislative Decree of 19 January 2017, No. 3 (the Decree)).

For the purpose of admitting the request, the court will evaluate its proportionality by taking into account:

- the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- the scope and cost of disclosure; and
- whether the evidence to be disclosed contains confidential information.

In this respect, a relevant principle has been recently established by the Italian Supreme Court, which held that even after the terms for the parties to submit evidence are expired, in the event that the court appoints an expert witness the latter is entitled to require the parties to submit data and documents that are deemed to be necessary to perform his duties (ie, to assess the existence or quantify the damages arising from an antitrust infringement, or both). Such power, however, cannot be exercised to acquire documents that, according to the Supreme Court, are aimed at demonstrating the main facts (1) submitted as the basis of the claim and (2) of the objections that it is the parties' burden to prove (Italian Supreme Court, 1 February 2022, No. 3086).

Evidence from the file of a competition authority

Another novelty introduced by the Decree is the possibility for the courts to order the disclosure of evidence included in the file of a competition authority (article 4 of the Decree), provided that:

- the parties and third parties are not reasonably able to produce such evidence; and
- the request is proportional, considering, among other things, whether:
 - it has been formulated specifically with regard to the documents submitted to a competition authority;
 - the party requesting disclosure is doing so in relation to an action for damages; and

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- there is a need to safeguard the effectiveness of antitrust public enforcement.

The Italian Competition Authority (ICA) may provide the court with its views on the proportionality of disclosure requests.

In this respect, the Italian Council of State (see [Judgment of 2 May 2022, no. 3416](#)) recently confirmed the annulment of a decision of the ICA that granted a disclosure request made by a party to a civil proceeding in the context of an action for damages allegedly suffered following an anticompetitive agreement. The ICA's decision had been previously annulled by the Regional Administrative Court of Lazio (see [Judgment of 21 December 2021, No. 13214](#)), which clarified that, when assessing a disclosure request, the ICA shall: (1) grant the party to which the disclosure request is addressed the right to submit their observations before the request is granted by the ICA; (2) carry out a preliminary assessment on the status of the applicant as a potentially injured party from the effects of the anticompetitive agreement; and (3) refrain from granting the request in relation to documents or their sections containing confidential information. Moreover, the administrative court clarified that the disclosure request shall not be indefinitely aimed at the disclosure of the entire case file, but rather shall expressly indicate which documents the applicants wish to access. In the case at hand, the administrative court found that the ICA did not comply with the first two requirements mentioned above, insofar as it granted the claimant access to the file before verifying its status and engaging in a discussion with the defendant in the civil proceedings.

In any case, under article 4(5) of the Decree and para. 15 of the Commission's 2020 [Communication](#) on the protection of confidential information for the private enforcement of EU competition law by national courts, the courts cannot order a party or a third party to disclose evidence related to leniency or settlement programmes.

Furthermore, if the disclosure of evidence relates to confidential information of personal, commercial, industrial and financial nature, the court has the power to adopt certain measures to protect the confidentiality (article 3(4) of the Decree), such as:

- the obligation of secrecy;
- the possibility of redacting the confidentiality of parts of a document;
- the setting-up of closed-door hearings;
- the limitation of the number of persons authorised to view the evidence; and
- the assignment to experts of the task to draft summaries of the confidential information.

In this regard, the Commission's confidential information guidance identifies the measures that courts may consider when dealing with the disclosure of sensitive documents and data, including the redaction of documents, the creation of confidentiality rings and the appointing of third-party experts to access certain information.

Admissible evidence

10 | What evidence is admissible?

Documents are always admissible evidence; however, the evidentiary value of documents varies depending on their source.

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In addition, witness evidence is admissible but with some specific limitations. It is generally inadmissible in relation to contracts, and it is admissible, with specific limitations, in relation to agreements aimed at amending or contrary to a document.

Legal privilege protection

11 | What evidence is protected by legal privilege?

As a general rule, in the context of civil litigation, a defendant may challenge a request of disclosure by the plaintiff on the grounds that the documents requested are covered by legal professional privilege.

In this regard, article 3(6) of the Decree foresees that a court's power to order the parties or a third party to disclose relevant documents is without prejudice to the confidentiality of communications between the lawyers in charge of a party's representation and their clients.

The possibility to benefit from legal privilege protection requires an independent relationship between the client and the lawyer, who must not be bound to the former by an employment relationship. Therefore, the legal privilege does not cover communications between a party in proceedings and its in-house counsel (see [Italian Council of State, 24 June 2010, No. 4016](#)).

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions seeking compensation for damages are available even if the conducts constituting antitrust violation have also been ascertained in the context of criminal proceedings. Article 651 of the Code of Criminal Procedure expressly provides that a decision pronounced at the outcome of a criminal proceeding, when it is final and binding, has a *res judicata* effect in the civil proceeding for the liquidation of the damages deriving from the criminal offence ascertained therein. The *res judicata* effect covers only the existence of the fact, its criminal relevance and the assessment that the condemned party committed it.

In the Italian legal framework, antitrust law does not provide for criminal sanctions for individuals. However, in limited and exceptional cases, a conduct that constitutes an antitrust infringement can also constitute a separate criminal offence, such as:

- bid rigging (articles 353, 353-bis and 354 of the Criminal Code);
- price increase, or the output limitation, of raw materials, food products or first need products (article 501-bis of the Criminal Code);
- the use of violence, threats or fraudulent means in carrying out commercial activities (articles 513 and 513-bis of the Criminal Code); and
- the implementation of anticompetitive practices with the corruption of public officials (articles 319 and 319 of the Criminal Code) or private individuals (article 2635 of the Civil Code).

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Utilising of criminal evidence

- 13** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Italian law does not provide for the legal relevance in civil proceedings of evidence taken in criminal ones. However, under case law, criminal evidence is treated as 'atypical evidence' in the civil proceedings.

The judge can, at his or her discretion, take atypical evidence into account for the purpose of assessing circumstances that are otherwise unknown, only if it points to objective, precise and consistent conclusions.

Albeit not protected against private damages actions, leniency and settlement applicants are granted preferential treatment by the Decree by means of:

- the prohibition of the disclosure of leniency or settlement statements and the right of the leniency or settlement applicants to be heard in the event that the judge intends to access the leniency or settlement statements to verify their contents, for which the judge may request the support of the ICA (article 4(5) of the Decree); and
- a more favourable regime of joint liability, given that the leniency recipient is jointly and severally liable:
 - to its direct or indirect purchasers or providers; and
 - to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law (article 9(3) of the Decree).

Stay of proceedings

- 14** In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Under Italian civil procedural law, there are three typical kinds of stay of proceedings:

- compulsory (ie, under article 295 of the Code of Civil Procedure, when the judge or another judge is called upon to decide on a dispute on which the decision of the original case depends);
- stay that is jointly requested by all the parties if there are justified reasons (pursuant to article 296 of the Code of Civil Procedure); and
- discretionary, under article 337 of the Code of Civil Procedure, which provides that, when a judgment is invoked in a different proceeding, the latter may be suspended if that judgment is challenged.

A party alone can ask the court to stay the proceedings only when the decision of the case depends on the decision of another court such that the assessment of the merits of the

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former depends on the assessment of one or more issues pending in the latter (whether before the same or a different judge).

A challenge of the decision on an antitrust violation does not imply the compulsory suspension of the pending private enforcement proceedings. However, the judge has full discretion on this issue.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

As a general rule, a party who wants to exercise a right must prove the facts on which the right rests, while a party who contests the relevant rights or facts must prove the facts on which the contestation rests.

In assessing causation, the Italian civil courts take the view that the finding must be based on the balance of probabilities. It is, thus, sufficient for the plaintiff to prove that there is a 50 per cent plus one probability of causation to satisfy the relevant burden of proof (more probable than not rule).

The Decree, however, sets forth certain provisions that derogate from the general rule and grant to the plaintiff the benefit of certain presumptions. In particular:

- the final decision of the ICA that ascertained the infringement is binding for the judge (ie, the existence of the infringement), and its material, personal, temporal and territorial scope is deemed as proven and cannot be disputed in the civil proceedings;
- a rebuttable presumption is provided for by article 14 of the Decree, which states that the harm caused by cartel infringements is presumed unless the infringer proves the contrary;
- a rebuttable presumption is provided for by article 12 of the Decree concerning the passing on of the overcharge to indirect purchasers, provided that the plaintiff is able to prove that:
 - the defendant committed a competition infringement;
 - the infringement has resulted in an overcharge for the direct purchaser; and
 - the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law or has purchased goods or services derived from or containing them.

On the other hand, the defendant bears the burden of proving that the plaintiff passed on the whole or part of the overcharge or damage resulting from the infringement of competition law (passing-on defence).

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The length of civil proceedings varies widely from court to court and from case to case. In particular, the main aspects that could significantly affect the duration of civil proceedings are

- how burdensome the discovery phase is (eg, if the judge is called to assess the nature of the evidence to exclude leniency documents, or when the evidence contains confidentiality information and the judge is called to adopt appropriate measures to protect them) and
- the need to involve a third-party expert appointed by the court for evidentiary purposes.

On average, first-degree proceedings usually last around three years, whereas appeal proceedings take around two years.

Decisions rendered at the outcome of a first-degree proceeding are immediately enforceable, but if the decision is challenged, the appellant can ask the court of appeal to suspend the enforceability of the first-degree decision. The suspension will be granted if the appellant is able to demonstrate serious grounds also in relation to the possible risk of insolvency of one of the parties to the proceedings.

There is no way to accelerate proceedings. However, provided that the relevant requirements are met during the proceedings, a party can apply for anticipatory or interim measures. For example, a party can ask the judge to order the payment of the amount of the claim that is undisputed.

Limitation periods

17 | What are the relevant limitation periods?

As a general rule, actions for damages from non-contractual liability are subject to a limitation period of five years under article 2947 of the Italian Civil Code.

Also, in relation to antitrust damages actions, article 8 of the Decree establishes that the statutory limitation period of the right to damages is five years from the date of the harmful event. The Decree further clarifies that limitation periods do not begin to run before the infringement of competition law has ceased and the plaintiff knows, or can reasonably be expected to know:

- the behaviour and the fact that it constitutes an infringement of competition law;
- the damage caused by the infringement of competition law; and
- the identity of the infringer.

In the context of a follow-on action brought by a competitor of a company fined for an abuse of dominant position, where the Decree was not applicable by reason of time, the Italian Supreme Court has established that the day from which the statute of limitations can be anticipated to be the date of initiation of the investigation from the competition authority,

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assuming that such competitor diligently monitored the conduct of its competitors (Italian Supreme Court, 19 October 2022, No. 30783).

On the other hand, if the event is considered a crime, the statutory limitation applicable for the relevant crime must also be taken into consideration for the purposes of damages.

The limitation period is suspended if the ICA takes action for the purpose of the investigation or if its proceedings in respect of an infringement of competition law to which the action for damages relates are still pending. The suspension ends at the earliest one year after the ICA's infringement decision has become final or after the proceedings are otherwise terminated.

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Decisions rendered at the first degree by tribunals can be appealed before the competent court of appeal.

In appellate proceedings, the appellant can request a full review of the merits of the case. Under article 342 of the Italian Code of Civil Procedure, the appellant shall expressly indicate the sections of the contested decision they wish to challenge, the specific adjustments that the Court of Appeal shall make to the decision, and the circumstances from which it can be inferred that the first instance court violated the law. In appeal, the appellant cannot submit further facts, evidence or claims unless they are new or the appellant is able to show that such facts, evidence or claims could not be brought before the first instance judge for reasons not attributable to the appellant itself.

Court of Appeal decisions, in turn, can be challenged before the Court of Cassation only on grounds pertaining to legal issues: thus, the Court of Cassation cannot revise or affect the factual findings reached by the Court of Appeal.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Italy has special legislation on class action proceedings, provided by article 140-bis of the [Legislative Decree of 6 September 2005, No. 206](#) (the Consumer Code).

That legislation has been amended by the [Law of 12 April 2019, No. 31](#) (the Class Action Reform). The new legislation will apply only to class action proceedings for antitrust infringements that have taken place after the date of the legislation's entry into effect (which, after a few postponements, took place on 19 May 2021).

Class action proceedings are available also in respect of antitrust claims, as also acknowledged by article 1 of the Decree, which recalls class actions governed by article 140-bis of

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the Consumer Code. However, the Class Action Reform 'moved' the legal discipline of class actions from article 140-bis of the Consumer Code to the Code of Civil Procedure, introducing the new articles from 840-bis to 840-sexiesdecies. In light of the above, such reference must be intended as referring to the mentioned articles of the Code of Civil Procedure.

One of the most significant innovations of the Class Action Reform, with a direct impact also on antitrust class actions, is that every party (including companies and professionals) that shares 'homogeneous individual rights' can commence a class action, not just consumers and users.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

No. Consumers, users, companies and professionals are always free to commence individual proceedings, even when they are entitled to commence a class action or to opt in to a class action that has been already commenced.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Under the Class Action Reform, class action proceedings start with a phase aimed at assessing the eligibility of the claim, at the end of which – and no later than 30 days from the first hearing – the court issues a decision on the admissibility of the claim, which can be denied in the following cases:

- the application is manifestly groundless;
- lack of homogeneity among the individual rights;
- claimant's conflict of interest towards the defendant; or
- claimant's inadequacy to represent and protect the rights of the class.

The court's decision declaring the action admissible, which is then published on a public website within the next 15 days, can be appealed by the defendant in the following 30 days.

To our knowledge, only one class action in antitrust matters has been brought in Italy. It was initiated in 2011 before the Court of Genova for the damages arising from a cartel assessed by the Italian Competition Authority (ICA) that related to some ferry companies' tariffs (AGCM, 18.10.2011, 1743, *Tariffe Traghetto da/per la Sardegna*). The court, however, stayed the proceedings owing to the challenge of the ICA's sanction by the relevant ferry companies. The proceedings were later extinguished owing to the annulment of those sanctions.

22 | Have courts certified collective proceedings in antitrust matters?

To our knowledge, no class action in antitrust matters has been certified in Italy so far. However, the last amendments to the Italian class action legislation under the Class Action Reform make it likely that more class actions in antitrust matters will be commenced in the future.

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Opting in or out

23| Can plaintiffs opt out or opt in?

Italian legislation on class actions (also under the Class Action Reform) has, in principle, adopted the opt-in system. However, a significant difference is introduced by the Reform. Under the previous legislation, plaintiffs could opt in until the term fixed by the judge with the order admitting the class action at the outcome of the certification process. The Class Action Reform has instead introduced the possibility for class members to opt in even after the decision on the merits of the class action.

Judicial authorisation

24| Do collective settlements require judicial authorisation?

Under the former legislation, no judicial authorisation was needed. However, under the new class action law the settlement agreement must be authorised by the judge if it is reached after the court decision has been given.

National collective proceedings

25| If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Collective-proceeding bar

26| Has a plaintiffs' collective-proceeding bar developed?

No; however, class actions in general are likely to increase after the new class action law's entry into effect.

REMEDIES

Compensation

27| What forms of compensation are available and on what basis are they allowed?

Compensation for damage can be sought by any victim that has suffered harm as a consequence of a competition law infringement, regardless of whether the person is a direct or indirect purchaser. The compensation includes the actual loss suffered as a direct consequence of the infringement, the loss of profits, the payment of interest and appreciation.

Article 10(2) of the Decree provides that to avoid overcompensation, the actual damage awarded in relation to damages at any level of the supply chain cannot exceed the harm suffered at that level.

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The loss of profits, on the other hand, falls within the category of indirect damages, which, in accordance with Italian civil law, can be awarded on the basis of the theory of causal regularity (ie, insofar as they can be construed as a 'normal effect' of the infringement).

With regard to the quantification of damages awarded by the courts in private enforcement cases, the Decree expressly refers to articles 1223, 1226 and 1227 of the Civil Code, which contain the main civil law principles regulating the calculation of damages arising from contractual and, pursuant to article 2056 of the Civil Code, from tort liability.

When determining the amount of damages, judges frequently avail themselves of the assistance of a court-appointed expert witness.

In addition to the above, article 14(3) of the Decree allows judges to request the Italian Competition Authority (ICA) to assist the court regarding the determination of the quantum of damages; however, it allows the ICA to refuse to provide assistance where it deems it inappropriate in relation to the need to safeguard the effectiveness of the public enforcement of competition law. This might be the case when the public enforcement proceeding:

- is still in a preliminary phase;
- was closed with commitments pursuant to article 14-ter of the Competition Act;
- was closed owing to a priority decision of the ICA; or
- was closed but the ICA's decision was annulled or suspended during the appeal.

Furthermore, Article 15(1) of [Regulation \(EC\) No. 1/2003](#) allows national courts to ask the European Commission to transmit information in its possession or its opinion on questions concerning the application of the EU competition rules.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Interim measures

A party can be granted, upon his or her application, interim measures prior to or pending ordinary proceedings.

The applicant must provide the judge with clear evidence of the existence of the compensation right related to the requested measure (*fumus boni iuris*) and of the serious and actual risk that the right may be harmed if not promptly and temporarily protected until the decision of the merits of the case (*periculum in mora*).

Summary proceedings

A party can file an application directly with the competent judge, who fixes the hearing. The applicant must then serve its application to the defendant, and at the hearing where both the parties appear, the judge will decide whether the parties' defences can be examined summarily. If so, the judge will proceed in the most appropriate manner and issue an order

with the same effect as a decision. Otherwise, the summary proceedings are converted into ordinary ones.

It is, however, unlikely for summary proceedings to be employed in the context of private antitrust litigation, due to the complex questions – both legal and economic – that such actions put forward, which often require an in-depth expert evaluation that cannot be carried out in the simplified procedural framework of summary proceedings.

Punitive damages

29 | Are punitive or exemplary damages available?

Italian law does not encompass the US concept of punitive damages, although in some specific instances, the portion of damages awardable in favour of a party can be increased owing to the behaviour of the losing party (eg, if the losing party acted in bad faith or with gross negligence in civil proceedings, the judge can order the party to pay the winning party not only the cost of the proceedings but also an extra sum (ie, for vexatious litigation)). As a consequence, punitive damages have traditionally been considered contrary to Italian public policy, and foreign decisions awarding punitive damages have typically not been granted recognition and execution in Italy.

This trend changed in 2017 when the Supreme Court stated that a foreign decision awarding punitive damages is not incompatible with Italian public policy, provided that the foreign judgment is based on legal provisions that precisely identify the cases in which those damages can be awarded and, in such cases, the awardable amounts can be reasonably foreseen (see [Supreme Court, 5 July 2017, No. 16601](#)).

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Under Italian law, in the case of tort, interest on damages accrues from the date the damage occurred.

The default interest rate is determined each year by the Ministry of Finance, based on the yield of annual government bonds and on the inflation rate.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

When awarding damages for infringements of competition law, the courts do not take into consideration fines imposed by the Competition Authorities.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In civil proceedings, as a general rule, legal costs follow the outcome.

Under article 91 of the Code of Civil Procedure, with the final decision of the proceedings, the judge orders the losing party to refund the legal costs borne by the counterparty (in practice, they are liquidated according to at the rates set by a ministerial decree) unless both the parties have partially lost or the question of law of the case was exceptionally new or there was an overruling.

In a few cases, the courts found complex antitrust private enforcement cases to justify the entire compensation of the legal costs (see Court of Appeal of Milan, 15 October 2014, Case No. 85107/2010, *Fastweb SpA c Vodafone Omnitel NV SpA*).

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Article 2055 of the Civil Code provides that if the same harmful event is caused by several parties, they are held jointly liable in equal parts unless the presumption is rebutted by one of those parties that expressly proves otherwise.

In the case of different allocations of liability, those should be ultimately determined depending on the seriousness of each injuring party's liability and the effects of the respective portion of violation (ie, its contribution to the damage).

This principle is, however, derogated from by the Decree in relation to the following few cases (article 9 of the Decree).

Small and medium-sized enterprises

Small and medium-sized enterprises (SMEs) (as defined in [Commission Recommendation 2003/361/EC](#)) are liable only towards their direct and indirect purchasers, provided that their share in the relevant market was below 5 per cent during the infringement, and the joint and several liability regime would irretrievably jeopardise their economic viability and result in their assets losing all their value.

The exception does not apply if:

- the SME played a leading role in the context of the infringement or forced other undertakings to take part in it;
- the SME has previously been found to have committed other antitrust infringements; or
- the damaged party cannot seek full compensation for damages from the other companies involved.

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Leniency applicants

Another exception to the ordinary regime is provided in relation to companies that benefited from a leniency programme, which, under article 9(3) of the Decree, are generally jointly and severally liable towards their direct or indirect purchasers or suppliers. However, those companies may be held jointly and severally liable with regard to other damaged parties where full compensation for their damages cannot be obtained from the other undertakings involved in the same infringement of competition law.

Settling co-infringers

Finally, pursuant to article 16 of the Decree, following a consensual settlement, non-settling co-infringers are not permitted to recover contributions for the remaining claim from the settling co-infringers. Moreover, if non-settling co-infringers are insolvent, the damaged party may seek compensation from the settling co-infringer unless this is expressly excluded in the settlement agreement.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Italian civil law provides for the possibility of contribution claims among defendants.

Pursuant to article 2055(2) of the Civil Code, a person who has compensated the damaged party has recourse against each of the others in proportion to the degree of fault of each defendant and to the consequences arising therefrom.

This principle also applies to damages awarded for competition law infringements, as the Decree expressly refers to article 2055(2) of the Civil Code.

One or more defendants may bring a lawsuit against the jointly liable debtors (either by suing them in the same proceedings commenced by the damaged party or by suing them after paying a share of the damages that exceeds his or her portion of liability) under the right of recourse to assess the appropriate allocation of liability and, if that is the case, to be indemnified.

Passing on

35 | Is the 'passing-on' defence allowed?

The defendant in an action for damages is able to invoke that the plaintiff has passed on the whole or part of the damage resulting from the infringement of competition law (article 11 of the Decree).

In such a case, the burden of proving that the damage was passed on is on the defendant, who may require disclosure from the plaintiff or from third parties to satisfy its burden of proof.

In determining the passing on (as well as for the calculation of the amount of damages), parties can appoint technical advisers, while judges frequently avail themselves of the assistance of a court-appointed expert witness.

In the decisional practice relating to private enforcement proceedings, in several cases the local courts have authorised the disclosure requests made by the defendants in order to prove the existence of passing-on and to quantify it.

In addition, in 2019 the European Commission adopted specific [Guidelines](#) for national courts on how to estimate the share of overcharge that was passed on to the indirect purchaser (Passing-on Guidelines), with the purpose of assisting national courts in the estimation of passing on. The Passing-on Guidelines include, among other things, an overview of the theory of passing on, techniques for assessing its extent and examples drawn from practical cases.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Besides passing-on defences, defendants can defend themselves against antitrust damages claims using ordinary tortious liability claims defences, such as the absence of wrongdoing in standalone actions, absence of damage, lack of causal link between the wrongdoing and the damage or contribution to the damage by the plaintiff.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

The typical alternative dispute resolution methods are also available in relation to private enforcement cases. Article 15 of the Decree expressly mentions (for the purposes of the suspension of the statutory limitation periods) arbitration, mediation and negotiations conducted by lawyers.

Arbitration

Arbitration is widely relied upon as a method to solve civil and commercial disputes in Italy, in both domestic and international disputes. In most instances, it is much faster than court proceedings and offers the parties a better chance to have their dispute decided by professionals with significant experience in the relevant fields.

It is undisputed that claims for antitrust damages can be submitted to the jurisdiction of arbitral tribunals.

Mediation

Mediation proceedings and mediation institutions are governed by [Legislative Decree of 4 March 2010, No. 28](#). If an agreement is reached at the outcome of such proceedings, it will be directly enforceable.

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Negotiations assisted by lawyers

Lawyer negotiation is regulated by the [Law Decree of 12 September 2014, No. 132](#) and is mandatory for damage claims of up to €50,000. The result of the negotiation is a written agreement that, in the case of a breach of the obligations provided therein, can be executed in respect of the defaulting party.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

Private antitrust litigation has been known and practised in Italy for a long time, albeit to a limited extent until recent times when the number of private antitrust litigations has significantly increased.

The entry into force of the Legislative Decree of 19 January 2017, No. 3 (the Decree) poses a few new challenges for legal practitioners and judges who are required to apply the new rules.

Among these emerging trends, the coordination between the courts and the competition authorities, both the Italian Competition Authority and the European Commission, is particularly interesting, given that the effectiveness of this relationship will certainly have a crucial effect on the interests at stake in the proceedings. In this regard, in a recent follow-on action, we witnessed efficient cooperation between the judge and the European Commission pursuant to a request by the judge under article 4 of the Decree in relation to the accessibility of documents in the European Commission file and the identification of those documents that concern a leniency application and must be absent of documents disclosure orders.

Another significant trend relates to the tools used to assess the possible damages caused by antitrust infringements. The courts have increasingly recognised that the quantification of the damages in antitrust cases frequently demands difficult economic evaluations that are further complicated by the inherent asymmetries among the parties and the sophistication of the methodologies that need to be undertaken according to the economic literature and the European Commission's 2013 [Practical Guide](#) for quantifying damages in private antitrust actions. For this reason, even though the Italian courts usually appoint an economic expert to assess the existence and amount of damage (and, possibly, the extent of passing-on), on some occasions, damages have been awarded on an equitable basis under article 1226 of the Italian Civil Code (which allows judges to order the compensation of the claimant even without a precise quantification of the damages where they cannot be proved in their exact amount).

A decision of the Joint Divisions of the Italian Supreme Court (see [Judgment of 30 December 2021, no. 41994](#)) settled a longstanding debate among lower courts concerning the validity of contracts enforcing an anticompetitive agreement. The dispute dates back to 2005, when the Bank of Italy (acting at the time in its capacity as competition authority) found that some clauses of the standard bank guarantee adopted by the Italian Bank Association (ABI),

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to be used by Italian banks as a template in their private agreements with final customers, breached competition law. After the decision of the Bank of Italy, banks continued to include the anticompetitive clauses of ABI's standard bank guarantee in their contracts with final clients, which gave rise to private actions seeking a declaration of invalidity (and, therefore, unenforceability) of such contracts. It became controversial among lower courts asked to resolve such disputes whether those contracts should be considered void and unenforceable in their entirety or whether the invalidity should be limited to the specific clauses expressly declared anticompetitive. Finally, the Supreme Court endorsed the latter interpretation, with the consequence that the contracts agreed upon by banks and their customers are deemed to be valid and enforceable, save for those clauses expressly declared anticompetitive by the Competition Authority.

As anticipated, the reform of class action proceedings has also been implemented with the Law of 12 April 2019, No. 31, which will presumably show its results in the following years. Information on pending class actions is published on a [dedicated page](#) on the website of the Italian Ministry of Justice. According to this database, only a few class action proceedings appear to have been initiated at the present date, none of which, however, relates to antitrust infringements.

At the regulatory level, the reform of the civil procedure put in place by [Legislative Decree of 10 October 2022, No. 149](#) is expected to have a material impact on the civil litigation landscape in Italy, allowing courts to bring down their backlog and reduce the length of the proceedings.

Finally, a topic that will become increasingly relevant is the joint and several liability of parties responsible for antitrust infringements, especially in the case of long-lasting multi-party cartels, where different roles (and, therefore, causal efficiency vis-à-vis the alleged damage) can be attributed to each of the infringer. As general principle, the allocation of liability among the damaging parties should be determined depending on each contribution to the damage. However, as confirmed in a recent judgment of the Court of Milan, judges could still apply a presumption of equal relevance of the conduct of each party pursuant to article 2055(3) of the Italian Civil Code unless provided with evidence of an effective differentiation of their conducts in relation to their respective faults or their lesser or greater influence on the harmful consequences (see Milan Court Judgment of 15 May 2023).



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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 | How would you summarise the development of private antitrust litigation in your jurisdiction?

In 1998, there was a dramatic change in the development of private antitrust litigation in Japan. Before this, there were almost no cases in Japan where the plaintiffs who sought damages or injunctive relief from the harm caused by anticompetitive acts of defendants had prevailed, even though several such private suits were instituted each year. However, the following seminal case brought about a radical shift in the way courts perceived and tried cases in the field of private antitrust litigation.

In that case, the defendants, who were manufacturers, were ordered to pay approximately US\$400,000 in damages, equivalent to 5 per cent of the turnover generated from the sale of cartel-related products to the plaintiffs, who were private residents suing on behalf of a local government authority that was the victim of the anticompetitive act.

In the years since that case was decided, more than half of all private suits for damages brought in the various courts of Japan have resulted in a judgment for damages in favour of the plaintiff, with judgments for damages as high as 20 per cent of the turnover of cartel-related products.

In March 2007, the Tokyo District Court rendered a judgment against three large Japanese corporations and ordered them to pay a total of ¥9.7 billion for damages incurred by the Tokyo metropolitan government as a result of illegal acts that were carried out between 1994 and 1998; two of the three corporations settled this case in the Tokyo High Court in April 2009, where they agreed to pay approximately ¥7.5 billion to the Tokyo metropolitan government. The Supreme Court also ordered five corporations that engaged in cartel activities to pay a total amount of ¥5.5 billion for damages incurred by the Yokohama, Kobe and Fukuoka local governments in April 2009.

Further, in March 2011, the Tokyo District Court ordered a defendant to cease and desist from conducting illegal activities that constituted an 'interference against a competitor' under unfair trade practices of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade ([Act No. 54 of 1947](#), as amended (the Anti-monopoly Law)). There has been a recent trend for corporations listed on a stock exchange to seek damages arising from anticompetitive acts before a court, or outside court, to avoid the potential risk of a shareholder initiating derivative litigation. Likewise, in recent years, there has been an increase in derivative litigations against directors of companies guilty of cartel behaviour for damages against the company if they chose not to apply for leniency.

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Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Yes. Private antitrust actions are mandated by statute under the Anti-monopoly Law and are also possible under general tort law, pursuant to the [Civil Code](#). Standing to bring a claim is not limited to those directly affected but includes those indirectly affected under both the Anti-monopoly Law and the Civil Code.

Also, pursuant to article 24 of the Anti-monopoly Law, introduced by a 2001 amendment to the Law, a private plaintiff may, in addition to seeking damages, seek an injunction against certain unfair trade practices. The Anti-monopoly Law provides for, and the Japanese Fair Trade Commission (JFTC) has designated under the authority of the Anti-monopoly Law, many unfair trade practices, such as:

- exclusive dealing;
- price discrimination;
- below-cost sales;
- tie-ins;
- resale price maintenance;
- refusal to deal; and
- trading on restrictive terms.

Among these, private plaintiffs have most commonly sought injunctions for price discrimination, below-cost sales and division of sales territories. However, private plaintiffs have been unsuccessful in many injunction cases.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Articles 25 and 26 of the Anti-monopoly Law relate to suits for damages arising from anti-competitive acts. Article 25 provides that parties that have monopolised or engaged in a cartel or other unfair trade practices are liable to indemnify those injured by those practices.

Article 709 of the Civil Code provides the principles for general tort law, stating that those who violate the rights of another must compensate for the damage resulting from their actions. This is recognised to include anticompetitive acts, thereby authorising the initiation of private antitrust actions. In addition, there is another legal claim available for victims of anticompetitive acts under article 703 of the Civil Code, which provides that the victims are entitled to claim for unjust enrichment that violators gained through the anticompetitive acts.

There are three possible ways to bring an action seeking compensation, the distinction among them being the burden of proof applicable to each. Article 26 of the Anti-monopoly Law provides that the right to claim damages under article 25 of the Law may not be asserted in court until a relevant order (such as a cease-and-desist order) by the JFTC has become final and binding (which means that the judgment also needs to become final and binding if a defendant challenges the relevant order in court). However, when such an order exists, the

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plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant in respect of the infringement of the Anti-monopoly Law, given that such a determination has already been made in the prior JFTC decision.

In article 709 litigation, no such JFTC determination will exist; therefore, the plaintiff must prove the existence of intention or negligence of the defendant at trial. A plaintiff based on article 703 of the Civil Code must also prove anticompetitive acts to present the fact that a defendant gained profits without legal cause.

A private plaintiff may, in addition to seeking damages, seek an injunction against certain unfair trade practices (article 24 of the Anti-monopoly Law).

The Tokyo District Court decisions can be appealed before the Tokyo High Court only, and the Tokyo High Court decision may be further appealed before the Supreme Court of Japan, similar to actions brought under general tort, although the court of first instance for general tort or unjust enrichment actions is not restricted to the Tokyo District Court, and the district court decision may be appealed before the relevant high court. High courts must accept an appeal of both the factual determinations and the interpretations of law by the lower court. Although the Supreme Court rarely agrees to revisit the factual determinations of the lower court, it nevertheless has the discretion to do so, based on the merits of the case. Injunction litigations are initiated in the district courts.

PRIVATE ACTIONS

Availability

- 4** | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Redressal for damages caused due to all types of antitrust violations may be sought in a private litigation. However, under article 24 of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)), a private action seeking an injunction is limited solely to claims of unfair trade practices on the part of the defendant. A finding of infringement by the Japanese Fair Trade Commission (JFTC) is not required to initiate a private antitrust action.

In principle, a civil court is not bound by any determination of the JFTC regarding misconduct by a defendant. However, if a JFTC order has become final and binding, it is, as a matter of practice, likely that the facts determined by the JFTC will be given some weightage in a private litigation.

In addition, when such an order exists, a plaintiff can assert the right to claim damages under article 25 of the Anti-monopoly Law, under which the plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant in respect of the infringement of the Anti-monopoly Law, given that such a determination has already been made in the prior JFTC decision. In this case, pursuant to article 84 of the Anti-monopoly

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Law, a court may refer to the JFTC for its opinion about the amount of damages incurred due to anticompetitive acts.

Without a final and binding JFTC order, a plaintiff claiming damages must choose legal actions based on the Civil Code, such as article 709, and must prove the existence of intention or negligence of the defendant in respect of the relevant infringement. Having said that, since the presumption of fact based upon the JFTC's findings may be accepted to some extent, in practice, past claims are mainly based on the findings of infringement by the JFTC.

In some severe cases, the JFTC files a complaint with public prosecutors for criminal prosecution pursuant to articles 74 and 96 of the Anti-monopoly Law. A plaintiff in a private action may rely on findings in criminal proceedings concerning the relevant infringement. Although a civil court is not bound by the findings in criminal proceedings, it would be difficult for the defendant to rebut the findings unless new and definite evidence is submitted in private litigation.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

With regard to actions in Japan as a whole, the nexus for bringing a private action is that the anticompetitive act or agreement by the defendant must have had some impact on the Japanese market. If the Japanese market has been affected by the act of agreement, conspiracy, etc, it is possible to bring an action before a court in Japan. If a claim for damages is based on the Anti-monopoly Law, it must be brought solely in the Tokyo District Court, and if a claim is based on general tort, it must be brought in a district court pursuant to the general rule of jurisdiction under the Civil Procedures Laws. If a plaintiff wishes to bring an action for damages or unjust enrichment to a district court other than the Tokyo District Court, the plaintiff must choose a cause prescribed in the Civil Code.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes, provided that those actions have an impact on the Japanese market.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties, and contingency fee is available. In fact, most cases of private antitrust litigation are fought on a contingency basis. The number of corporations, in particular public corporations, that have brought such cases for damages is increasing, and a time-charge basis may be used by those public corporations.

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Jury trials

8 | Are jury trials available?

No, jury trials are not available in private antitrust litigation. A lay judge system was introduced in May 2009, but it is used only for trying serious criminal cases.

Discovery procedures

9 | What pretrial discovery procedures are available?

During the past 10 years or so, the Japanese legal system's form of discovery has changed to generally extend its scope under the Civil Procedures Law. Under the system, a plaintiff or defendant may request that the court orders the other side to submit certain evidence to the court. If the court so orders, the party must comply and submit the evidence. Although this discovery system is utilised in some cases, it is limited in scope under articles 132-4 and 220 of the Civil Procedures Law in comparison with the discovery procedures of the United States and some other legal systems.

There have also been amendments to the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)) since January 2010. Article 80 of the Anti-monopoly Law, introduced by the amendments, states that only a plaintiff seeking an injunction may request the court to order the defendant to produce relevant evidence that assists in establishing illegal activities.

Apart from judicial proceedings, the plaintiff may rely on the Act on Access to Information Held by Administrative Organs ([Act No. 42 of 1999](#) (the Information Disclosure Law)) to request administrative documents used for investigations and possessed by the Japanese Fair Trade Commission (JFTC) under certain conditions. For instance, upon a request from victims of bid-rigging practices pursuant to the Information Disclosure Law, the JFTC has so far disclosed administrative surcharge orders, most of which are usually not revealed by the JFTC, so that the plaintiffs could identify from those orders which biddings were related to the bid-rigging practices.

Admissible evidence

10 | What evidence is admissible?

In civil actions in Japan, in general, all evidence, including documentary or testimonial evidence, is admissible. There are limited exceptions, such as evidence that was obtained by illegal activity, depending on the severity of the illegality.

Under the Civil Procedures Law, judges determine the weight or value to be ascribed to the evidence, which can include a conclusion that certain submitted evidence has no weight or value. Each party to the litigation submits its own evidence, which is, in general, limited to evidence that the party either possesses or can obtain through independent means, although it is possible for a party to request a court to order another party to produce information.

An e-discovery system is not common in Japanese court or even in JFTC procedures.

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Legal privilege protection

11 | What evidence is protected by legal privilege?

In general, there is no applicable rule that allows for protection of evidence under attorney–client privilege under the Anti-monopoly Law as at the time of preparing this response. However, in civil litigation procedures relating to testimony and the submission of documents, legal counsel (including in-house counsel) can refuse to testify or submit a document regarding facts that have come to their knowledge while performing their duties that should be kept secret. Additionally, injunctive relief can be sought to protect trade secrets under article 81 of the Anti-monopoly Law.

The amended Anti-monopoly Law has come into force in December 2020, and the JFTC has discretion to set administrative surcharges on cartelists that apply for leniency and are willing to cooperate with the JFTC's investigation to obtain a further reduction of the surcharges.

To ensure that the new leniency system works efficiently and fairly, in accordance with an additional resolution to the amendment adopted by the Diet, the JFTC added new provisions to the JFTC's investigation regulations, providing that an alleged company can be subject to the limited attorney–client privilege in proceedings regarding unreasonable restraint of trade. Under the new Anti-monopoly Law, the JFTC can be requested to return certain types of attorney–client communications that are seized.

When an alleged company receives a submission order for certain documents from the JFTC officers during a dawn raid, the company will be entitled to claim that the documents should not be subject to the order because the documents contain attorney–client communications. Under those circumstances, the JFTC officers will order the submission of the documents, seal the documents and place the documents under the control of the Determination Officers at the Secretariat of the JFTC, which is independent from the Investigation Bureau. The Determination Officers will then determine whether those documents satisfy the conditions for attorney–client privilege provided under the new regulations or guidelines. If the conditions are satisfied, the documents will be promptly returned to the company.

The rationale behind the introduction of attorney–client privilege is to protect communications between companies and external attorneys in connection with investigations against unreasonable restraints of trade, resulting in a more efficient flexible surcharge system. Communications with in-house counsel will also be subject to attorney–client privilege if it is apparent that the in-house counsel conducts legal affairs independently from and beyond the control of his or her employer after the violation (of the Anti-monopoly Law) in question is revealed, and the independence and lack of control of the in-house counsel is found to be based on the employer's instructions.

In respect of communications with overseas attorneys, the JFTC will preclude documents or data containing those communications from the scope of submission orders by the JFTC in light of the attorney–client privilege in relevant countries in accordance with the draft guidelines.

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Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. The JFTC may file complaints about severe criminal cases with public prosecutors for criminal prosecution pursuant to articles 74 and 96 of the Anti-monopoly Law. In those cases, private litigation may still proceed as civil cases are clearly distinguished from criminal proceedings in Japan. In most cases in which there has been a criminal prosecution followed by private litigation against the relevant defendant, the plaintiffs have had a good chance of prevailing at trial.

However, in practice, few criminal cases are brought in Japan with regard to anti-monopoly violations (perhaps only one case every two years). In contrast, administrative decisions of the JFTC regarding anticompetitive acts are common, but in recent years, there have been around five JFTC orders each year. Orders that have become final and binding allow for article 25 private litigations to be brought about and, hence, are a common connective source for the initiation of private antitrust litigation in Japan.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence and findings in criminal proceedings can be relied on by plaintiffs in parallel private actions. Private actions may rely on judgments or decisions rendered or evidence presented in criminal proceedings (even including JFTC administrative proceedings). Applicants for leniency are not protected from follow-on litigation. In most of the private actions thus far, the leniency applicants have been defendants.

In respect of the Information Disclosure Law, the JFTC has a general policy to disclose, at its discretion, administrative documents obtained or used in its administrative investigation (except leniency procedures) to private claimants. The JFTC has so far disclosed certain administrative documents in response to requests based on the Information Disclosure Law.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Generally, there is no statutory right for a defendant to stay proceedings. If a defendant's petition is allowed in court, the court may decide at its discretion whether to grant the stay, although such a stay of proceedings is granted only under exceptional circumstances.

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Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Generally speaking, although there is no clear applicable standard of proof, the claimant, regardless of whether they are a direct purchaser, has the burden of proof to the extent of the preponderance of the evidence. With regard to the finding of the amount of damages, in cases where it is determinable that damages have arisen and if it is extremely difficult for the claimant to prove the amount owing to the nature of the damages, the court may determine the proper amount on the basis of the entire import of the oral argument and the result of the examination of evidence under article 248 of the Civil Procedures Law. In general, there are no rules of thumb or rebuttable presumptions even relating to overcharges of cartels.

Actions brought pursuant to article 25 of the Anti-monopoly Law will have the benefit of a decision passed by the JFTC regarding the existence of intention and negligence of the defendant. Therefore, in those actions, the defendants are liable for damages without negligence, provided that the other requirements are fulfilled.

In actions brought pursuant to article 709 of the Civil Code, no such JFTC determination exists; therefore, the plaintiff has the burden of proving the existence of intention and negligence of the defendant, together with other requirements provided by article 709 during the trial.

A claimant for unjust enrichment under article 703 of the Civil Code must prove that the defendants obtained profits to the detriment of the claimant, and that the profit transfers from the claimant to the defendant are without legal basis, by establishing anticompetitive acts of the defendants and the invalidity of the contact that made those profit transfers.

Although a civil court is not bound by any determination of the JFTC regarding misconduct by a defendant, if a JFTC order has become final and binding, it is likely that the facts determined by the JFTC will be given some weightage in a private litigation. Since this assumption is not based on any provisions of law, there is no difference in terms of the presumption between actions pursuant to articles 25 of the Anti-monopoly Law or article 709 of the Civil Code.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

No class proceedings may be brought in Japan.

For single party proceedings, actions brought in a district court typically require a period of between one and two years to resolve. Actions brought in a high court typically require six months to one year to resolve.

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In general, there is no mechanism for accelerating the proceedings. However, in recent years, the Japanese courts have generally sought to shorten the time required to reach a judgment in a case.

Limitation periods

17|What are the relevant limitation periods?

Pursuant to article 26, paragraph 2 of the Anti-monopoly Law, private actions brought pursuant to article 25 must be brought within three years of the date of the finalisation of the relevant JFTC order in the matter (ie, the limitation period starts to run from the finalised date of the relevant JFTC order).

Actions brought under general tort, pursuant to article 709 of the Civil Code, must be brought either within three years of the date on which the victim or plaintiff became aware of both the damage and the defendants who caused the damage through involvement in the conspiracy or an act, or within 20 years of the date of the conspiracy or damaging act (whichever is earlier).

A claim for unjust enrichment under article 703 of the Civil Code must be brought within five years of the date when the claimant became aware of capability of the claim, or within 10 years of the date when the claim is objectively available, whichever is earlier.

Appeals

18|What appeals are available? Is appeal available on the facts or on the law?

Actions pursuant to article 25 must be brought solely before the Tokyo District Court. The Tokyo District Court decisions may only be appealed before the Tokyo High Court, and the decision on appeal may be further appealed before the Supreme Court. The Tokyo High Court must accept an appeal on the factual determinations as well as the interpretations of law of the Tokyo District Court. The Supreme Court rarely agrees to revisit the factual determinations of the lower court although it has the discretion to do so if it chooses.

Actions under general tort and unjust enrichment as well as actions seeking an injunction under article 24 of the Anti-monopoly Law are brought in district courts, the decisions of which may be appealed to the relevant high court.

COLLECTIVE ACTIONS

Availability

19|Are collective proceedings available in respect of antitrust claims?

No, class actions and proceedings are not available in Japan.

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Applicable legislation

20 | Are collective proceedings mandated by legislation?

Not applicable.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 | Have courts certified collective proceedings in antitrust matters?

Not applicable.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Not applicable.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Not applicable.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable since class actions are not available in Japan.

Japan has multiple courts, with the relevant courts of general jurisdiction being the district courts located throughout the country. Above the district courts are the high courts. Private actions brought pursuant to article 25 of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade must be brought solely before the Tokyo District Court, as the court of first instance.

Actions brought under the Civil Code, such as articles 703 and 709, will be brought in the relevant district court. An appropriate choice of a district court is generally the court in the locale where the plaintiff's residence or corporate headquarters is located, the place where the conspiracy or act occurred, or the place where the headquarters of the defendant is located. It is only possible to bring an action in one jurisdiction concerning any claim.

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Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Damages are limited to actual losses only, and only the loss that has a reasonable causation link to the harmful act or conspiracy. However, unlike in some other jurisdictions, damages can, in principle, be claimed by both direct and indirect purchasers as long as they can show that they suffered a loss because of the original harmful act or conspiracy.

In Japan, some of the largest damages are awarded in bid-rigging cases and, in particular, to local governments or public corporations that have suffered damages as a result of an agreement among bidding participants to agree in advance upon the successful bidder and the amount of the successful bid. Because of this, there has been a trend in recent years for local governments and public corporations to insert a clause in the project contract specifying a pre-agreed amount of damages to be paid if it is subsequently discovered that the successful bidder had participated in bid-rigging. Typically, the amount specified in such contracts is between 6 and 20 per cent of the contract value. For example, it has been reported that the Tokyo Metropolitan Government stipulates a damages clause amounting to 10 per cent of the contract value, and many other local governments have followed this 10 per cent stipulation.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Article 24 of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)) permits a person whose interests are infringed upon or likely to be infringed upon by unfair trade practices, and who is thereby suffering or is likely to suffer serious damages, to seek an injunction suspending or preventing the party from engaging in those infringements. Both provisional (interim) and permanent injunctions are available, although the burden of proof is lower in provisional dispositions than in permanent injunctions.

Further, restitution is rarely granted as a remedy. However, it may be granted (at least in part) through an injunction to restore the injured party to the position it held prior to the commencement of the violation.

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Punitive damages

29 | Are punitive or exemplary damages available?

No.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Yes. The court must award interest at a rate of 3 per cent per year from the time the damaging act or conspiracy occurred until the defendant makes the payment.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

No. Fines (administrative surcharges) imposed by competition authorities are calculated as a percentage (ie, 10 per cent of the violator's turnover from the related product or products during the relevant period up to 10 years). Fines paid by violators are contributed to the Japanese national treasury and are not distributed to private parties injured by the violator's conduct. Therefore, the court does not take into account the fines imposed by the Japanese Fair Trade Commission (JFTC) at all.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In general, each party must bear its own legal costs.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Yes, tortfeasors are generally liable for actual damages on a joint and several basis.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Yes. If there are several defendants, in the event that one defendant is required to pay for the entire damages award, that defendant may seek indemnification from the co-defendants and demand a contribution equivalent to their respective proportion of the damages. Such a contribution is commonly sought in these cases.

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A defendant who paid the whole or a part of the damages can seek indemnification from the co-defendants in or out of court, provided that for the defendant to assert those claims, the amount paid by the defendant to a victim or plaintiff must exceed the amount for which the defendant is liable. The claim for indemnification from the co-defendants is brought in separate proceedings from the principal claim and is normally pursued after a judgment or settlement of the principal claim.

Passing on

35 | Is the 'passing-on' defence allowed?

The passing-on defence may be taken into account, although not by using that terminology. In Japanese civil litigation, an award for damages must compensate for the injury actually suffered by the plaintiff. This stems from the underlying principle that the purpose of private actions is to compensate for a loss, not to act as a deterrent. Based on this, if a direct purchaser passes an overcharge down the supply chain, the purchaser may still have difficulty showing the non-existence of damages.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

No.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

In theory, private claims for violations of the Anti-monopoly Law may be resolved by agreement through arbitration. Although any such arbitration that has occurred under confidential conditions would not be publicly reported, we believe that there have been almost no such arbitration or alternative dispute resolution mechanisms used in Japan for Anti-monopoly Law claims. This is because the Anti-monopoly Law is a 'national and public law' in Japan, and any matters arising under it are, as a matter of practice, generally submitted to the JFTC regardless of whether such private claims are settled through arbitration.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

The commitment procedure was effectively introduced into the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)) on 30 December 2018. The commitment procedure is similar to the commitment system under EU competition law in that it is aimed at resolving suspected

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violations of Anti-monopoly Law on a voluntary basis; by consent between the Japanese Fair Trade Commission (JFTC) and the undertakings concerned.

Under the new system, undertakings in which a certain type of violation of the Anti-monopoly Law occurred may not be subject to the issuance of an infringement decision if the JFTC approves the commitment plan submitted by the undertakings for the resolution of the suspected conduct. As of May 2023, there have been more than 10 cases in which the JFTC approved the commitment plans since December 2018.

When a JFTC order has been issued, a plaintiff can assert its right to claim damages under article 25 of the Anti-monopoly Law, pursuant to which the plaintiff (in the related private litigation) need not prove the existence of intention or negligence of the defendant in respect of the relevant infringement of the Anti-monopoly Law, given that such a determination has already been made by the JFTC. Accordingly, undertakings that have allegedly violated the Anti-monopoly Law may benefit from the introduction of the commitment procedure in that they may avoid a JFTC order that finds an infringement against them and the consequent claims for damages under article 25 of the Anti-monopoly Law.

However, on the other side of the coin, the plaintiff of an anti-monopoly infringement case will only have recourse to articles 703 and 709 of the Civil Code as a legal basis for action against an infringement if the JFTC decides to deal with the matter via the commitment procedure. Pursuant to those provisions of the Civil Code, an infringement of the defendant must be proven or shown by the plaintiff, which may be an onerous task, depending on the circumstances of the case.

Apart from the above, private litigation has remained relatively limited in Japan so far. This trend is expected to continue and there are no hot topics in the law of private antitrust litigation in Japan.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

- 1 How would you summarise the development of private antitrust litigation in your jurisdiction?

The Netherlands has traditionally been seen as an attractive jurisdiction for bringing damages claims in competition cases. And the number of claims being brought in the Netherlands have increased even further in the last few years owing to the possibility to litigate in English at the Netherlands Commercial Court (NCC), and to [the Collective Settlement of Mass Damages Act](#), which entered into force on 1 January 2020.

In recent years, several (interim) judgments have been rendered in ongoing private cartel damages cases in the Netherlands. This trend persisted in 2022, when there were seven new judgments by Dutch courts in follow-on cases, including a judgment in a follow-on abuse of dominance case. The rulings have mainly concerned issues such as jurisdiction, claimants' duty to substantiate their claims, applicable law, the validity of assignments of claims to claims vehicles, pretrial hearings, liability and the use of the 'passing-on' defence. The application and interpretation of these issues have gained somewhat in clarity thanks to these judgments; however, several aspects remain as yet unresolved. Example cartel cases that have led to follow-on actions for damages in the Netherlands are *Air Cargo*, *Trucks* and *Elevators*.

In addition, there were several civil law matters in which a competition law based claim was brought forward on a standalone basis. However, as usual, most of those claims were dismissed due to insufficient substantiation.

Applicable legislation

- 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions for damages are mandated by statute, and both direct and indirect purchasers as well as any other party with sufficient interest can bring a claim.

- 3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

[Directive 2014/104/EU](#) (the Antitrust Damages Directive) was implemented into Dutch law in 2017 through [an implementing act \(Implementing Act\)](#), supplementing the existing general

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rules on tortious liability in the Civil Code (CC) to create a specific (but non-exclusive) statutory basis for actions for damages based on breaches of competition law in [article 6:193m\(1\) of the CC](#). In addition to this, the general rules on tort (article 6:162 of the CC) and unjust enrichment (article 6:212 of the CC) can also apply. Moreover, a representative entity can also bring a collective action on an opt-out basis under [article 3:305a of the CC](#) (as part of the Collective Settlement of Mass Damages Act).

Unlike administrative proceedings against decisions of the Dutch Competition Authority for which the Rotterdam district court has exclusive jurisdiction, private antitrust litigation under civil law is not assigned to any specialised competition law court. Private competition damages actions must be brought in first instance before the district court that has territorial jurisdiction. When the Amsterdam district court has jurisdiction in an international damages case, since 1 January 2019, claimants have the option to bring their claim before the NCC and conduct the proceedings in English, provided that the defendants agree to the jurisdiction of the NCC, which includes the choice for the English language.

PRIVATE ACTIONS

Availability

- 4** | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

With regard to follow-on cartel damages claims, claimants benefit – where applicable – from the legal presumption (introduced in the implementation of Directive 2014/104/EU (the Antitrust Damages Directive)) that a cartel causes damage. For any type of breach of the competition laws laid down in articles 101 and 102 of the Treaty on the Functioning of the European Union committed by multiple undertakings, the Civil Code provides for joint and several liability for the undertakings involved in the infringement. No previous finding of an infringement is required. Standalone cases before the Dutch courts are a common phenomenon, notably with regard to vertical restraints.

In addition to these provisions, a claimant can bring a claim for damages for any type of competition law infringement, based on the general rules governing tort. Other types of actions, such as seeking a declaration that an agreement is null and void owing to incompatibility with the competition rules, or seeking a declaration that the defendant has abused its dominant position, can also be brought by private claimants. However, with regard to any claim other than a damages claim against a cartel, the claimant does not benefit from a legal presumption that the infringement has caused damage.

Findings of infringement by the European Commission are binding insofar as, pursuant to article 16(1) of Council Regulation (EC) No. 1/2003, the Dutch courts cannot make decisions that are contrary to a final decision of the European Commission (*Masterfoods* doctrine). The implementation of the Antitrust Damages Directive has also resulted in the introduction of a statutory provision declaring definitive decisions by the Dutch Competition Authority to be formally binding.

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Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

Where it concerns companies established in the European Union, international jurisdiction is governed by Regulation (EU) No. 1215/2012 (the Recast Brussels I Regulation). Based on the Regulation, the Dutch court has jurisdiction if the defendant is domiciled in the Netherlands or if the harmful effects of the unlawful conduct have occurred, or may occur, in the Netherlands.

In addition, the Dutch courts have jurisdiction in respect of claims against a defendant based in another EU member state if one or more of the co-defendants in the case are established in the Netherlands, and the claims are so closely connected that the cases should be heard and determined together (article 8 of Regulation (EU) No. 1215/2012). For companies established outside the European Union, the Code of Civil Procedure provides for the same rule of jurisdiction as article 8 of Regulation (EU) No. 1215/2012.

For collective actions pursuant to the Collective Settlement of Mass Damages Act, an additional requirement applies: the collective action must be sufficiently closely connected to the Dutch legal system (the scope rule). Such a sufficiently close connection can be established if:

- the majority of the injured parties are located in the Netherlands;
- the defendant is established in the Netherlands and additional factors point to a connection with the Dutch legal system; or
- the event to which the claim relates took place in the Netherlands.

It is fairly common for defendants that are held jointly and severally liable for damages to also start third-party proceedings before the same court in the Netherlands.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

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The statutory basis for damages claims based on competition law infringements taken up in the Civil Code with the implementation of the Antitrust Damages Directive only concerns undertakings. However, based on the general rules on tort, a damages claim may be brought against an individual (employee or executive) as well, provided they can be held personally liable. In practice, we have seen only one legal action against an individual in a competition litigation case to date – namely in the follow-on proceedings in the *Shrimp* cartel, in which the curators held a former director liable for the damages incurred by the company as a result of the cartel (ie, the fine imposed by the European Commission).

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Dutch law does not contain limitations on third-party funding of litigation. The Dutch Bar regulations prohibit attorneys from having a financial interest in a client's claim, which means that, as a general rule, contingency fee arrangements are not available for Dutch attorneys (although it is generally permissible to make fee arrangements that are to a limited extent outcome-dependent). Lawyers that are not or no longer members of the Dutch bar are not subject to this prohibition and are, therefore, free to work on the basis of contingency fee arrangements. However, they have no right to appear in court and will, thus, need to be represented in court by a member of the bar.

Jury trials

8 | Are jury trials available?

Jury trials are unknown in the Dutch judiciary system.

Discovery procedures

9 | What pretrial discovery procedures are available?

Dutch law does not provide for a general right to discovery. The court can, however, by injunction, order a party to disclose or provide certain documents if another party to the proceedings submits a reasoned request to the court. A request to this extent can be submitted during a procedure or before the commencement of a procedure. The requesting party will need to first substantiate that it has a legitimate interest in obtaining or accessing the documents. The documents must, furthermore, be sufficiently specifically described and relate to a legal relationship between the parties in question (eg, a claim for breach of contract or a claim for damages based on a tortious act). These three conditions are interpreted restrictively by the court where it concerns actions for damages in cartel cases.

With regard to documents from the file of the Dutch Competition Authority (ACM), the relevant provisions from Directive 2014/104/EU (the Antitrust Damages Directive) have been implemented in Dutch law, limiting the possibilities of obtaining those documents and limiting the evidentiary value of those documents.

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Admissible evidence

10 | What evidence is admissible?

There are, in principle, no limitations in respect of the form in which evidence is provided, although in some cases the law or the court may specify otherwise. Parties in competition cases often submit economic expert reports as evidence. When faced with conflicting reports from the disputing parties or otherwise faced with issues requiring a certain expertise, it is possible for the court itself to also appoint an expert, without being bound to the expert's opinion.

Legal privilege protection

11 | What evidence is protected by legal privilege?

Documents, both physical and digital, that constitute correspondence with an attorney are legally privileged. In respect of investigations by the ACM, this includes all correspondence with attorneys admitted to the bar (including in-house lawyers). However, correspondence with in-house counsel is not privileged if the in-house counsel in question is not an attorney admitted to the bar. For investigations by the European Commission, the rule established in the *Akzo* case applies: only correspondence with external attorneys is legally privileged; correspondence with in-house counsel is not.

Trade secrets or other commercially sensitive matters are not always protected from disclosure. Whether commercial confidentiality constitutes a legitimate reason not to provide a certain piece of evidence will be assessed by the court on a case-by-case basis. It is important that parties are given the opportunity to give their views on all materials brought into the procedure (honouring the principle that both sides to the dispute should be heard). Confidentiality rings provide an option to protect trade secrets while also enabling disclosure of the information to the parties to a procedure. This entails that the court imposes an obligation of confidentiality on the parties to the procedure that receive the information. Such confidentiality rings have, however, in practice, not been applied much in competition damages actions. [The law implementing Directive 2016/943/EU](#) into Dutch law entered into effect on 23 October 2018. With this legislation, the Directive's specific provisions on the protection of know-how and trade secrets have been implemented into Dutch law.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Infringement of the competition rules is not a criminal offence under Dutch law.

Utilising of criminal evidence

- 13** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Because infringement of the competition rules is not a criminal offence under Dutch law, evidence or findings in criminal proceedings will normally not play a role in private antitrust litigation in the Netherlands. Leniency applicants are not granted immunity for follow-on litigation, but leniency statements are protected from disclosure in the context of follow-on litigation. The act implementing the Antitrust Damages Directive has introduced specific provisions in Dutch civil procedural law exempting leniency statements and statements made in the context of a settlement from being disclosed.

Stay of proceedings

- 14** In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The Amsterdam Court of Appeal decided in the *Equilib* case, a follow-on procedure regarding the *Air Cargo* cartel, that the fact that a European Commission enforcement decision is being challenged before the EU courts does not necessarily mean that the national follow-on proceedings need to be stayed. The court interpreted the European Court of Justice *Masterfoods* case to mean that a national procedure only needs to be stayed if and to the extent that it concerns questions of fact or law, the answer to which depends on the validity of the European Commission's decision. There must be reasonable doubts as to the validity of the European Commission's enforcement decision. To substantiate this, the party requesting a stay of the proceedings must:

- prove that it has appealed the European Commission's decision on time;
- substantiate that, in the proceedings before the EU courts, it contests the decision of the European Commission on reasonable grounds; and
- set out the defences that it intends to raise in the national proceedings to allow the national court to determine whether and to what extent the assessment of those defences raised in the national proceedings is dependent on the validity of the European Commission's decision.

The court can also stay proceedings in actions for damages for a maximum of two years if the parties are involved in out-of-court settlement procedures in relation to the matter in question.

Standard of proof

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The burden of proving submissions and allegations in principle lies with the party that relies on them. The burden is, therefore, on the claimant to reasonably substantiate its claims and arguments in the writ. The claimant will have to prove:

- a breach of competition law;
- the existence and amount of the damages; and
- a causal link between the wrongful act and the damage suffered.

The standard of proof for an allegation of fact is to show that the allegation is plausible.

In follow-on actions, the burden for claimants to prove a competition law infringement is low because the enforcement decision by the European Commission or the ACM constitutes proof of the infringement. However, in standalone procedures, where claimants cannot refer to an administrative enforcement decision finding an infringement, claimants frequently have difficulty in sufficiently substantiating their claim. This also applies if claimants extend the scope of their claim (in terms of duration, products covered or otherwise) beyond the scope of the infringement as established in the underlying decision of the competition authority.

Damages proceedings are normally divided into two stages in the Netherlands. First, a claimant seeks a declaratory judgment to the effect that each defendant is (jointly and severally) declared liable with regard to the claimant in question for all the damage caused by the infringement to which it was a party. The threshold to obtain such declaratory judgment is fairly low; to succeed, the claimant must demonstrate that it is likely that it suffered damage. The second stage is a separate procedure in which the quantification of the damages is dealt with (unless the court has already obtained all the information needed for a decision on the amount of damages in the first stage). Claimants benefit from the (rebuttable) evidentiary presumption laid down in the Civil Code through the act implementing the Antitrust Damages Directive (Implementing Act), which establishes that a cartel is presumed to cause damage.

The presumption of damage has even been held to apply to claims predating the entry into force of the Implementing Act. In a case concerning the Bitumen cartel, the Rotterdam district court held that based on the facts of the case and the considerations in the decision of the Commission, it followed from the type of conduct in question that the claimant could be presumed to have suffered damage. This outcome, according to the court, was also in line with what would have followed from the Antitrust Damages Directive (had it been temporally applicable), and thus in line with the court's duty to interpret Dutch law in accordance with the Antitrust Damages Directive to the extent possible. This does, however, not relieve claimants from the burden of having to substantiate the amount of damages they are claiming. It is also possible for the court itself to set a presumption of facts or reverse an existing burden of proof if it finds that this is required for reasons of reasonableness and fairness.

The burden of proof for facts underlying specific defences on which a defendant can rely (such as the passing-on defence) lies with the defendant.

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In recent cartel damages cases, the duty of the claimant to substantiate its claim sufficiently has been clarified further. It has become clear that claimants will generally have to substantiate that they have purchased products from participants in a cartel and will have to specify from which party and when they purchased those products. If the claimant is a litigation vehicle that has collected multiple claims via an assignment model, the litigation vehicle must provide this substantiation for each individual underlying assignor.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The duration of private antitrust proceedings is variable and to a large extent determined by factors such as the level of complexity of the case, the schedule and workload of the court and the procedural attitude of the parties involved. Therefore, whereas the average duration for civil commercial proceedings in first instance is around one to two years, for complex, multiparty cartel damages cases involving international parties or foreign legal systems, the duration could extend to five years or more.

Another important factor that may delay a procedure's duration is whether procedural interim motions (eg, jurisdiction motions, admissibility defences, disclosure requests or motions for joinder) are raised. To plan the procedural aspects of a case, case management hearings may be organised at the request of the parties or at the initiative of the court itself. In practice, Dutch courts have proven willing to adapt the conducting of the procedure to the specific circumstances of complex multiparty cartel damages cases and have embraced the possibility of using case management hearings to reach agreements with the parties as to the phases of the procedure and the timing of procedural steps.

Limitation periods

17 | What are the relevant limitation periods?

A limitation period of five years applies for bringing a damages claim for breach of competition law under Dutch law, both for claims based on the statutory basis for private antitrust actions introduced by the act implementing the Antitrust Damages Directive and for claims based on the general rules governing tort. The limitation period for follow-on procedures generally starts to run on the date after the day that the European Commission or other competition authority publicly announces its decision to impose fines. For other procedures, the first day of the limitation period is the day the claimant becomes aware of the damage and the person liable for it, but not before the infringement has ceased to exist.

To interrupt and renew the limitation period, parties can send a notice letter. The five-year limitation period cannot, however, be extended or renewed beyond the absolute limitation period of 20 years, calculated from the date on which the damage occurred, regardless of whether the injured party is aware of the damage. The limitation period can also be extended if a competition authority takes investigative or procedural action in respect of the competition infringement to which the damages claim relates, with the time needed for closing the procedure increased by one year.

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Claims litigated in the Netherlands often concern international claims to which various foreign limitation laws may be applicable. In a damages case concerning the Prestressing Steel cartel, the Limburg District Court and Court of Appeal of Den Bosch had to apply German law to the question of limitation. To do so, the courts looked at relevant case law from the Bundesgerichtshof. In a damages case concerning the Sodium Chlorate cartel, the Amsterdam Court of Appeal assessed the limitation period for claims under (inter alia) Finnish, Swedish and Spanish laws and took into account the EU law principle of effectiveness in its considerations.

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

A judgment by a district court in civil cases can be appealed to the court of appeal that has territorial jurisdiction. The court of appeal will exercise a full review of questions of fact and law. A subsequent judgment of the court of appeal can then be appealed to the Supreme Court in The Hague. The Supreme Court reviews the matter on questions of law only. If a district court renders an interim judgment, it may give parties leave for interim appeal to the relevant court of appeal. Subsequently, interim appeal on questions of law to the Supreme Court may be available.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Collective proceedings for private competition litigation are possible in the following ways:

- 1 Multiple claimants can jointly bring a legal action for damages in their own name.
- 2 Parties with an interest in a pending case can request to join the proceedings (article 217 of the Code of Civil Procedure).
- 3 Claimants can assign their claims to a claims vehicle, after which the claims vehicle brings the legal action under its own name. A common structure for this in the Netherlands is the assignment of individual claims to a claims vehicle against a deferred purchase price expressed as a percentage of the damages ultimately awarded.
- 4 Associations or foundations that act as representative bodies can litigate on behalf of injured parties (article 3:305a of the Civil Code (CC)) (this type of collective action was applied in *Cathode Ray Tubes* and *Libor*). Since it was not possible for such representative bodies to claim damages in court proceedings, they would normally seek to obtain a declaratory judgment as a basis to then negotiate a collective settlement.

With regard to [4], the regime changed with the entry into force (on 1 January 2020) of the Collective Settlement of Mass Damages Act. This act applies to collective actions initiated on or after 1 January 2020 and relates to damage that occurred on or after 15 November 2016. It makes it possible to claim compensation directly, also in collective actions, under article 3:305a of the CC. If several representative bodies initiate collective actions relating to the same damage, only one of the bodies will be selected to present the case as an exclusive

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advocate. Other representative bodies that have not been selected will, however, remain involved as parties to the proceedings. While settlement remains the preferred route, if the parties fail to reach an agreement, the court may determine the amount of the damages in a decision binding on both the defendants and the injured parties (with the exception of injured parties who have chosen to opt out).

Applicable legislation

20 | Are collective proceedings mandated by legislation?

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Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

For a claim by representative bodies to be admissible, it must follow from the representative body's articles of association that it represents the interests of the injured parties on behalf of which it brings a claim. In addition, the claim must sufficiently warrant the interests of the injured parties represented by it. For representative bodies presenting a claim under article 3:305a of the CC, the requirements of the Collective Settlement of Mass Damages Act apply:

- the representative body must meet certain criteria on governance, financing and representativeness;
- representative bodies must have an internal supervisory body;
- they must have sufficient experience and expertise; and
- they must maintain a publicly accessible web page with relevant information.

These requirements are essentially the same as those laid down in the Claim Code, a non-binding code of conduct for foundations and associations that bring representative collective actions or negotiate collective settlement agreements.

22 | Have courts certified collective proceedings in antitrust matters?

Most collective proceedings in private competition litigation have so far been based on assignment of the claims to a claims vehicle. In the follow-on procedures to *Cathode Ray Tubes*, however, a claim was brought by a representative body. The admissibility of the Consumentenbond, a Dutch consumers' association, has been debated in respect of a damages claim in *Cathode Ray Tubes*, and in a judgment in 2018, the court found the association to be admissible in its claims (*Consumentenbond/Philips*, Amsterdam District Court, 29 March 2018). The district court of Oost-Brabant also rendered a judgment regarding the same cartel on the admissibility of the claims of Consumentenbond and Aequitas, which based their claims on article 3:305a of the Civil Code. The district court found that article 3:305a precludes the assessment of individual circumstances in a collective action, and thus that claims regarding damages incurred by injured parties cannot be assessed in a collective action based on article 3:305a, because such assessment depends on the special circumstances of the individual case. In civil litigation concerning the *Libor* case, the Amsterdam District Court rendered a judgment in December 2020 declaring the claims of a foundation, Stichting Elco, also litigating on the basis of Article 3:305a of the CC, inadmissible because Elco's claim did not sufficiently warrant the interests of the injured parties. Moreover, the admissibility of representative bodies has been assessed in the context of numerous collective actions outside the field of competition.

Opting in or out

23 | Can plaintiffs opt out or opt in?

For a collective settlement pursuant to the Collective Settlement Act of 2005 or the Collective Settlement of Mass Damages Act of 2020, an opt-out system applies for injured parties. For other types of collective actions in the form of a joinder of proceedings or an assignment of claims to a claims vehicle, injured parties must opt in to be a part of the proceedings.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Collective settlements through a representative body pursuant to the Collective Settlement Act of 2005 or the Collective Settlement of Mass Damages Act of 2020 must be declared binding by a court to be binding for all injured parties. Collective settlements on the initiative of parties, without binding effect on injured parties not involved in the proceedings, can be reached among the parties themselves and do not, in principle, require judicial authorisation.

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National collective proceedings

- 25** | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

National collective proceedings pursuant to the Collective Settlement Act of 2005 to obtain a settlement binding for all parties must be brought before the Amsterdam Court of Appeal. Collective actions pursuant to the Collective Settlement of Mass Damages Act of 2020 may, however, be brought before any district court that has territorial jurisdiction. If multiple private actions are brought simultaneously before different district courts in respect of the same matter, the proceedings may be referred to one of the district courts to avoid deviating judgments (eg, this occurred in follow-on proceedings in *Trucks*).

Collective-proceeding bar

- 26** | Has a plaintiffs' collective-proceeding bar developed?

There is no plaintiffs' (or defendants') bar in the Netherlands (in the sense of specialisations); however, some law firms are increasingly specialising in bringing collective damages claims in competition cases.

REMEDIES

Compensation

- 27** | What forms of compensation are available and on what basis are they allowed?

Claimants who have incurred losses as a result of a violation of competition law can be awarded damages. Damages are compensatory and based on claimants' actual losses (in terms of additional costs and foregone profits). Alternatively, claimants may claim reimbursement of payments unduly made or compensation for undue enrichment.

Where the action concerns an agreement that is found to violate competition law, the agreement can furthermore be declared void in whole or in part. Courts can also provide a remedy by issuing an injunction, which, if necessary, can be imposed subject to a periodic penalty payment.

Other remedies

- 28** | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

On the request of the claimant and provided that the claimant can show urgency (a low threshold in practice), the courts can provide an interim remedy by imposing an injunction until a final judgment is rendered in the matter. A defendant can, for example, by injunction, be ordered to stop the allegedly unlawful practice. Injunctive relief can be obtained during

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a procedure on the merits or through preliminary relief proceedings. Injunctions can be declared immediately enforceable, regardless of whether the judgment has been appealed. On the other hand, only in exceptional cases may there be room for awarding an advance payment of all or part of the damages claimed in the main case by way of an interim measure.

Punitive damages

29 | Are punitive or exemplary damages available?

Exemplary or punitive damages are not available, as damages are meant to be compensatory and based on claimants' actual losses. However, despite not yet being applied in practice in antitrust damages cases, courts may set the amount of damages corresponding to the level of extra profits realised by the defendant as a result of its anticompetitive conduct.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

For the payment of damages, statutory interest accrues after the expiration of the deadline for payment. For cases based on tort, payment is due from the date the damage can be claimed (ie, the damage has been incurred).

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

Any fines imposed by competition authorities are not taken into account in determining the amount of damages to be awarded, based on the principle that damages are compensatory and based on the damage the claimant actually sustained. However, damages already awarded through redress schemes are taken into account in the calculation.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In principle, the 'loser pays' rule applies, meaning that the party winning a court procedure can recover its legal costs from the losing party. However, the compensation for legal representation is set at a fixed amount that normally represents only a limited part of the actual costs incurred.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Save exceptions for small and medium-sized enterprises (SMEs) and successful immunity applicants, undertakings are jointly and severally liable. Under certain circumstances,

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an SME's liability can be limited to its own direct and indirect purchasers. The liability of successful immunity applicants with regard to contribution in relation to the other defendants is limited to compensation of the damage of its own direct and indirect purchasers and suppliers in proportion to the extent to which the circumstances attributable to the immunity applicant contributed to the damage.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Dutch tort law provides for an obligation for parties that are found jointly and severally liable for compensation of damages to contribute equally to the compensation amount, unless the circumstances of the case require the contributions to be distributed differently. This provides a basis for contribution claims among defendants. The rules for contribution for defendants who have received immunity in respect of fines for a competition infringement and for defendants who have entered into settlements with claimants deviate from this general contribution obligation. Contribution claims can be brought in the context of the principal claim or in proceedings between defendants after a judgment or settlement in the principal claim has been reached.

Passing on

35 | Is the 'passing-on' defence allowed?

With the act implementing Directive 2014/104/EU (the Antitrust Damages Directive) (Implementing Act), a specific legal basis determining that parties can use the defence that the claimant passed on the higher costs caused by the competition law infringement has been formally adopted in Dutch law.

Before the introduction of the Antitrust Damages Directive through the Implementing Act, a passing-on defence had already been accepted, in principle, in a damages claim procedure following the *Gas Insulated Switchgear* case. In the ruling of a dispute between TenneT and ABB in 2016, the Supreme Court held that the passing-on defence can both relate to the amount of profit the claimant enjoyed as a consequence of the wrongful conduct insofar that it is reasonable and functions as a defence to reduce the amount of damage the claimant alleges it has suffered. However, the deduction from the amount of damages awarded based on passing on must always be reasonable, which was found not to be the case in the matter between TenneT and ABB in a subsequent ruling.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Defendants can use several other defences against alleged liability for damages, the most relevant being:

- force majeure;

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- the infringement being the result of government compulsion; and
- the infringement being the result of complying with a statutory provision.

However, these defences are raised only very rarely in actions for damages relating to competition law infringements.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

In principle, the parties are free to decide to settle a dispute through arbitration. The Amsterdam District Court has, however, held in a damages claim case related to the Sodium Chlorate cartel that a general arbitration clause in a contract does not cover damages claims resulting from alleged breaches of competition law (the decision was subsequently confirmed by the Amsterdam Court of Appeal, and a similar judgment was rendered in 2019 by the Rotterdam district court in a case concerning the Elevators cartel).

However, if the arbitration clause in a contract is specifically formulated to include disputes arising from damages claims related to breaches of competition law, the defendant can rely on such an arbitration clause, as confirmed in a judgment of the Court of Justice of the European Union on a preliminary question from a German local court related to the *Sodium Chlorate* case.

If a valid agreement on settlement of the dispute through arbitration has been reached and is relied on by (one of the) parties, the Dutch court before which a claim is brought will declare lack of jurisdiction to hear the claim.

Judges have the possibility to refer parties to a dispute to mediation. There are, however, no examples of such decisions in antitrust damages cases to date, with mediation not being a realistic option in those cases.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

The Netherlands remains a highly popular jurisdiction for private antitrust litigation, with the number of cartel damages proceedings being initiated in the Netherlands steadily increasing and with the Collective Settlement of Mass Damages Act, this number is increasing even more. The use of an assignment model to collect multiple claims in a special litigation vehicle is becoming increasingly common in cartel damages litigation. To create more structure in such complex multiparty cartel damages proceedings, Dutch courts appear to be embracing the possibility of organising case management hearings or dividing cases between different batches. Concerning the phase that several cartel damages proceedings are in right now, we expect several proceedings to move to the phase 2 damage assessment phase soon, which will certainly lead to many more new developments and interesting judgments.

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In recent years, a number of interesting (interim) judgments have been rendered in the *Trucks*, *Prestressing steel* and *Elevators* cases on the duty of claimants to sufficiently substantiate their claim, in terms of the concrete and specific information that must be provided on the purchases of goods or services on which the claim of each claimant or underlying assignor is based; providing only a general economic model to substantiate your claims is not enough.

There were also two interesting judgments rendered in 2021 by the Amsterdam Court of Appeal and the Rotterdam district court about the liability of a parent company, in line with the *Skanska* judgment from the European Court of Justice. In both judgments, the court held that the parent companies are liable for the actions of their subsidiary as part of the undertaking and that the parent company can therefore serve as an anchor for jurisdiction. Moreover, it was explained by different Dutch courts in several judgments that the competition law concept of 'single and continuous infringement' must be seen as a 'single and continuous wrongful act' in civil antitrust litigation.

In addition, in 2022, the Amsterdam district court rendered a judgment in the *Trucks* proceedings. In this case, the court found that Dutch law applies to all claims, which is notable since the Amsterdam District Court emphasised in a judgment in the *Air Cargo* case that declaring Dutch law applicable to all claims was exceptional. The approach from the district court was to adopt a pragmatic solution whereby it could uniformly apply one law to the damage claims. This judgment will presumably cause more claim vehicles to focus on the Netherlands and result in even more follow-on proceedings in the Netherlands.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Even before the adoption of Directive 2014/104/EU of 26 November 2014 on actions for damages under national law for infringements of competition law provisions of the member states (the Antitrust Damages Directive), it was already indisputable that private parties could file actions for damages before the Portuguese courts where the illicit behaviour at issue consisted of a violation of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). This understanding followed from the European Court of Justice decision in *Courage v Crehan*, Case C-453/99, of 20 September 2001 (subsequently confirmed in other decisions, notably in *Manfredi*, Cases C-295/04 to C-298/04, of 13 July 2006), where the court ruled that effective protection of the rights granted by the Treaty requires that individuals who have suffered a loss arising from an infringement of the competition rules have the right to claim damages.

With regard to national courts, the possibility of claiming damages under the tort liability rules set forth in the Portuguese Civil Code, where the illicit behaviour corresponds to a violation of the competition rules, as well as the declaration of nullity of agreements for infringement of competition rules, had already been the object of national case law.

In any event, it was the entering into force, on 4 August 2018 of Law No. 23/2018 of 5 June (the Private Antitrust Act), which transposed Directive 2014/104/EU of 26 November 2014 (the Private Damages Directive), that boosted the number of private antitrust cases brought before the Portuguese Courts. This trend has been consolidated over the past few years and is expected to continue in the future, also triggering the need to increase the resources and expertise of the judiciary, all the more so since Portugal has only one court (the Court of Competition, Regulation and Supervision) that rules on all private antitrust actions at national level, besides being the appeal instance for decisions from the Portuguese Competition Authority, as well from sector regulators and supervisory authorities.

Applicable legislation

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions are primarily governed by the Private Antitrust Act, which transposed the Private Damages Directive.

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Under the Private Antitrust Act, an undertaking or association of undertakings that has infringed competition law is under the obligation of fully indemnifying the injured parties for the damages arising out of the infringement, under the terms set forth in article 483 of the Portuguese Civil Code. This sets out the general tort liability requirements: the finding of blameful or negligent illicit behaviour, proof of injury to the claimant and the demonstration of a causal link between the illicit conduct and the damage.

Furthermore, pursuant to the Private Antitrust Act, those who have exercised a decisive influence over the infringer during the infringement are also liable for the indemnification obligation. A decisive influence may be exercised notably by means of ownership of the whole or part of the share capital, ownership or the right to use all or part of the assets of an undertaking or rights or contracts that confer decisive influence on the composition, voting or decisions by an undertaking. A decisive influence is presumed in case of ownership of 90 per cent or more of the infringer's share capital.

The substantive and procedural rules in the Private Antitrust Act are complemented by the provisions of Law No. 19/2012 of 8 May (as amended by Law No.17/2022, which transposed into Portuguese law the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (the ECN+ Directive)), (the Competition Act), the Portuguese Civil Code and the Portuguese Code of Civil Procedure.

In respect of standing, under the Portuguese civil procedure rules, the plaintiff is required to have a direct interest in filing the lawsuit. This interest is expressed by the usefulness for the plaintiff of a decision upholding the claim. Unless otherwise provided for in the law, the parties to the relationship underlying the dispute, as described by the plaintiff, are considered to have a direct relevant interest. Accordingly, and depending on how it describes the relationship, a plaintiff, such as an indirect purchaser or supplier, may have standing. In addition, several provisions in the Private Antitrust Act include references to indirect customers or suppliers, indicating that these may also have standing.

Particularly relevant in the assessment of standing is the European Court of Justice judgment in *Sumal* (Case C-882/19), a reference for a preliminary ruling in which the Court ruled that an action for damages arising out of an anticompetitive practice may be brought 'without distinction, either against a parent company who has been punished by the Commission for that practice in a decision or against a subsidiary of that company which is not referred to in that decision, where those companies together constitute a single economic unit'.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Private antitrust actions are governed by the Private Antitrust Act, which transposed the Private Damages Directive. The substantive and procedural rules of the Competition Act, the Portuguese Civil Code and the Portuguese Code of Civil Procedure apply on a subsidiary basis. In any event, under the Private Antitrust Act, the application of such substantive and procedural rules to private antitrust actions cannot render exercising the right of indemnification impossible in practice or extremely onerous. Furthermore, the application of substantive and procedural rules to actions arising out of infringements to articles 102 and 102 TFEU may not be less favourable for the injured parties than the rules for private antitrust actions arising out of national law infringements.

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The Competition, Regulation and Supervision Court (a specialised court created by Law No. 46/2011 of 24 June to handle competition, regulation and supervision matters) is competent to handle private antitrust actions, actions against co-infringers and requests for access to corresponding evidence. This court's rulings are subject to review by the Appellate Court of Lisbon, the decisions of which, though limited to matters of law (except when the assessment of the evidence or the determination of the facts proved violates an express provision that requires a certain type of evidence for certain facts or that establishes the effects of certain types of evidence), may be appealed to the Supreme Court of Justice. Appeals of the decisions in question that exclusively involve matters of law may, under certain circumstances, be filed directly with the Supreme Court of Justice.

PRIVATE ACTIONS

Availability

- 4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions may be brought on the basis of any conduct that constitutes an infringement of Law No. 19/2012 of 8 May, another member state's competition law or articles 101 or 102 of the Treaty on the Functioning of the European Union. These include cartels, abuse of dominant position or abuse of economic dependence. A finding of infringement by a competition authority is not a requirement for a private antitrust action. However, a final decision of the Competition Authority, or of an appeal court that finally rules on an appeal from the Competition Authority's decision, that establishes the existence of an infringement constitutes a non-rebuttable presumption of the existence, nature and material, personal, temporal and territorial scope of the infringement. A final decision of another member state's competition authority, or of an appeal court of another member state's court of appeal, that establishes the existence of an infringement constitutes a rebuttable presumption of the existence, nature and material, personal, temporal and territorial scope of such infringement. If the decision on the merits of a private antitrust action depends on the investigation by a competition authority, or on a decision of a competition authority or of a court of appeal that is not yet final, the court assessing the private antitrust action may halt the proceedings until any of those decisions becomes final.

Required nexus

- 5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

In general, and unless the parties have agreed otherwise, the domicile of the defendant determines the territorial competence of the courts.

In the case of tort liability, an action may be brought before the court of the place where the infringement took place.

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Under certain conditions, the parties may agree to attribute, in writing, to a certain jurisdiction the competence to hear the claim. Nonetheless, when the Portuguese courts are competent, the Competition, Regulation and Supervision Court is mandatorily competent.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Individuals and undertakings may file actions for damages before the Portuguese courts against either corporations or individuals (where they stand as an undertaking or have exercised a decisive influence over the infringing undertaking) if the former have suffered damage within the Portuguese territory.

Where matters involve individuals or legal entities established outside Portuguese territory, the territorial jurisdiction of the Portuguese courts will be governed by the Lugano Convention of 30 October 2007 or 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).

In the cases where the Lugano Convention and Council Regulation No. 1215/2012 are not applicable, the matter will be governed by articles 59, 62 and 63 of the Portuguese Code of Civil Procedure Code. Article 62 of the Portuguese Code of Civil Procedure prescribes that the Portuguese courts have international competence, among other situations, where:

- the action may be brought before a Portuguese Court according to the rules of international competence established in Portuguese law;
- the fact that constitutes the cause of action, or any of the facts that are part of such cause, has been performed in Portugal; or
- the right invoked can only be enforced with an action brought in Portuguese territory or it is appreciably difficult for the plaintiff to bring an action before foreign courts, provided that there is a relevant element of connection between the object of the action and the Portuguese legal system.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

In principle, nothing prevents the funding of litigation by third parties.

With regard to fees, the Portuguese Bar Association Statute, enacted by Law No. 145/2015 of 9 September, prohibits agreements entered into by an attorney and the client before the conclusion of the case whereby the attorney's fees would be exclusively dependent on the result attained and by virtue of which the client would only have to pay the attorney a part of the result (*quota litis* arrangements). However, an arrangement consisting of the prior fixing of the amount of the attorney's fees, even as a percentage of the amount of the claim

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entrusted to the attorney, is permitted. Arrangements whereby a success fee is payable alongside fees determined on the basis of the other criteria are also permitted.

As a rule, fees must be determined taking into account the time spent, the complexity and the urgency of the matter handled, the degree of the attorney's intellectual innovation required and the results attained.

Jury trials

8 | Are jury trials available?

No.

Discovery procedures

9 | What pretrial discovery procedures are available?

Discovery as known in common law systems is not available under Portuguese law.

However, pursuant to Law No. 23/2018 of 5 June (the Private Antitrust Act), the court may, upon request from any party in a private damages action, request from the other party or from a third party, including public entities, the submission of evidence in their possession, subject to certain limitations. The request must be reasoned, indicate the facts intended to be proved and identify in a precise and strict manner the evidence or category of evidence whose submission is requested. The court shall order the submission of the evidence that it considers proportional and relevant for the decision of the action, refusing requests that require indiscriminate searches of data.

In assessing the proportionality of a request the court shall weigh the legitimate interests of all the parties and of interested third parties, having, notably, taken into account the justification of the submission of the documents in the light of the claim or of the defence, the scope and costs of the submission of documents or the existence of confidential information in the evidence that must be submitted. In respect of evidence containing confidential information, the court orders its submission when it considers that it is relevant for the action, subject to the adoption of effective measures for its protection, notably concealing confidential sections, conducting hearings not open to the public, restricting the number of individuals authorised to have access to the evidence or requesting from experts the preparation of summaries of the data in an aggregate or otherwise non-confidential manner. The court shall not order the disclosure of information protected by professional secrecy under national or EU laws. Any submission order is subject to prior hearing of the holder of the evidence.

The above rules apply to the access to evidence before the action is brought to court.

With regard to requests to access the evidence included in a competition authority's proceedings, the above rules also apply. In addition, the court may only order the submission of this evidence when none of the parties or any third party may reasonably submit it. In assessing the proportionality of a request for submission of evidence included in a competition authority's proceedings, the court shall also take into account, besides the aspects mentioned

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above, if the request for submission is specific in respect of the nature, object and contents of the evidence or is rather an indiscriminate request, if the disclosure is requested within an action already initiated or if it is necessary to preserve the public enforcement of competition law, notably the protection of the investigation. The submission of the following may only be ordered by the court after the competition authority's proceedings are finalised:

- documents specifically prepared by an individual or legal entity for a competition authority's proceedings;
- documents prepared by a competition authority and sent to the parties in the framework of proceedings; or
- settlement proposals that have been withdrawn.

Furthermore, the court may not order the submission of evidence that includes leniency statements and settlement proposals. In this respect, a party that has requested the submission of evidence that includes leniency statements (for both full immunity and reduction of fines) and settlement proposals may, on reasoned grounds, request access to such evidence for the exclusive purpose of confirming that the evidence in question includes such elements. The court may seek the assistance of the competition authority and hear the authors of the concerned documents to assess the request and shall not permit access to these documents by other parties to the action or by third parties.

The Private Antitrust Act also establishes some limits to the use of evidence obtained exclusively through access to a competition authority's proceedings. Leniency statements and settlement proposals obtained exclusively through access to a competition authority's proceedings are not admitted as evidence in private antitrust actions. Documents specifically prepared by an individual or legal entity for a competition authority's proceedings, documents prepared by a competition authority and sent to the parties in the framework of proceedings, or settlement proposals that have been withdrawn cannot be used as evidence in private antitrust actions if they were obtained exclusively through the access to a competition authority's proceedings. Other evidence exclusively obtained through such access may only be used as evidence in private antitrust actions by the person who has obtained them, by a successor of this latter or by a person who has acquired the right to the compensation.

Failing to comply with an order for submission of documents, destroying or concealing, or otherwise rendering impossible access to evidence for which submission is ordered, failing to comply with measures ordered by the court to preserve confidentiality or violating the limits for using evidence included in a competition authority's proceedings is punishable with procedural fines in the amount imposed by the court, ranging from €5,100 to €510,000. The court may further impose periodic penalty payments ranging from €510 to €51,000 per day of delay. In addition, the court can freely assess the significance of any of the above behaviour for evidence purposes and the burden of proof may be shifted.

Admissible evidence

10 | What evidence is admissible?

All types of evidence are admitted, except if otherwise provided for in the law (for example, regarding some facts the law may require a specific type of document, such as a public registration certificate).

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Types of evidence more commonly used include testimony, documents, expert opinions, expert audits, confessions and inspections.

Under the Private Antitrust Act:

- evidence that includes leniency statements (for both full immunity and reduction of fines) and settlement proposals obtained exclusively by accessing a competition authority's proceedings is not admitted as evidence in private antitrust actions;
- documents specifically prepared by an individual or legal entity for a competition authority's proceedings, documents prepared by a competition authority and sent to the parties in the framework of proceedings or settlement proposals that have been withdrawn and were obtained exclusively by accessing a competition authority's proceedings but not admitted as evidence in private antitrust actions until those proceedings are finalised; and
- other types of evidence obtained exclusively by accessing a competition authority's proceedings may only be used as evidence in private antitrust actions by the person who obtained them, or by his or her successor, or by the person who acquired the right to be indemnified.

The court freely assesses the evidence submitted and decides in accordance with its beliefs, with the exception that to prove certain facts, the law may require the fulfilment of special formalities.

Legal privilege protection

11 | What evidence is protected by legal privilege?

The court shall not order the disclosure of information protected by professional secrecy under national or EU law.

In this regard, as a general rule, under Portuguese law, every person has a duty of cooperation with the courts in discovering the truth.

Under the Private Antitrust Act, in the case of private antitrust actions, the refusal to cooperate is legitimate if compliance involves violation of the physical or moral integrity of individuals, violation of private or family home life, in correspondence or in telecommunication, or the violation of professional secrecy, public servants' secrecy or state secrecy.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Under Law No. 19/2012 of 8 May (the Competition Act), competition law infringements are not considered crimes but rather quasi-criminal minor offences, without prejudice, however, to any criminal liability that may arise from any behaviour qualified as criminal associated with a competition law infringement.

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It may occur, therefore, that a competition law infringement that in itself does not constitute a crime may also involve behaviour that may entail criminal proceedings. However, any criminal conviction that may arise from such criminal proceedings shall not, in principle, prevent the filing of a private antitrust lawsuit based on the infringement of the competition law rules and not on the conduct that originated the criminal proceedings.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence or findings in criminal proceedings against an undertaking may, with limitations, be relied upon by plaintiffs in parallel private actions. In fact, the parties' or witnesses' statements, or evidence produced by a panel of experts, may be considered for these latter actions but only if such evidence has been obtained in proceedings in which the undertaking has been heard.

Under the Portuguese leniency regime, the Competition Authority can grant immunity or a reduction of fines in proceedings for quasi-criminal minor offences that concern agreements and concerted practices prohibited by article 9 of the Competition Act and (where applicable) article 101 of the Treaty on the Functioning of the European Union. However, leniency applicants, although benefiting from the protection that, to a certain extent, is granted by the rules regarding access to information, are not protected from the possibility of being subject to follow-on litigation. In any event, evidence that includes leniency statements (for both full immunity and reduction of fines) obtained exclusively by accessing a competition authority's proceeding is not admitted as evidence in private antitrust actions.

Under the Competition Act, the Competition Authority (the Authority) must publish on its website the final decisions adopted in restrictive practices proceedings, ensuring the protection of business secrets and other information considered confidential. In addition, access to the file may be granted to any individual or legal entity that demonstrates a legitimate interest and applies for such access. However, information classified as confidential for business secrets reasons, which is used as evidence by the Authority, may only be obtained by an attorney or outside economic adviser within the framework of the exercise of rights of defence or of appeals of the Authority's decisions in which such documents were used as evidence.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

A defendant may request that the court stay the proceedings, and the court may of its own volition order such stay, in cases where the matter is being assessed in proceedings opened by the European Commission, in accordance with article 16 of Council Regulation (EC) No. 1/2003 of 16 December 2002.

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In addition, if the decision on the merits of a private antitrust action depends on the investigation by a competition authority, or on a decision of a competition authority or of a court of appeal that is not yet final, the court assessing the private antitrust action may halt the proceedings until any of these decisions becomes final.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

As a rule, the burden of proof relative to each fact submitted to the court rests with the party that invoked the fact in question to substantiate its rights.

The Private Antitrust Act establishes specific rules in respect of evidence related to the passing-on defence. The defendant bears the burden of proof whenever the claimant passing on the whole or part of the overcharge resulting from the infringement of competition law is invoked. In a private antitrust action in which the claim is grounded on the passing on of the overcharge to the indirect customer or claimant, the latter bears the burden of proof. Nevertheless, the Private Antitrust Act presumes passing on whenever:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the defendant's direct purchaser; and
- the indirect purchaser has purchased the goods or services affected by the infringement or has purchased goods or services derived from or containing them.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

It is not possible to anticipate precisely what the length of proceedings may be as it may vary greatly from case to case. However, in view of the complexity inherent in most actions for damages based on the infringement of the competition rules, and considering the usual duration of proceedings relating to damages claims, the adoption of a decision by the first-instance court may take a considerable time after the lawsuit is filed (easily over two years after the initiation of the proceedings). Moreover, after the first-instance court adopts a decision, in some cases two degrees of appeal to higher courts will be available. These appeals will normally take another one to two years. It is not possible to accelerate the proceedings.

Limitation periods

17 | What are the relevant limitation periods?

Under the Private Antitrust Act, without prejudice to the absolute limitation period of 20 years from the date of the act causing the damage, private antitrust actions must be initiated within five years of the date the injured party has knowledge or from the date on which it may reasonably be presumed that it had knowledge of:

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- the behaviour at issue and that it constitutes an infringement to competition law;
- the infringer's identity; and
- the fact that the infringement to competition law has caused damage to the injured party, although the full extent of the damage is not yet known.

The deadline only starts after the infringement ends.

In the case of joint liability among co-infringers and for the purpose of establishing the liability of a co-infringer that is either a small or medium-sized enterprise or a company to which full immunity has been granted in leniency proceedings, the limitation period applicable to injured parties, who are not customers or suppliers, in respect of such small or medium-sized enterprise or full immunity beneficiary is five years. It starts on the date enforcement proceedings against the other co-infringers are extinguished by lack of assets, insolvency or by any other judicial decision that confirms the co-infringers' inability to pay.

The limitation period is suspended if a competition authority initiates an investigation related to the infringement at issue in the antitrust action. Such suspension ends one year after the decision declaring the infringement becomes definitive or the proceedings are otherwise terminated.

The limitation period is suspended in relation to the parties that participate, have participated or have been represented in out-of-court settlement proceedings during the time such proceedings last.

The limitation period is further interrupted (ie, the time elapsed before the interruption is not considered) upon the summoning or judicial notification of the infringer of any act that expresses the claimant's intention of exercising the right.

Appeals

18|What appeals are available? Is appeal available on the facts or on the law?

Decisions of first-instance courts in private antitrust actions may, in principle, be the object of appeals.

COLLECTIVE ACTIONS

Availability

19|Are collective proceedings available in respect of antitrust claims?

Collective actions for infringements to competition law may be brought under Law No. 83/95 of 31 August 1995, which defines the regime applicable to 'people actions' and confers upon any citizens (legal entities or professionals are excluded) or associations and foundations that promote certain general interests the right to claim compensation arising from an injury caused by the violation of such general interests. Besides the regime set forth in this statute, Law No. 23/2018 of 5 June establishes, notably, that:

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- consumer protection associations and foundations, as well as other associations of undertakings whose associates have been injured by the infringement to competition law at issue have standing to initiate the action;
- the decision that condemns the defendants establishes the criteria to identify the injured parties and for the quantification of the damages that each individually identified injured party has suffered;
- if all the injured parties are not individually identified, the court shall fix a global amount of the compensation and, if not sufficient, such global amount shall be distributed among the injured parties individually identified on a pro rata basis; and
- the decision shall indicate the entity responsible for the collection, administration and payment of the compensation to injured parties who are not individually identified.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Collective actions for infringements to competition law may be brought under Law No. 83/95 of 31 August 1995, which defines the regime applicable to 'people actions' and confers upon any citizens (legal entities or professionals are excluded) or associations and foundations that promote certain general interests the right to claim compensation arising from an injury caused by the violation of such general interests. Besides the regime set forth in this statute, Law No. 23/2018 of 5 June also establishes a number of provisions.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 | Have courts certified collective proceedings in antitrust matters?

Not applicable.

Opting in or out

23 | Can plaintiffs opt out or opt in?

In people actions, the plaintiff represents, in principle, all owners of the rights or interests without need for any mandate or express authorisation.

Under the law, the above owners of the rights or interests who do not intervene in the proceedings are granted the possibility, within a period fixed by the court, of intervening in the proceedings as parties thereto, accepting them in the current phase and declaring whether they agree to be represented by the plaintiff or, on the contrary, whether they wish to be excluded from such representation. The silence of the owners of the rights or interests shall be deemed as acceptance of representation by the plaintiff, without detriment to the right of the owners to refuse the representation by means of an express statement in the proceedings until the end of the evidence-taking or equivalent phase.

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Judicial authorisation

24 | Do collective settlements require judicial authorisation?

There are no deviations in this respect from the general civil procedure rules. As in ordinary cases, any judicial settlement is subject to confirmation by the court.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No. However, there are firms increasingly active in private antitrust litigation, including collective proceedings.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Under Law No. 23/2018 of 5 June (the Private Antitrust Act), an undertaking that infringes competition law is under the obligation of fully indemnifying the injured parties for the damage caused by the infringement.

The indemnification obligation includes both the actual damages and the benefits that the injured party did not receive by virtue of the infringement, calculated as at the moment the damage has occurred, plus late payment interest from the date of the decision until full payment.

The Private Antitrust Act further presumes that the members of cartels are responsible for the damage caused by the infringements carried out.

If the calculation of the exact amount of the damages is practically impossible or excessively difficult, the court may make such calculation by resorting to an approximate estimation and may for such purposes take into account the Communication from the Commission on quantifying harm in actions for damages based on breaches of articles 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07) of 13 June 2013.

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The Competition Authority shall, upon request from the court, assist the latter in the quantification of the damages, but it may, upon reasoned request, ask the court to be released from such assistance.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

If there is a justified fear of serious damage to a right that would be difficult to rectify, interim remedies that may be adequate to preserve or protect the threatened right may be requested from the court. These interim remedies have an urgent nature and are aimed at preventing risks arising out of any delays to which the main proceedings (ie, the private anti-trust action) may be subject. Moreover, interim remedies depend on such main proceedings. In the interim remedies proceedings, the claimant must prove the likelihood of the existence of its right (*fumus boni iuris*) and of the irreparable damage it would suffer in the absence of the interim measures (*periculum mora*).

Punitive damages

29 | Are punitive or exemplary damages available?

No.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Under the Private Antitrust Act, an undertaking that infringes competition law is under the obligation of fully indemnifying the injured parties for the damage caused by the infringement.

The indemnification obligation includes both the actual damages and the benefits that the injured party did not receive by virtue of the infringement, calculated as at the moment the damage has occurred, plus late payment interest from the date of the decision until full payment.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

The indemnification obligation includes both the actual damages and the benefits that the injured party did not receive by virtue of the infringement. Possible fines imposed by the Competition Authority, the quantification of which is subject to specific criteria set out in article 69 of the Competition Act, are not to be taken into account by a court in fixing the amount of the compensation for damages.

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Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Two types of legal costs should be considered: on the one hand, the court fee, and on the other, expenses relating to services requested by the court and other costs incurred by the court in connection with the proceedings (for example, costs resulting from the intervention of experts appointed by the court).

The amount of both court fees and expenses applicable in each case is defined in accordance with the Regulation on Judicial Costs and, thus, may be estimated by plaintiffs prior to filing the action. The amount of the court fees largely depends on the initial amount of the claim or claims made before the court.

Legal costs are initially borne by all the parties. However, at the end of the proceedings, the court shall determine the proportion of the costs to be borne by each party. The basic rule is that the losing party shall bear the full amount of the costs. In the case of partial loss, the costs shall be divided proportionally among the parties concerned.

With regard to attorneys' fees, under the Regulation on Judicial Costs, the winning party may request the losing party to pay the former's attorneys' fees. However, a losing party is not liable for attorneys' fees exceeding 50 per cent of the applicable court fees.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Under the Private Antitrust Act, the liability among co-infringers is, in principle, joint and several.

However, if the damage has been caused by a small or medium-sized enterprise, the latter shall only be liable:

- in respect of its own customers or suppliers if its market shares in the markets affected by the infringement have been lower than 5 per cent during the infringement, and the application of the joint liability rules would irreversibly damage its economic viability and fully depreciate its assets; and
- vis-à-vis other injured parties if they are not able to obtain from the other co-infringers full compensation for the damage suffered.

These limitations do not apply if the small or medium-sized enterprise at issue led the infringement or coerced other undertakings or had been previously condemned by a definitive decision for another infringement to competition law.

If the damage has been caused by an undertaking that has benefited from full immunity in leniency proceedings, the latter shall only be liable with regard to its own direct or indirect customers or suppliers and with regard to other injured parties if they are not able to obtain from the other co-infringers the full compensation of the damages suffered.

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The liability among co-infringers is proportional to its responsibility for the damages caused by the infringement and is presumed to be equivalent to the average of the infringer's market shares in the markets affected by the infringement. However, the amount to be borne by an undertaking that has benefited from full immunity in leniency proceedings cannot exceed the damages it has caused to its own direct or indirect customers or suppliers.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Under the Private Antitrust Act, the liability among co-infringers is, in principle, joint and several. Certain limitations apply in respect of small and medium-sized enterprises in certain circumstances.

The liability among co-infringers is proportional to their responsibility for the damages caused by the infringement and is presumed to be equivalent to the average of the infringer's market shares in the markets affected by the infringement. However, the amount to be borne by an undertaking that has benefited from full immunity in leniency proceedings cannot exceed the damages it has caused to its own direct or indirect customers or suppliers.

Passing on

35 | Is the 'passing-on' defence allowed?

The passing-on defence is allowed.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Besides the passing-on defence, defendants may use any defence allowed against tort liability claims.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Unless a dispute is, under special law, exclusively subject to the jurisdiction of a judicial court and the dispute concerns rights that cannot be waived, the parties may agree to submit any dispute, including tort liability disputes, to an arbitration court to be constituted and to operate under Law No. 63/2011 of 14 December.

Parties may also seek to resolve a dispute through mediation.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

Private antitrust litigation cases have substantially increased in Portugal over the past few years, mainly in the last four years.

The adoption of the Damages Directive and its subsequent, albeit somewhat delayed, transposition by the Private Enforcement Act increased the level of awareness, particularly in the business and legal communities, in respect of private antitrust litigation matters.

Cases are being brought before the Specialised Court following decisions of the Portuguese Competition Authority but also European Commission decisions. These latter include cases that are also being brought in various other jurisdictions against undertakings sanctioned by the European Commission. So far, standalone actions do not seem to be so attractive for undertakings and practitioners in Portugal.

The increasing number of cases also raises concerns associated with the fact that in Portugal only one court, the Specialised Court, is responsible for handling all the private antitrust litigation cases in the national territory, all the more so since the Specialised Court is also the appeal instance for decisions from the Portuguese Competition Authority, as well as from sector regulators and supervisory authorities.

It is thus required that adequate resources, notably judges, are timely allocated to the Specialised Court.

The need for more judges, coupled with the degree of specialisation required to handle competition law matters, is likely one of the main challenges for private antitrust litigation in Portugal in the near future.

Also noteworthy is the fact that, while there has been an observable increase in the number of cases, until recently there were very few cases of class action proceedings.

However, since the establishment, in March 2020, of lusOmnibus, a non-profit association with the aim of defending consumers in the European Union, there has been an increase in the number of class action proceedings brought forward in Portugal on the basis of antitrust violations, namely against: Super Bock (a national beer producer) and Mastercard, in 2020; EDP, ANT (the National Topographers Association), Comcast/Universal Studios, and Meliá, in 2021; and Google and Apple, in 2022.

lusOmnibus works through litigation funding. Currently, and according to the association, the litigation funders of the ongoing lusOmnibus actions are Nivalion, Telluride, Consumer Justice Network, Augusta and Consumer Justice Legal Fund Trust.

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Regarding relevant issues that currently are discussed in private enforcement cases brought before the Specialised Court, they are similar to those addressed in other EU jurisdictions following the adoption of the Damages Directive, notably in relation to:

- the liability of subsidiary companies for the actions of their respective parent companies (Sumal (case C-882/19)); and
- the temporal scope of the Damages Directive, particularly regarding:
 - substantive provisions, such as the rebuttable presumption of damages, which, according to the Damages Directive, as applied by the European Court of Justice (*Volvo/Daf Trucks* (case C-267/20)), are not applicable retroactively in that they do not apply to infringements that ended before the deadline for transposition of the Damages Directive;
 - procedural provisions on the burden and standard of proof, which apply to actions that, albeit related to infringements that ended before the date the Damages Directive entered into force, were brought after the entering into force of the national provisions that implement the Damages Directive; and
 - the limitation period for actions where such period had not expired before the deadline for the transposition of the Damages Directive, to which the European Court of Justice ruled that the limitation period established in the Damages Directive applies (*Volvo/Daf Trucks* (case C-267/20)).

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 | How would you summarise the development of private antitrust litigation in your jurisdiction?

To date, private antitrust litigation has not been very active in Korea because, among other reasons, the scope of recoverable damages is limited to actual damages under Korean law and it is not easy for plaintiffs to prove such damages.

Under the recent comprehensive amendment to the [Monopoly Regulation and Fair Trade Act](#) (MRFTA), a plaintiff in private antitrust litigation is now entitled to recover treble damages in the case of (1) unfair collective action such as price-fixing or collusion, or (2) retaliatory measures taken against a person or entity that has reported the unfair trade practice to the Korea Fair Trade Commission (KFTC), cooperated with the KFTC's investigation on such unfair trade practices or filed a request for mediation with the Korea Fair Trade Mediation Agency (KOFAIR) in relation to unfair trade practices.

Further, the recent comprehensive amendment to the MRFTA includes the addition of provisions permitting injunctive relief and court submission orders to prove damages, or the amount thereof, even if such document is protected as a trade secret.

As such, through these legislative efforts, it is anticipated that private antitrust litigation will be more actively utilised in Korea going forward. However, there have not yet been any notable cases or court precedents that have applied the above-mentioned amendments to the MRFTA.

Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions are mandated by statute. The primary competition law governing antitrust issues, including private antitrust actions, in South Korea is the MRFTA.

Article 109, paragraph (1) of the MRFTA states:

where a person sustains damage caused by a violation of any provision of this Act by a business entity or an association of business entities, the business entity or the association of business entities shall be liable for the damages, provided that the foregoing shall

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not apply if the business entity or the association of business entities proves that it acted neither intentionally nor negligently.

To successfully assert a claim for damages under the above MRFTA provision, the plaintiff must establish the following elements: an act violating the MRFTA, the fact that damage occurred and the amount of the damage, and causation between the violation and the damage.

In addition, article 108 of the MRFTA prescribes that a person harmed, or likely to be harmed, by an unfair trade practice in violation of the MRFTA is entitled to bring claims for injunctive relief or prevention of such violation against the violating business entity or association of business entities to a district-level court.

The victim of an act violating the MRFTA may file a civil lawsuit against the violating party, seeking damages or an injunction. There are no other limitations on the standing of a private party in bringing a lawsuit against the violating party. For example, the doctrine restricting the standing of an indirect purchaser, as recognised by the United States Supreme Court, does not exist under Korean law.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The primary relevant legislation is the Monopoly Regulation and Fair Trade Act (MRFTA), which was most recently amended on 30 December 2022.

Under Korean law, private antitrust litigation is treated as general civil litigation, and thus, it is proceeded in a civil court in accordance with the civil procedural laws, together with certain special regulations under the MRFTA that are applicable.

PRIVATE ACTIONS

Availability

4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Damage claims are available against all types of antitrust violations. Injunctions are only available in cases involving unfair trade practice prohibited under the Monopoly Regulation and Fair Trade Act (MRFTA).

Private antitrust litigation can be pursued by a private party separately from the KFTC's administrative sanctions or criminal complaints. A finding of infringement by a competition authority is not required to initiate a private antitrust action.

The Korean courts have ruled that even if the KFTC issues a corrective order on the alleged violation of the MRFTA, it does not automatically lead to a court finding the violating party's

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conduct illegal because the KFTC's fact-finding and ruling is not binding upon the courts. However, the courts have also ruled that in such a case, the violating act can be presumed in a subsequent civil lawsuit to have occurred. Once the KFTC finds through its investigation or disposition that a violation of the MRFTA has occurred, the damaged party may use it in a civil lawsuit against the violating party and this would certainly lighten the damaged party's burden of proving the violation.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

In general, Korean courts can review cases in which the defendant is an individual or corporation with Korean nationality, or the act of violation in question occurs in Korea.

The main issue in relation to the place of violation in private antitrust litigation is extraterritorial application of antitrust law. Article 3 of the MRFTA stipulates that the MRFTA shall also apply to acts done outside South Korea if such acts affect its domestic market. It is understood that the MRFTA explicitly adopted the 'effect principle' in relation to the extraterritorial application of antitrust regulations. The Supreme Court held that the phrase, 'if such acts affect its domestic market', under article 3 of the MRFTA refers to cases where an act committed overseas has direct, considerable, reasonable and predictable effects on the domestic market. Whether or not a case meets the above criteria will be determined on a case-by-case basis by considering the totality of circumstances, including the details of and intent behind the act in question, the goods and services subject to the act in question, the transaction structure and the effects of and degree to which the act in question will affect the domestic market. In particular, with respect to the element of 'direct effect' (which refers to the direct result of the act committed by the business entity), the Supreme Court ruled, over the conflicting views of the lower courts, that such element is necessary in determining the extraterritorial application of the Korean antitrust laws. For instance, in a case where foreign entrepreneurs have reached an agreement that limits competition in many geographical markets, and those markets include the Korean market, the court held that in the absence of any special circumstances, such agreement is deemed to have effects on the Korean market and therefore the MRFTA is applicable.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals, including those from other jurisdictions.



PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties. Contingency fees are available for civil actions. In Korea, attorney's fee is commonly paid in the form of a lump sum retainer plus a contingency (success) fee.

Jury trials

8 | Are jury trials available?

Jury trials are not available for civil litigation under Korean law.

Discovery procedures

9 | What pretrial discovery procedures are available?

Discovery procedures are not available under Korean law.

Under the [Civil Procedure Act](#), a party to a litigation may ask the court to issue an order for production of documents to the other party or a third party. The request for document production can be filed:

- for the documents referred to or cited by the other party to the lawsuit;
- when the requesting party has a legal right to request that the person who possesses the documents transfer them or grant access to them;
- when the documents in question were prepared for the benefit of the requesting party; or
- when the documents in question were prepared to address the legal relationship between the requesting party and the possessor.

However, since the requested party may refuse to submit the documents on the ground that the 'document has been prepared solely for use by the possessor' under the Korean Civil Procedure Act and considering that most of the documents that can be used to prove damage are internal documents of the violating entity, in practice, the plaintiff faces the difficulty of proving damage caused by the violation of the MRFTA since most defendants can argue for the above exemption from the document production order.

In addition, the party that receives the court's document production order is not subject to sanctions for non-compliance; the court may simply find the other party's argument concerning the contents of the document in question to be true.

In addition to those grounds listed above, a party may also file a request for a court order requiring the other party or a third party to submit the document in question to the court. This request for document submission order is commonly utilised to collect documents relating to the lawsuit from the government or other institutions. However, similar to the

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court's document production order, there are no legal grounds to enforce the document submission order on the other party or the authorities.

In a lawsuit in which a private party files to seek monetary damages against the party violating the MRFTA pursuant to article 109 thereof, if it finds it necessary, the court may order the KFTC to produce the entire set of investigation records for the case in question, including interviews with persons related to the case, witnesses, appraisers, stenographic records and other evidentiary documents.

Admissible evidence

10 | What evidence is admissible?

There are no particular limitations to the admissibility of evidence in civil actions. Documents or materials are generally admissible so long as the authenticity thereof can be substantiated.

Legal privilege protection

11 | What evidence is protected by legal privilege?

Under Korean law, legal privileges (eg, the attorney–client privilege, attorney–work product and joint work product defences) are not recognised in the litigation process.

Article 111 of the Monopoly Regulation and Fair Trade Act (MRFTA) allows the court in a lawsuit seeking damages caused by unfair collective action (ie, cartel) or unfair trade practices to issue an order against a party to prevent it from submitting a certain document, or to prohibit it from refusing to submit the document, if it is necessary to prove damages or the amount thereof, even if such document is protected as a trade secret. In connection with the above submission order, article 112 of the MRFTA permits the court to issue a separate order against the receiving party and its attorney not to use the trade secrets contained in the produced document except for the purposes of carrying out the lawsuit and not to disclose the information to anyone except the party that received the order to maintain the confidentiality thereof.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Where there has been criminal conviction in respect of the same matter, private actions are available.

Utilising of criminal evidence

- 13** | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

The evidence or findings in criminal proceedings do not have binding effects on parallel private actions. But there is a court precedent that held that they can be used as strong evidence in related civil proceedings, and thus, civil courts cannot admit facts that are contrary to such evidence in the absence of special circumstances.

Leniency applicants are entitled to limited protection from follow-on litigation. The amount of damages that the violating business entity that has been granted leniency pursuant to the MRFTA is liable to pay shall not exceed the amount of damage the victim suffered as a result of the violation.

Since private antitrust litigation can be pursued by a private party separately from the KFTC's administrative or criminal sanctions, the competition authorities do not routinely disclose documents obtained in their investigations to private claimants. In a lawsuit in which a private party files to seek monetary damages against the party violating the MRFTA pursuant to article 109 thereof, if it finds it necessary, the court may order the KFTC to produce the entire set of investigation records for the case in question, which includes interviews with persons related to the case, witnesses, appraisers, stenographic records and other evidentiary documents.

Stay of proceedings

- 14** | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

There is no official petition to the court by a defendant for a stay of proceedings in a private antitrust action. However, when an enforcement decision is being challenged by such defendant and such proceedings are pending at another court, the court handling a private antitrust action tends to postpone its judgment to avoid any inconsistency of judgments.

Standard of proof

- 15** | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

A generally applicable standard of proof for claimants under Korean civil procedure is preponderance of the evidence.

The Korean courts have ruled that even if the KFTC issues a corrective order on the alleged violation of the MRFTA, it does not automatically lead to a court finding the violating party's conduct illegal because the KFTC's fact-finding and ruling is not binding upon the courts. However, the courts have also ruled that in such a case, the violating act can be presumed

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in a subsequent civil lawsuit to have occurred. Once the KFTC finds through its investigation or disposition that a violation of the MRFTA has occurred, the damaged party may use it in a civil lawsuit against the violating party and this would certainly lighten the damaged party's burden of proving the violation.

While the plaintiff asserting a general tort claim must prove the defendant's intent or negligence, the burden of proof shifts to the defendant to prove the lack of intent or negligence in order to be relieved from liability in accordance with article 109, paragraph (1) of the MRFTA.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

It normally takes about 10 to 12 months from filing of a complaint to obtain a decision of a court of first instance. In principle, after a plaintiff files its complaint, the named defendant is required to submit its answer within 30 days. After the defendant's answer is filed, it usually takes about one to two months for the court to designate a hearing date. Hearings can be held three to four times at one-month intervals, followed by a court decision. Private antitrust actions often take longer to conclude than ordinary civil actions, because the computation of damages may require analysis by economic experts.

There are no available means to accelerate the proceedings.

Limitation periods

17 | What are the relevant limitation periods?

The statute of limitations for a general tort claim is also applicable to damage claims under the MRFTA: (1) three years from the date on which a claimant comes to know of the damage and the person who inflicted such damage; or (2) 10 years from the date on which the act of violation occurred, whichever is earlier. However, if the damaged party is the national or local government (which is common in cases involving bid rigging for construction ordered by the national or local government), the 10-year term is reduced to five years in accordance with the [National Finance Act](#) or the [Local Finance Act](#).

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

A decision by a court of first instance can be appealed to an appellate court and such appeals are available both on the facts and on the law. A decision by an appellate court can be further appealed to the Supreme Court, the court of last resort in Korea, but the appeal to the Supreme Court is only available on the law.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Collective proceedings are not available in respect of antitrust claims.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

No. Collective proceedings are not available under Korean law except for claims relating to securities.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 | Have courts certified collective proceedings in antitrust matters?

Not applicable.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Not applicable.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Not applicable.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

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Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Damages are available for violation of antitrust regulations. In principle, the scope of recoverable damages is limited to actual damages under Korean law. The same principles apply to antitrust cases, but the Monopoly Regulation and Fair Trade Act (MRFTA) permits recovery of damages up to three times the amount of actual damages in the case of unfair collective action such as price-fixing or collusion, or retaliatory measures taken against a person or entity that has reported the unfair trade practice to the KFTC, cooperated with the KFTC's investigation on such unfair trade practices or filed a request for mediation with the Korea Fair Trade Mediation Agency (KOFAIR) in relation to unfair trade practices.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Injunctions to prevent unfair trade practices in violation of the MRFTA are available. A claimant must prove that it was harmed or is likely to be harmed from an unfair trade practice in violation of the MRFTA to obtain an interim remedy.

Punitive damages

29 | Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Korean law.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Interest at 5 per cent per annum is awarded on damages from the date of an act in violation of the MRFTA, provided that if there is a time gap between the act of violation and the occurrence of damage, the interest accrues on the date on which damage occurs.

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Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

In principle, since the scope of recoverable damages is limited to actual damages under Korean law, the fines imposed by competition authorities are not taken into account when setting damages. However, when determining the amount of treble damages in accordance with article 109, paragraph (3) of the MRFTA, the court will consider the amount of fines imposed by competition authorities.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Korean courts may order the losing party to pay a certain amount of the attorney's fee to the prevailing party, but the actual recoverable amount is limited to the amount calculated based on the formula stipulated in the rules of the Korean Supreme Court.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Liability by joint tortfeasors is imposed on a joint and several basis.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

In principle, joint tortfeasors have joint and several liability. The liability of each joint tortfeasor is proportional to the percentage of his or her negligence contributed to the violation, and when one tortfeasor pays for damages exceeding his or her portion of the liability, he or she can seek indemnity for the exceeding portion from the other tortfeasor.

That said, article 109, paragraph (4) of the MRFTA stipulates that where the business entity that has been granted leniency in accordance with the MRFTA is held liable for treble damages, the entity will be held liable as a joint tortfeasor to the extent not exceeding the damages caused to the other from a cartel.

Such claims will be asserted in separate proceedings between joint tortfeasors after judgment or settlement of the private antitrust litigation.

Passing on

35 | Is the 'passing-on' defence allowed?

The Korean Supreme Court does not recognise passing-on defences, on the ground that it cannot conclude there is direct causation between the price of raw materials, intermediary goods, etc, and the price of the final product, or that the price increase in the final product reflects the price increase in raw materials and intermediary goods, in the absence of any special circumstance where the price increase in raw materials and intermediary goods directly results in the price increase in the final product.

Instead, it has taken the position that, under the principle of fairness, the possibility that an increase in price for products, etc, will partially reduce the damages can be taken into consideration when determining the amount of damages. In this regard, legal commentators hold the view that if the above doctrine is applied, it would bring about results that are substantially similar to those of passing-on defences.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There are no specific defences that permit companies or individuals to defend themselves against competition law liability.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

There is no separate settlement procedure for antitrust litigation cases, but settlement procedures under ordinary civil procedures will apply. Parties to a lawsuit may settle the case during the litigation procedure, or the court may issue a recommendation for settlement between the parties. If a settlement is reached by the parties, or the parties do not raise an objection to the court's recommendation for settlement within two weeks, the settlement will have the same legal effect as a court's final and conclusive decision.

For antitrust cases, there is a procedure for seeking mediation before the KOFAIR, a quasi-governmental agency established pursuant to the MRFTA. To handle the mediation procedure, a committee for the mediation of disputes concerning antitrust issues consisting of seven commissioners or less, including one chairperson, is formed within the KOFAIR.

The cases subject to the KOFAIR mediation procedure include disputes:

- relating to unfair trade practices;
- between franchisors and franchisees;
- relating to subcontract transactions;
- between large retailers and suppliers;
- between suppliers and agencies; and
- relating to unfair standard terms and conditions.

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The party that alleges it suffered harm from the violation of the MRFTA regarding one of the above specific issues may file a petition for mediation with the KOFAIR. Alternatively, the KFTC may request mediation before the KOFAIR.

The committee may conduct any necessary examination or investigation to verify the facts alleged by the parties, require submission of documents and materials related to the case, or recommend settlement or propose terms of mediation to the parties. Until the mediation proceeding is concluded, the KFTC cannot issue a corrective order against the alleged violating entity.

The mediation is concluded if any of the following occurs:

- the parties in dispute accept the recommendation or proposal for mediation issued by the committee or the parties voluntarily reach a settlement thereby completing mediation;
- an agreement between the parties is not reached within 60 days (or 90 days if both parties have agreed to such extension) of the date on which the petition or the request is filed; or
- one of the parties refuses to mediate the case or file a lawsuit with the court and thus there is no longer any real benefit for the parties to proceed with mediation.

Once an agreement is reached between the parties during the mediation procedure, the committee will prepare a written mediation report setting forth the terms of their mediation agreement, which will be signed by the commissioners of the committee and the parties. Thereafter, the parties must perform their obligations pursuant to the terms of the mediation agreement and submit to the KFTC a written confirmation specifying completion of the obligations under the mediation agreement. If the parties reach a mediation agreement and the performance of their obligations thereunder is completed, the KFTC will not issue a corrective order.

The mediation report issued by the committee will have the same legal effect as a court's final and conclusive decision. Therefore, if either party fails to comply with the obligations under the mediation agreement, the other party may enforce the agreement without filing a separate lawsuit.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

There are no updates at this time.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

- 1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Private antitrust actions have traditionally been available under Spanish law, although, for various reasons, they have evolved slowly. A series of legal reforms were implemented to modernise the rules on private antitrust litigation at the national level. Therefore, Spain introduced specialist commercial courts and enacted the [Competition Act No. 15/2007](#), which eliminated certain hurdles to bringing follow-on actions and brought Spanish law in line with [Council Regulation \(EC\) No. 1/2003](#).

This type of litigation has become widespread since then, with a relatively high number of standalone nullity and damages actions and ever more follow-on actions. Spanish courts, particularly the Supreme Court, have developed a growing and consistent body of case law applicable to those actions. Prior to the entry into force of [Directive 2014/104/EU](#) (the Damages Directive), the Supreme Court had already interpreted several substantive issues in line with it. The practice of the Spanish courts has been largely impacted by a number of preliminary references to the Court of Justice of the European Union (CJEU).

Private antitrust litigation, and particularly follow-on claims, continues to develop following the transposition of the Damages Directive into Spanish law in 2017 through the [Royal Decree-Act No. 9/2017](#). In addition, a specialist private antitrust litigation bar appears to be developing in Spain.

Applicable legislation

- 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions are governed by the relevant substantive antitrust provisions under Spanish or EU law (in respect of damages actions, articles 71 to 81 of the Competition Act, stemming from the Damages Directive) as well as the general civil law provisions contained in the [Civil Code](#), whether based on non-contractual (tort) civil liability or contractual nullity.

Indirect purchasers may bring private antitrust actions under such rules. This is reinforced by the rule of the Damages Directive, included in article 72 of the Competition Act, entitling any aggrieved party to bring a claim. Such indirect purchaser actions are, however, uncommon.

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3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Relevant legislation

Private antitrust damages actions are based on articles 71 to 81 of the Competition Act, which transposed the substantive provisions of the Damages Directive. The temporal application of such articles is regulated directly under article 22 of the Damages Directive, despite the indications given in the Royal Decree-Act No. 9/2017 (which implemented the Damages Directive), in accordance with their qualification as substantive or procedural provisions, as clarified by the Court of Justice of the European Union in *Volvo and DAF Trucks* (judgment of 22 June 2022, case C-267/20, ECLI:EU:C:2022:494).

Alternatively, such actions can be based on article 1902 of the Civil Code (non-contractual liability), invoking the relevant antitrust provisions contained in the Competition Act (articles 1, 2 or 3) or the [Treaty on the Functioning of the European Union](#) (articles 101 and 102). In this regard, it is settled case law that antitrust civil liability claims are generally non-contractual in nature. Further, it is also possible to base a nullity claim for breach of antitrust rules, where applicable, under articles 1300 and following of the Civil Code (nullity of contracts).

It may also be possible to bring antitrust damages claims on the basis of the rules contained in the [Unfair Competition Act No. 3/1991](#). Although such claims are not the general rule, it is possible to bring a damages claim under article 32(5) of the Act, since article 15(2) of the Act deems any antitrust infringement as 'unfair', as *Conduit v Telefónica* confirmed (Madrid Provincial Appeal Court, judgment of 25 May 2006, ECLI:ES:APM:2006:6773). These rules remain unaffected by the Damages Directive.

The applicable procedural rules are contained in the [Civil Procedure Act No. 7/2001](#). The new rules on access to evidence contained in the Damages Directive have been incorporated into article 283-bis(a) to 283-bis(k) of this Act.

Relevant courts and tribunals

The relevant courts are, at first instance, the commercial courts. Judgments of commercial courts may be appealed to the provincial appeal courts (except for follow-on damages claims heard under the fast-track procedure in which the quantum claimed does not exceed €3,000). Last, the Supreme Court hears appeals against judgments of the provincial appeal courts.

PRIVATE ACTIONS

Availability

- 4** | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available in all types of antitrust matters that generally come within the EU and Spanish antitrust rules (eg, vertical restraints, horizontal agreements, cartels and abuses of dominance).

Previously, it was necessary for Spanish competition authorities to have found an infringement to exist before litigation could be brought under Spanish antitrust law, although this requirement was removed when the current Competition Act came into force.

That said, following the transposition of Directive 2014/104/EU (the Damages Directive), final decisions of the Spanish competition authorities (both national and regional) bind Spanish courts, similar to the effect of European Commission decisions pursuant to Council Regulation (EC) No. 1/2003, and final decisions of other EU member states' competition authorities are prima facie evidence of an infringement. Additionally, the Supreme Court ruled that judgments confirming decisions of the Spanish competition authorities are binding and that non-final decisions are persuasive evidence (judgment of 9 January 2015, ECLI:ES:TS:2015:191).

Required nexus

- 5** | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

Claims may generally be brought in the commercial court with jurisdiction for the place where the defendant has its domicile, which in the case of corporations may be its registered office or main place of business. In the case of defendants that are not domiciled in Spain, the Supreme Court noted that the claimant may bring the claim before the commercial court with jurisdiction for the place where the harmful event took place or where it had its effects (order of 19 March 2019, ECLI:ES:TS:2019:3430A), notwithstanding further clarification by the Court of Justice of the European Union in *Volvo and Others* (judgment of 15 July 2021, case C-30/20, ECLI:EU:C:2021:604).

In respect of joint infringements (eg, cartels), claimants may choose the court with jurisdiction over the domicile of any of the defendants. Contractual nullity claims may be brought in the court with jurisdiction for the place where the products were delivered or where the contract was principally performed.

Additionally, a consumer may also bring the claim before the commercial court with jurisdiction for the place where such claimant is domiciled, as clarified by the Supreme Court (order of 13 October 2022, ECLI:ES:TS:2022:13976A).

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When the defendants are located in different EU member states, pursuant to Regulation (EU) No. 1215/2012, tort claims may be brought in Spain if at least one of the defendants is domiciled in Spain or if the harmful event occurred in Spain or, in the case of nullity actions, the goods were delivered or the services were provided in Spain.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions may be brought against both corporations and individuals, including those from other jurisdictions, provided that they are directly liable for breaches of antitrust law.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties in Spain as there is no rule under Spanish law to the contrary. There is, in fact, a growing market for private antitrust litigation funding.

Likewise, the assignment and purchase of claims is lawful under Spanish law. However, the sale of claims when the litigation is still ongoing may be subject to restrictions (for this purpose, litigation is deemed to be ongoing when the defendant has opposed the main claim). In this regard, according to article 1535 of the Civil Code, the defendant may, upon notice of the assignment and purchase of the claim, reimburse the assignee for the price paid for the assignment plus all legal costs and interest accrued since the sale of the claim and, therefore, terminate the 'credit'. For these purposes, the Supreme Court has greatly expanded the concept of 'credit', which may encompass 'any obligation' (judgment of 31 October 2008, ECLI:ES:TS:2008:5693). This may presumably be extended to tort actions and, particularly, private antitrust actions.

Contingency fees, including conditional fee arrangements, are available in Spain. The Supreme Court held that bar associations' prohibitions in this regard are contrary to antitrust law and, therefore, null and void (judgment of 4 November 2008, ECLI:ES:TS:2008:6610).

Jury trials

8 | Are jury trials available?

Jury trials are not available under Spanish law in any civil proceeding.

Discovery procedures

9 | What pretrial discovery procedures are available?

Spain has transposed disclosure procedures into articles 283-bis(a) to 283-bis(k) of the Civil Procedure Act, in line with Directive 2014/104/EU (the Damages Directive). Accordingly, both claimants and defendants may request categories of documents in each other's possession or that of a third party, or relevant parts of the competition authority's case file, providing that the request is proportionate in general terms.

Access to documents may be requested prior to filing the claim, in which case the claim should be brought within 20 days or face payment of compensation and costs, also at the time of filing the claim or at any time when the litigation is ongoing.

Other general disclosure procedures remain applicable, although these are far more limited in scope according to the Civil Procedure Act and the interpretation of the Spanish courts. Prior to bringing a claim, claimants may request very specific documents through 'preliminary procedural steps' (articles 256 to 263). The parties may request specific documents at the preliminary hearing from each other (article 328), a third party (article 330) or certifications by public entities (article 332).

Admissible evidence

10 | What evidence is admissible?

The Civil Procedure Act sets out the generally available types of evidence, which include documentary evidence (public or private documents), interrogation of parties, interrogation of witnesses, expert reports and, where applicable, judicial examination (article 299). Other types of evidence not included in that list are theoretically admissible.

Evidence generally must be submitted at the time of filing the statement of claim or defence (article 265). Expert reports may, however, be submitted at a later stage, providing that there are good grounds for this and their timely submission is notified no later than five days prior to the preliminary hearing (articles 336 and 337).

Commercial courts decide on the admissibility of evidence at the preliminary hearing based on a test of relevance and usefulness. Decisions not to admit evidence may be appealed to the same judge at the same preliminary hearing. Other parties may oppose the admission of evidence or the appeal on the same basis.

Additionally, the competent judge may voluntarily request the assistance of the competition authorities with any information in their possession, excluding leniency documents (article 15-bis of the Civil Procedure Act) or the relevant quantification criteria for the assessment of the damages claimed (article 76(4) of the Competition Act).

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Legal privilege protection

11 | What evidence is protected by legal privilege?

Article 283-bis(b) of the Civil Procedure Act has incorporated the Damages Directive's rules on access to confidential information. Evidence subject to legal privilege or professional secrecy is accordingly protected. In this regard, it is settled case law of the Constitutional Court that attorney-client communications are privileged. The newly approved deontological rules under Royal Decree No. 135/2021 regulate legal privilege, which is extended to in-house counsel.

The Civil Procedure Act generally provides that evidence obtained unlawfully is not admissible (article 283(3)), and, therefore, it cannot be voluntarily provided or requested from other parties. Other rules protecting the duty of legal privilege or professional secrecy relate to the testimony of parties (article 307) and witnesses (article 371), which Spanish courts have, however, interpreted restrictively.

Trade secrets are currently protected under the [Trade Secrets Act. No. 1/2019](#), which transposed EU Directive 2016/943 into Spanish law. Any party may invoke article 15 of the Trade Secrets Act to claim trade secrets privilege in any type of judicial proceeding, including civil proceedings. Additionally, the use and dissemination of trade (or industrial) secrets may, where applicable, constitute a criminal offence under the [Criminal Code](#).

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. However, antitrust infringements are not generally defined as criminal offences under Spanish law, with the exception perhaps of certain offences relating to market distortion.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

There is no prohibition regarding the use of evidence obtained in criminal proceedings in parallel private actions, as long as it has not been obtained unlawfully.

Information relating to both leniency applications and settlements are protected from follow-on litigation, following Spain's implementation of the Damages Directive. Article 15-bis of the Civil Procedure Act further precludes the Spanish competition authorities from providing information relating to leniency applications when intervening as an *amicus curiae*.

Spanish competition authorities do not routinely disclose documents contained in the case file to private claimants. However, parties that have filed a complaint with the Spanish competition authorities and have been granted 'interested party' status under Spanish administrative law may have access to the case file. Private claimants may theoretically request access to the

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case file or at least its index under the [Transparency Act No. 19/2013](#), with the latter option being upheld by the Transparency Council (decision of 1 March 2019, R/0752/2018). In any event, claimants may request that the competent court order the competition authorities to disclose certain parts of the file pursuant to article 283-bis(i) of the Civil Procedure Act.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Various interlocutory applications made before the defence is filed may give rise to a stay of proceedings until any such application is allowed or rejected (eg, where the defendant applies to have another party joined to the proceedings albeit not as a defendant).

A defendant may request a stay of proceedings during the preliminary hearing when there is an ongoing parallel proceeding that may condition the outcome of the antitrust action. Under the Civil Procedure Act, such prejudicial issues may arise when there are ongoing criminal proceedings (articles 40 and 41), another civil action (article 43) or any other case allowed by law or where the parties agree to a stay (article 42). Further, article 434(3) provides that the competent judge may suspend the proceedings prior to delivering the judgment where there is an ongoing antitrust investigation by the European Commission or the Spanish competition authorities.

The court may stay the proceedings, presumably at the request of either party, for up to two years in case of consensual dispute resolution (article 81 of the Competition Act, transposing the Damages Directive).

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Aside from the EU law principles of effectiveness and equivalence, there are no specific rules in Spanish law regarding the applicable standard of proof for either direct or indirect purchasers, with the only requirement being that the claimant sufficiently proves its claim and the damages alleged.

However, the Competition Act has incorporated the presumptions contained in the Damages Directive. Article 75 of the Act has incorporated the irrefutable presumption that final decisions of the Spanish competition authorities are binding and a rebuttable presumption regarding decisions of competition authorities of other EU member states. In addition, under Council Regulation (EC) No. 1/2003, Spanish courts cannot contradict findings of infringements by the European Commission. Claimants must typically determine the existence of harm and its quantification, notwithstanding the applicability of general presumptions in certain cases (such as the *res ipsa* doctrine) and the rebuttable presumption that cartels cause harm, incorporated in article 76(3) of the Competition Act. Courts may estimate the amount of the harm if such proof is almost impossible or excessively difficult to calculate in accordance with article 76(2) of the Competition Act.

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Defendants have the burden of proving the passing on of overcharges. Conversely, indirect purchasers can allege the existence of passing on when they prove that the defendant has infringed competition law, the infringement resulted in overcharges to the direct purchaser, and it acquired the goods subject to those overcharges.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is no typical timetable in either case. In addition to the statutory deadlines, any timetable essentially depends on the court's caseload and the complexity of the case (particularly in cartel damages litigation). While certain standalone cases have been resolved relatively quickly, with first instance judgments issued in less than a year, most cases usually take longer to be decided.

In principle, defendants must file their defence within 20 days from being notified of the statement of claim. In the case of collective proceedings coming within the category of diffuse (indeterminate) interests, proceedings may be further suspended for up to two months. The proceedings may be further suspended as a consequence of preliminary objections raised by the defendant prior to filing its defence or at the preliminary hearing and the subsequent opposition by other co-defendants or claimants.

Further, parties have 20 days to appeal the judgment after its notification, which other parties may oppose within 10 days.

Limitation periods

17 | What are the relevant limitation periods?

Spanish law has incorporated the minimum five-year period for private antitrust actions foreseen in the Damages Directive, which replaces the former general one-year period applicable to tort actions (article 74(1) of the Competition Act). Contractual nullity cases continue to be subject to the general five-year limitation period that applies to those actions under Spanish law.

The trigger for the limitation period is reasonable knowledge of the unlawful conduct, the damage caused and the identity of the infringer, in accordance with article 74(2) of the Competition Act, following the transposition of the Damages Directive. Prior to the introduction of this rule, in *Céntrica v Iberdrola*, the Supreme Court had already interpreted the general rules on the triggering of the limitation period in line with the Damages Directive (judgment of 4 September 2013, ECLI:ES:TS:2013:4739).

Claimants may send a potential defendant a letter or fax setting out the claim so as to interrupt the limitation periods, which are restarted (article 1973 of the Civil Code).

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Appeals are generally available in respect of interlocutory decisions (to the same court), the admissibility of interim measures (to the higher court) and judgments on the merits (to the superior court).

Judgments issued by the commercial courts under the ordinary procedure, as well as certain judgments rendered under the fast-track procedure (specifically, those concerning follow-on claims where the quantum of damages sought exceeds €3,000), may generally be appealed on the facts and on the law to the provincial appeal courts. In turn, judgments of the provincial appeal courts may be further appealed to the Supreme Court only on points of law, subject to strict admissibility criteria. These appeals concern breaches either of procedural rules or on the merits. In the latter case, where the quantum claimed is less than €600,000, the legal issues at stake must be sufficiently important to justify the Supreme Court's intervention. In practice, the Supreme Court does not allow most appeals to proceed.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Collective proceedings are generally available in respect of any civil claim that concerns consumers. In the absence of any rule to the contrary, this applies, at least in theory, to anti-trust claims.

Spain has not adopted any legislative measures in line with the EU Commission Recommendation of 11 June 2013 on collective redress, which covers, among others, anti-trust claims. At the time of writing, Spain has not yet implemented Directive 2020/1828 of 25 November 2020 on collective redress (Directive 2020/1828). The incoming implementation of this directive may lead to an amendment of the general collective proceedings' regulation also applicable to antitrust claims.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Collective proceedings are mainly regulated in article 11 of the Civil Procedure Act. Supporting legislation may be found in the [Consumers and Users Defence General Act approved by Royal Legislative Decree No. 1/2007](#) in respect of representative consumers associations, as well as in the Unfair Competition Act and the [Advertising Act](#). In addition to damages, injunctive relief may be sought in collective actions (eg, a declaration of the unlawfulness of the alleged harmful event).

Under Spanish law, collective actions fall under two distinct categories depending on how specific the harmful event is. Actions may relate to collective interests when the group of

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affected consumers is easily identifiable (article 11(2) of the Civil Procedure Act). In contrast, actions concern diffuse interests when the group of affected consumers is indeterminable or is very difficult to determine (article 11(3) of the Civil Procedure Act).

There is no clear-cut division between collective or diffuse interests. This must be assessed on a case-by-case basis and in view of the relevant case law. In any event, such a distinction is only relevant for the purposes of determining the standing to bring a claim.

The above will likely be impacted by the transposition of Directive 2020/1828.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no specific certification process applicable to collective actions similar to the US class action model. However, collective actions are subject to certain procedural requirements on standing that need to be assessed in the context of the ordinary procedure.

Actions falling under the category of collective interests may be brought by:

- an association of consumers and users;
- an entity constituted for the purpose of defending those consumers and users; or
- the group of affected persons that represents most of the latter. In this case, the claimant must notify individually each member of the group.

Actions relating to the diffuse interests category may only be brought by an association of consumers and users, but on condition that it is found to be sufficiently representative, which must be proved and assessed on a case-by-case basis.

In either case, there are certain publicity criteria to ensure that most affected consumers are joined to the proceedings (article 15 of the Civil Procedure Act). In the case of collective interest actions, each affected consumer must be individually notified. By contrast, in the case of diffuse interests actions, the court clerk will publish the order allowing the claim to proceed in the territory where the alleged harmful event took place.

The above will likely be impacted by the transposition of Directive 2020/1828.

22 | Have courts certified collective proceedings in antitrust matters?

By analogy with the certification process, there have been at least two collective proceedings in the context of private antitrust litigation in which the relevant procedural requirements were tested.

The Commercial Court No. 4 of Madrid preliminarily accepted the standing of Ausbanc as a representative of the diffuse interests of consumers affected by Telefónica in a follow-on action based on the European Commission Decision of 4 July 2007 in *Wanadoo v Telefónica* (COMP/38.784). During the proceedings, Ausbanc was struck off the State Registry of Consumer Associations. The Madrid Provincial Appeal Court ruled that this amounted to a

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loss of 'representative association' status and, therefore, that it lacked standing to sue on behalf of the consumers in question (order of 30 September 2013, ECLI:ES:APM:2013:2461A). The claim was discontinued.

Further, the Commercial Court No. 11 of Barcelona dismissed the request for disclosure brought by the Organización de Consumidores y Usuarios in advance for a follow-on damages action based on the Spanish Competition Authority Decision of 23 July 2015 in *Car Manufacturers* (S/0482/13). Among other grounds for dismissal, the court held that said entity lacked full standing because the affected individuals were not determined nor were they determinable in the sense of article 15 of the Civil Procedure Act (order of 12 January 2022, ECLI:ES:JMB:2022:59A, appeal pending).

The above will likely be impacted by the transposition of Directive 2020/1828.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Collective actions under Spanish law do not fall precisely under either the opt-in or opt-out categories. Nonetheless, according to article 15 of the Civil Procedure Act, consumers may join their claim to the collective proceedings.

Conversely, Spanish law does not envisage the possibility for consumers to opt out once a collective action has been filed. This is without prejudice to individuals bringing a claim in parallel to the collective proceedings.

The above will likely be impacted by the transposition of Directive 2020/1828.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

There are no rules on the procedure relating to the judicial authorisation of collective settlements. Therefore, the general procedure for individual settlements applies.

The above will likely be impacted by the transposition of Directive 2020/1828.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

National collective proceedings are generally possible. A collective action brought on behalf of consumers at the national level will in principle be adjudicated by the court of the territory where the defendant is seated. However, in the event of actions brought by consumers on an individual basis, the claimant may choose either between the court of the territory of their own residence or, alternatively, the competent court resulting from applying the general rules under the Civil Procedure Act.

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The above will likely be impacted by the transposition of Directive 2020/1828.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

Not yet. However, in the context of mass litigation (ie, multiple individual claims brought in parallel by the same firm or firms on the same legal grounds), which is by far more widespread, there is a specialist bar that is also active in antitrust claims initiated by small and medium enterprises or consumers (see the *Trucks*, *Milk Buyers*, *Car Dealers*, *Car Manufacturers*, and *Petrol Companies* cases).

The above will likely be impacted by the transposition of Directive 2020/1828.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Claimants are entitled to seek damages under Spanish law, which are limited to actual loss in addition to loss of profit and interest according to settled case law (also article 72(2) of the Competition Act, transposing Directive 2014/104/EU (the Damages Directive)). It is theoretically possible, albeit difficult, to claim non-financial damages.

In respect of the quantification of damages, the Supreme Court set out the basic requirements that the expert reports of both claimants and defendants should include in *Nestlé & Ors v Ebro Foods* (judgment of 7 November 2013, ECLI:ES:TS:2013:5819).

It stated that the claimant's expert report must provide a technically well-founded methodology based on a reasonable and testable hypothesis (eg, the existence of a cartel) and accurate and verifiable data, comparing the 'actual situation' (the price and loss of sales data) with the 'counterfactual analysis' (a 'but-for' scenario).

The defendant's expert report must not be limited to criticising the methodology of the claimant's expert report but must also provide an accurate, alternative and better-founded quantification of damages. An unreasonable hypothesis is sufficient for the defendant's expert report to be found unreliable.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Claimants may seek interim remedies. Article 727 of the Civil Procedure Act sets out a non-exhaustive list of these, including the freezing of assets, the deposit of goods and, particularly, injunctions.

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Claimants must meet three requirements to obtain interim remedies:

- an arguable case (*fumus boni iuris*), showing a prima facie good case (notwithstanding the eventual decision on the merits) based on well-founded data, arguments and evidence;
- irreparable harm (*periculum in mora*), proving that a delay may hinder the effectiveness of an eventual judgment, although interim measures will not be granted in the event of acquiescence; and
- provision of sufficient security that may compensate the possible loss suffered, the amount of which will be determined by the judge in view of the circumstances of the case and the claimant's application.

Interim measures have been requested in the context of private antitrust actions to a varying degree of success, and remarkably in sports-related disputes and abuse of dominance claims. While there are relevant precedents in which such requests were dismissed in the past (eg, in *Ryanair v Aena* (Alicante Provincial Appeal Court, order of 19 January 2012, ECLI:ES:APA:2012:1A), and *Pedro León v Liga de Fútbol Profesional*, in which case the Spanish competition authority intervened as *amicus curiae* at the request of the court (Madrid Provincial Appeal Court, order of 10 July 2015, ECLI:ES:APM:2015:711A)), there are recent instances of courts having awarded them (eg, on appeal in *Real Federación Española de Fútbol v LaLiga* (Madrid Provincial Appeal Court, order of 1 June 2020, ECLI:ES:APM:2020:2673A), *European Super League v UEFA/FIFA* (Madrid Commercial Court No. 17, order of 20 April 2021, not published, appeal pending) and *Unison Rights v SGAE* (Barcelona Provincial Appeal Court, order of 10 November 2021, ECLI:ES:APB:2020:10035A)).

Punitive damages

29 | Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Spanish law. This is reinforced by article 72(3) of the Competition Act.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Claimants may request interest on damages at the time of filing the claim, together with actual loss and loss of profit, to accrue from the date of loss (article 1109 of the Civil Code). In respect of private antitrust actions, the Supreme Court held in *Nestlé & Ors v Acor* that interest on damages must be adjusted in line with the appropriate discount rate to reflect the present value of the damage claimed, in that instance the Bank of Spain's official legal interest rate (judgment of 8 June 2012, ECLI:ES:TS:2012:5462).

Additionally, if the defendant fails to pay the damages awarded in the judgment, claimants may request 'procedural interest', accruing from that date and higher than the statutory interest rate (article 576 of the Civil Procedure Act).

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

Fines are not taken into account in civil proceedings when setting damages.

Conversely, the compensation of damages prior to the enforcement decision by the Spanish competition authorities may be regarded as a mitigating factor when calculating fines.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The 'loser pays' rule applies in Spain under the Civil Procedure Act. The winning party is generally entitled to recover all legal costs from the losing party, provided that it succeeds in respect of all the heads of its claim or defence, or, in accordance with the Supreme Court's settled case law, at least substantially. Conversely, each party must bear its own costs when the damages claim is partially upheld, which, as confirmed by the Court of Justice of the European Union (CJEU) in *Tráficos Manuel Ferrer*, does not contravene EU law (judgment of 16 February 2023, C-312/21, ECLI:EU:C:2023:99). Even if a claim is fully or substantially upheld, if there is reasonable doubt relating to matters of law or fact, each party bears its own costs. Costs may also be ordered against those litigating in bad faith.

Court clerks generally take into account the non-binding criteria of the bar associations when calculating those amounts. If the losing party challenges the assessment of the court clerk where it considers the legal costs to be undue or excessive, the court clerk may, in the latter case, request an opinion from the relevant bar association.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Joint and several liability in respect of private antitrust actions has been incorporated into article 73 of the Competition Act in similar terms to those contained in the Damages Directive, in addition to the direct effect of article 101 of the Treaty on the Functioning of the European Union in this regard (CJEU judgment of 16 February 2023, C-312/21, ECLI:EU:C:2023:99). Article 73 of the Competition Act includes certain limitations for small and medium-sized enterprises (unless they led the cartel or had previously breached antitrust law) and full recipients of leniency with regard to their own direct and indirect purchases or sales, unless it is not possible for the claimant to claim compensation from another co-defendant.

Although the general rule under Spanish law is several (proportionate) liability, joint and several liability is theoretically possible in civil liability claims under the Supreme Court doctrine applicable to infringements where it is very difficult to determine the allocation of liability among debtors, such as, in principle, cartel claims. In this regard, second instance courts seem to have endorsed that view in the context of pre-Damages Directive claims (eg, in *Paper Envelopes* (Barcelona Provincial Appeal Court, judgment of 10 January 2020,

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ECLI:ES:APB:2020:59, and Madrid Provincial Appeal Court, judgment of 3 February 2020, ECLI:ES:APM:2020:1, among others)).

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Joint and several defendants are generally entitled to bring claims against co-infringers as a matter of Spanish law in accordance with article 1145(2) of the Civil Code. This is reinforced by article 73(5) of the Competition Act, implementing the Damages Directive, which includes the limitation of contribution claims for leniency applicants to the damages caused to their own direct or indirect purchasers or suppliers, or, in the case of other purchasers or suppliers, to their own relative liability.

Contribution claims must be brought only after the judgment or settlement as otherwise it is impossible to determine the main amount. Spanish law does not foresee the exercise of contribution claims during the same proceedings as the principal claim.

Passing on

35 | Is the 'passing-on' defence allowed?

The passing-on defence is now expressly regulated in articles 78 to 80 of the Competition Act, following the transposition of the Damages Directive, although the Supreme Court had already accepted the possibility of raising this defence in pre-Damages Directive claims in *Nestlé & Ors v Ebro Foods* (judgment of 7 November 2013, ECLI:ES:TS:2013:5819). Since then, second instance courts faced with that defence have generally dismissed it for lack of proof (eg, in *Trucks* (Valencia Provincial Appeal Court, judgment of 23 January 2020, ECLI:ES:APV:2020:292, among many others)), with certain exceptions in other cases in which the passing-on defence has been upheld in part or in full (eg, in *Paper Envelopes* (PSOE's claim, Barcelona Provincial Appeal Court, judgment of 7 February 2022, ECLI:ES:APB:2022:1182), and in *Construction Insurance* (Madrid Provincial Appeal Court, judgment of 19 May 2022, ECLI:ES:APM:2022:8315)).

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Defendants may also raise several objections regarding their standing to be sued. If there is no binding enforcement decision, they may contend that they did not participate in the alleged infringement. Parent companies may also make allegations that rebut the presumption contained in article 71(2)(b) of the Competition Act that they participated in the alleged conduct. Additionally, defendants may deny the existence of any damage or causal link and, where applicable, rebut the presumption that cartels cause harm.

Defendants have the burden of proving the claimant's failure to mitigate the damages, as held by the Supreme Court in *Hidrocantábrico v Iberdrola* (judgment of 4 March 2015, ECLI:ES:TS:2015:669).

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Alternative dispute resolution

37 | Is alternative dispute resolution available?

Alternative dispute resolution is available in respect of private antitrust actions, including arbitration and mediation. The [Arbitration Act No. 60/2003](#) and [Mediation Act No. 5/2012](#) do not exclude antitrust claims. Despite the public policy nature of antitrust law, as confirmed by the CJEU in *Eco Swiss*, that could give rise to the risk of the award being unenforceable, it is settled case law that arbitrators have a duty to apply mandatory antitrust rules (Madrid Provincial Appeal Court, order of 18 October 2013, ECLI:ES:APM:2013:1988A).

Additionally, the national Spanish competition authority can theoretically act as an arbitration tribunal in any type of matter within its competence, including antitrust law claims, pursuant to article 5(1)(b) of [Act No. 3/2013](#).

We are not aware of alternative dispute resolution mechanisms having been used to settle antitrust claims.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

Private antitrust litigation, and particularly follow-on litigation, continues to consolidate in Spain. Since the seminal *Sugar* case, *Paper Envelopes* (decisions rendered in 2022) and *Trucks* (judgments expected in 2023) are the first landmark cases to reach the Supreme Court.

Regarding follow-on damages claims, in addition to a set of actions brought mainly by large corporations (see *Paper Envelopes*, *Construction Insurance*, and *Power Cables*), there is a sizeable number of individual actions brought in the context of mass litigation on behalf of small and medium enterprises and consumers (see *Trucks*, *Milk Buyers*, *Car Dealers*, *Car Manufacturers*, and *Petrol Companies*). There is also a growing number of standalone actions for abuse of dominance.

Additionally, many core substantive and procedural issues that had given rise to divergent approaches by the commercial courts are less controversial today. Provincial appeal courts in Barcelona, Madrid and Valencia, among others, have provided guidance in leading cases to interpreting substantive concepts, such as standards of proof of harm, limitation and parental liability. Many procedural issues have been clarified as well, although there is no consistent practice regarding disclosure yet. Remarkably, Spanish courts have paved the way for the harmonisation of EU private antitrust litigation by recently submitting a series of significant preliminary references to the Court of Justice of the European Union concerning the interpretation of Directive 2014/104/EU (the Damages Directive) and the direct effect of articles 101 and 102 of the Treaty on the Functioning of the European Union.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In Turkey, private antitrust litigation has been applicable since [Law No. 4054 on the Protection of Competition](#) (the Competition Law) entered into force in 1994. There have been a number of pending cases concerning private enforcement of competition law. The judicial developments have been relatively limited, and there have not been many court precedents in that respect. This is mostly because injured parties are largely unaware of the opportunity for private enforcement and compensation.

Additionally, the lengthy court proceeding period and the rules regarding the limitation period are among the factors preventing private antitrust litigation from becoming attractive to the injured parties. Moreover, the lack of established practice among the civil courts and difficulties encountered in accessing evidence for antitrust practices also constitute obstacles to the development of private antitrust litigation.

However, with the amendment of the Competition Law, mechanisms such as the settlement mechanism, commitment mechanism and SIEC Test, as well as the principle of de minimis have been introduced. With the implementation of the Settlement Communiqué, parties who accept the existence and scope of the violation will be able to settle the case with the Turkish Competition Authority (TCA) until the receipt of the investigation report. The TCA will still fine the parties if an infringement is found, but it can apply a reduction of up to 25 per cent of the administrative monetary fine.

This is expected to generate significant benefits for private antitrust litigation through reducing the lengthy investigation process by enabling the parties to settle without completing the investigation process and deeming the TCA's decision final, as the parties are not granted the right to litigate the terms of the settlement. Thus, at the end of the settlement procedure, there will be a final infringement decision that the claimant can use as the basis for their compensation claim. Therefore, the settlement mechanism is expected to increase parties' applications for compensation claims, based on the final infringement decisions of the TCA, before the competent courts.

In addition, the increasing interest of academics and bar associations encourages future private antitrust litigation. Another promising aspect is the discussion platforms that bring the TCA, the courts, practitioners and academics together to put forward their views and discuss the possible ways to create a tradition of private antitrust litigation. A positive development in that regard is the vast number of actions that have been taken by parties (that have

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suffered damages) against the banks, which were found to have violated the Competition Law by being involved in an anticompetitive agreement by the TCA's Banks decision dated 8 March 2013 (Board Decision No. 13-13/198-100).

In this context, it should also be highlighted that on the grounds of the inaccurate implementation of the single continuous infringement doctrine, the Council of State (in May 2019) overruled, at the revision of decision stage, the judgment of the court of first instance upholding the TCA's concerned decision. Subsequently, the case was sent back to the 2nd Ankara Administrative Court. The court decided to persist in its previous judgment and stated that the TCA's Banks decision was lawful. The court, by dismissing the appeal in its entirety, stated that the parties concerned have a right to appeal to the Council of State Administrative Judicial Chamber Board within 30 days of receiving the judgment. At the time of writing, these cases are still ongoing, and their outcome is yet to be seen. On this front, it should be noted that the court decisions on the legality of the TCA's Banks decision will affect the ongoing private damage claim lawsuits filed based on said TCA decision. Importantly, as the courts review each private damage claim on its own basis, and not solely based on the underlying TCA decision, if, in the end, one of the courts grants the private damage claim of one of the parties, this would not lead to an automatic positive outcome for other claimants as well.

Another notable example in private antitrust litigation in Turkey was focused on treble damages and concerned the TCA decision regarding an undertaking operating in the alcoholic beverages sector (Board Decision No. 14-21/410-178 of 12 June 2014). After the TCA's fining decision, other undertakings operating in the alcoholic beverages sector filed a lawsuit to request treble damages, including both pecuniary and non-pecuniary damages. Even though the First Chamber of İzmir Commercial Court granted the compensation claim, the Regional Court of Justice overturned this decision regarding one of the claimants, ruling that one of the prerequisites of private damage claims (ie, an unlawful act) did not occur. Importantly, the Regional Court of Justice in fact upheld the assessments on treble damages but challenged the ruling on non-pecuniary damages. This decision is significant as it is an important precedent regarding treble damages, and also because the claimants in this case received the largest private antitrust damages to date.

As for the commitment mechanism, its impact is arguably more ambiguous in nature than the Settlement Communiqué. Pursuant to the Commitment Communiqué of the TCA, the parties can offer commitments to bring the investigation to an end during the preliminary investigation or investigation phase. Nonetheless, the parties must submit their commitments to the TCA within three months after the receipt of the investigation notice.

If the TCA deems the commitments offered sufficient to remedy the competition problems, it shall render the commitments binding and bring the investigation to an end. However, this decision of the TCA will not include a determination on whether the agreement, decision or practice raises any competition problems amounting to a competition law violation. In this regard, in practice, courts usually wait until the decision of the TCA is finalised before delving into the merits of the compensation claim. However, if the TCA deems the commitments offered sufficient to remedy the competition problems, it will no longer pursue the case and will render an infringement decision. This might put the parties who may have been harmed by the practices of the undertaking previously under investigation into a precarious state. Indeed, under the scenario that the claimant is harmed by the practices

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of an undertaking previously under investigation, it will not be able to present an infringement decision rendered by the TCA because the TCA will close the investigation pursuant to commitments remedying the competition problems. The commitment mechanism has already been applied several times since its introduction. The TCA published several of these examples on its website. However, from public records, it is not yet clear whether any one of these commitment decisions have led to any private antitrust claims. Therefore, for the time being, the effect of the commitment mechanism over private antitrust claims is still uncertain, and since there are still no court decisions on this front, it is also not clear whether the courts will delve into the merits of the case or dismiss the case in its entirety regarding compensation claims.

Finally, another significant development that may have serious effects in private antitrust litigation is that the draft amendments to the Competition Law specifically tailored to the need to regulate digital markets, similar to the European Union's [Digital Markets Act](#), were revealed in 2022. Although there were no specific provisions on private competition enforcement in the draft text, assuming that the draft will enter into force as it is, general provisions on damages will also apply to undertakings holding significant market power. In this context, heightened private enforcement may be expected for undertakings active in the digital markets following adoption of these amendments. Having said that, the draft amendments have not been adopted at the time of writing.

Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

The rules regulating private antitrust actions are set forth under the Competition Law. Although it grants injured third parties the right to claim damages, section 5 of the Competition Law does not provide any definition of an injured party (or parties) that has suffered harm as a result of a breach of the Competition Law. For example, it is still controversial whether indirect purchasers can claim damages.

The greatest difficulty that indirect purchasers may encounter in the process of private enforcement is to satisfy the conditions of being a plaintiff in the relevant antitrust actions since they would have to prove a causal link between the competition infringement and the damages incurred under the Turkish law. On one hand, it is argued that because of the lack of an official definition of an injured party, indirect purchasers should also be able to claim damages due to a lack of specification by the relevant legislation. On the other hand, it is argued that allowing indirect purchasers to claim private antitrust damages would lead to an extreme increase in court cases, which may in turn result in several different parties submitting the same claim for the same damage. Therefore, due to the difficulty of establishing a causal link, potential claims of indirect purchasers are likely to be dismissed by the court.

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3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

In the case of a breach of the Competition Law, section 5 grants a right for the injured party (or parties) to claim treble damages before the civil courts, which have exclusive jurisdiction in those matters. The civil courts apply general principles of torts regulated under the [Code of Obligations No. 6098](#) (the Code of Obligations). The procedural rules set out in the [Code of Civil Procedure](#) are applicable to private antitrust litigation. At the same time, both parties may lodge an appeal against the civil court judgments.

In addition, under the [Consumer Protection Act](#), the Arbitration Committee for Consumer Problems has the power to hear consumer disputes below a certain threshold. This applies to disputes arising out of the Competition Law, and the consumers must bring their disputes before this Committee so long as the dispute is below the concerned thresholds. The current threshold is 66,000 Turkish lira (subject to revaluation by the Ministry of Trade each year). This threshold is also applicable to private antitrust claims.

PRIVATE ACTIONS

Availability

4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

In the case of a breach of any rule under Law No. 4054 on the Protection of Competition (the Competition Law), private actions can be taken in accordance with article 57 of the Law. Those who prevent or restrict competition by way of anticompetitive concerted practices, decisions or agreements as well as by abusing their dominance must compensate the injured parties.

In its judgment dated 30 March 2015 (2014/13296 E and 2015/4424 K), the Court of Cassation ruled that the injured parties may claim their damages as soon as they become aware of the person who violated the Competition Law and the existence of the injury. In addition, the court also stated that a decision of the Turkish Competition Authority (TCA) is not a prerequisite for bringing a compensation claim. Therefore, it is suggested to bring an action for damages as soon as possible after submitting the complaint to the TCA.

However, even though a decision by the TCA is not a prerequisite for bringing a compensation claim, the Court of Cassation stated that the final decision of the TCA, which cannot be appealed, is considered as a prerequisite for requesting compensation claims. Indeed, according to the Court of Cassation, the parties have the ability to bring a compensation claim before the final judgment of the TCA. However, the court will make it a preliminary issue and wait until the TCA's decision is final before ruling on the merits of the compensation claim (Decision of the Court of Cassation 11th Chamber Dated 8 March 2016 and numbered 2015/5134 E and 2016/2543 K; Decision of the Court of Cassation 11th Chamber Dated 5 October 2009 and numbered 2008/5575 E and 2009/10045 K, dated 21 December 2011).

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and numbered 2011/14714 E and 2011/17389 K, dated 12 September 2014 and numbered 2013/7687 E and 2014/13657 K).

Furthermore, in a lawsuit based on competition law infringement without a previous application to the TCA, it is certain that the civil court would request the plaintiff to make its complaint to the TCA first so that it can determine whether there is a breach of competition law and whether there are legal grounds for the alleged competition law violation. On the other hand, the civil court only evaluates whether the applicant has suffered harm as a result of the competition law violation and does not take into consideration arguments of the defendants against the decision of the TCA. In other words, the civil courts do not have the power to evaluate whether the TCA's decision is against the law.

However, the parties that are engaged in the violation of the competition rules may appeal the TCA's decision finding the violation before the administrative courts. If a private enforcement action is brought to a civil court before the decision of the administrative court becomes final, the civil court may, under article 165 of the Code of Civil Procedure (CCP), decide to wait until the administrative court becomes final.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The competent court in private antitrust litigation is determined in accordance with the CCP. The CCP authorises the local courts of the geographic district in which the damage has arisen or the court located in the domicile of the claimant. As for the general principle of jurisdiction, the court of the place where the illicit act or competition infringement has occurred shall be defined as the place where the essential elements of the illegal act have taken place. As to the location where the damage has arisen, this will likely be linked to the place where the claimant has incurred damages from the infringement. Taking into account that the TCA defines the relevant geographical market as 'Turkey', in most cases the court of the domicile of the claimant is competent to hear the case.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes. Private actions can be brought against both corporations and individuals, including those from other jurisdictions.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

In Turkey, there are no litigation financing companies that fund litigation costs, bear financial risks or receive a certain percentage in the case of success. Under Turkish law, only attorneys-at-law are eligible to represent and act on behalf of clients in legal processes and litigation cases before the courts, whereas antitrust investigations and filings before the Turkish Competition Authority (TCA) can be conducted by representatives who are not attorneys-at-law.

With regard to fees, according to article 164 of the [Attorneys' Act](#), the attorneys' fee may be agreed as a certain percentage of the money to be litigated or adjudicated, not exceeding 25 per cent.

Contingency fees are available under Turkish law. In the event of a successful outcome of the proceeding, the attorneys may receive a certain percentage of the proceeds recovered by the claimant, provided that the claimant and representatives (attorneys) agreed on this beforehand.

Jury trials

8 | Are jury trials available?

No. Jury trials have been recognised in neither civil nor criminal cases under Turkish law.

Discovery procedures

9 | What pretrial discovery procedures are available?

There are no pretrial discovery instruments that enable parties to obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence. However, pursuant to article 16 of the CCP, during the preliminary examination hearing, the court will grant a two-week period, which is not extendable, to submit any evidence that has not yet been included within their initial submissions.

There are some discovery proceedings, such as requesting declaratory decisions for the breach of trademark and the recording of evidence; however, these are not within the scope of antitrust private litigation.

Admissible evidence

10 | What evidence is admissible?

In general, any testimonial, documentary, or tangible evidence, is admissible provided that it is enough to prove or disprove any statement made in the course of the court proceedings.

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As with the Code of Civil Procedure (CCP) that Law No. 4054 on the Protection of Competition (the Competition Law) refers to, evidence may be divided into:

- direct evidence (ie, confession, documents, oath and definitive judgment); or
- circumstantial evidence (ie, witness or expert opinions and on-the-spot inspections).

Consequently, according to the CCP, any kind of evidence is admissible in private anti-trust actions.

Whether a decision of the TCA may constitute direct evidence is a controversial question; however, the opinion in this regard is mostly that the TCA's decision cannot be considered as direct evidence until it becomes final. The investigation may be initiated by the TCA, either by a complaint or ex officio.

In cases where an undertaking or individual puts forward its complaint regarding the practices of another undertaking, both parties are entitled to make an appeal and claim the annulment of the TCA's decision or issue of a stay order before the administrative courts, or both. If none of the parties submits an appeal within the envisaged time period or if the relevant courts uphold the TCA's decision, it becomes final. Only then may the TCA's decision be referred to as direct evidence in the private antitrust litigation. In other words, if none of the parties to the TCA's decision appeals it or the decision imposing a fine has been affirmed by the courts, the claimant may also use this as direct evidence to prove that the behaviour in question is against the competition law.

The Court of Cassation clarified whether the TCA's final decision will be considered mandatory for bringing a legal action for damages in antitrust litigation. The court of first instance in this case rejected the claims for treble damages as the TCA's decision was not final. In other words, the court of first instance ruled that only the TCA's final decision is a condition to bring a treble damages action to court. Nevertheless, the Court of Cassation annulled the ruling of the court of first instance and stated in its judgment that the TCA's final decision will be considered as a preliminary issue rather than a condition to bring a legal action for damages.

Legal privilege protection

11 | What evidence is protected by legal privilege?

The concept of legal privilege for lawyer–client communications exists in Turkey. The claimant is not entitled to request the defendant to present evidence that relates to communications between the defendant and its in-house counsel or lawyers. However, during the court proceedings, the court will be guided by provisions of the CCP as opposed to the procedural rules of the TCA.

Pursuant to the general rules of law or the CCP, the judges must ensure that there are appropriate measures to protect legal privilege, including the documents and electronic communications. At the same time, the courts may order one of the parties or a third party to submit any relevant documents regarding the case or request any of those documents from the TCA's file. Should this be the case, the parties are not allowed to refrain from

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implementing the court's order to submit the evidence based on the reason that the information constitutes a trade secret.

In practice, parties may take additional precautions to ensure that the documents they submit are kept confidential. As this is not formally recognised by the CCP, parties may prefer various proceedings including (1) refraining from using the online judiciary informatics system and submitting the documents by hand or (2) if possible, making the submission along with a confidentiality request. However, in any case, none of these methods would guarantee confidentiality since parties to the lawsuit and their official representatives may review any document within the case file with proper authorisation.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

In accordance with Turkish law, competition law infringements are not subject to criminal law. But if the action or behaviour that constitutes an infringement from the viewpoint of the Competition Law also constitutes a crime under the criminal law or other areas of law (ie, public procurement law), then the perpetrators will be penalised under both laws.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Competition law infringements are not subject to criminal law.

Leniency applicants are not protected from follow-on litigation. According to the administrative procedure of the TCA, where the undertaking involved in a cartel informs the TCA about the cartel, it may be immune from a fine or benefit from a reduction of a fine under certain circumstances. However, there are currently no rules on leniency during private enforcement procedures, and, in practice, leniency applicants may not be protected from follow-on litigation and can be severally and jointly liable for the damages.

With regard to the disclosure of the documents to claimants, the Communiqué on the Right of Access to the File and Protection of Trade Secrets provides some guidance. Within the scope of the right to access to the file, the parties can have access to any document that has been drawn up and any evidence that has been obtained by the TCA, except for correspondence among the TCA's departments and information that constitutes trade secrets or other undertakings' confidential information. Request for access to the file is evaluated by the TCA (the investigation committee of the case). As a result of the evaluation, the TCA may deny the request if it is not convinced about legitimacy. If the request for access to the file is denied, the reason thereof is notified to the requesting party.

Nevertheless, if the court requests the documents regarding the investigation file from the related parties or the TCA with its formal decision, both the parties and the TCA must submit

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any and all requested documents to the court without having any right to deny the disclosure based on arguments in respect of trade secrets or confidential information.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Under article 57 of the Competition Law, a private action does not depend on the TCA's enforcement decision that is pending or at the stage of the appeal. Therefore, it is possible, *de jure*, to bring a private action even if no administrative proceedings (ie, investigations or preliminary investigations) have been initiated or no final decision has been adopted by the TCA. However, the TCA's decision is, *de facto*, required.

The Court of Cassation ruled in its judgment that if there is no TCA decision that constitutes the basis for the action for damages under the competition law, the court of first instance dealing with the private enforcement case must wait for the TCA's decision before proceeding with the hearing of the case. Therefore, if the TCA has already launched an investigation regarding the infringement of competition law that has the same subject as the case before the court of first instance, notwithstanding the fact that no imperative legislation provides this, the court will usually prefer to wait until the TCA's investigation is finalised before continuing the litigation proceedings or adopting a decision.

In addition to this, if the TCA has not launched any investigation related to the private action case before the national court, the national court will request the plaintiff to apply to the TCA to obtain an administrative decision regarding the alleged competition law violation.

Although there are no direct legal obstacles to bringing a private action relating to competition law infringements before the courts in Turkey, the courts of first instance normally prefer to wait for the TCA's final decision (which is in line with the court's practice) before proceeding with the file.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Under the CCP, the burden of proof is on the person claiming that the acts of the other party constitute the competition law infringement. Actions for damages in private enforcement of competition law are subject to general evidence rules applicable to the illicit acts under the civil law. In this respect, as proof of damage suffered, the claimant must provide the court with sufficient evidence of a breach by the defendant of the competition rules, the existence of damage and the causal link between the unlawful act and the damage incurred.

The CCP does not define the standard of proof as the 'balance of probabilities' or 'beyond reasonable doubt'. Proof of the relevant facts is sufficient. Moreover, under Turkish law, the judge has discretionary power to assess the evidence and decide whether it is sufficiently convincing. In accordance with article 59 of the Competition Law, it is sufficient to provide

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evidence that illustrates the existence of agreements, decisions and practices restricting competition.

There is an exception to the above-mentioned general rule. If certain conditions are satisfied, the burden of proof passes to the defendant. In particular, if the injured party (or parties) submits to the court evidence (eg, of the actual sharing of markets, stability of the market price for a long period of time or price increases within close intervals by the undertakings operating in the market) that gives the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof (that the undertakings are not engaged in concerted practice) lies with the defendant.

On this note, there has been an important court decision regarding the standard of proof required for resale price maintenance cases in particular. In the TCA's *Henkel* decision, the Board found that Türk Henkel Kimya Sanayi ve Ticaret AŞ (Henkel) had violated competition law rules, and imposed an administrative monetary fine upon the undertaking. Subsequently, Henkel initiated annulment proceedings against the board's decision. The administrative court of first instance and the regional administrative court rejected the annulment request by Henkel as they found that the board's decision was compliant with the law. The case was then brought before the Council of State, which has reversed the regional administrative court's decision by finding the Board's *Henkel* decision to be against the law. Regarding the standard of proof, the TCA provided that to establish the existence of a resale price maintenance, there must be 'a pressure/force or incentive towards implementing the recommended price as a resale price' and 'the use of price monitoring systems'. The court also required that the TCA must rely on concrete and serious data to support its findings. Although the courts' assessments do not provide mandatory rules for the review of private antitrust claims, these assessments may still serve as a guideline for private antitrust claims since the *Henkel* decision raises the standard of proof for establishing resale price maintenance conduct as an unlawful act, which is the pre-requisite for private antitrust damage claims.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

Collective party proceedings had not been specifically recognised in antitrust litigation proceedings in Turkey; however, the new CCP that entered into force in 2011 (unlike the Competition Law) recognises collective action proceedings, although they are very limited in scope. In terms of single-party enforcements, however, there are no standard timetables for the court proceedings. The Court of Cassation is the last instance for reviewing judgments rendered by lower instance courts upon an appeal in cassation. It is also entitled to modify and revise its own rulings upon request.

The parties have no explicit rights to accelerate proceedings. Each party has the possibility of accelerating the proceedings through its own conduct; that is, by not requesting an extension of time limits. The duration of court proceedings is relatively lengthy, and the total length of proceedings including all instances is approximately two-and-a-half to three years.

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According to articles 184 and 186 of the CCP, following the legal examination, the court shall summon the parties to a hearing only after the evidence has been evaluated. In other words, the hearing does not take place until all evidence has been examined. This practice has been in force since the enactment of the CCP in 2011.

In addition, to achieve uniformity in cases, the Court of Cassation's opinions and judgments are considered as precedents for the lower instance courts. It is also possible for the parties to include references to precedents in their applications to accelerate the court review proceedings.

Limitation periods

17 | What are the relevant limitation periods?

The Competition Law does not set forth any rules regarding time limitation for bringing treble damages compensation claims. The question of whether a private action is time-barred has always been arguable, and there have been attempts to make the calculation of limitation periods clearer by applying the principles of the Code of Obligations.

According to article 72 of the Code of Obligations, the limitation period for a private claim is two years, but in any case, the ability to claim damages expires in 10 years. As for the starting dates of the limitation period, the two-year period for general or intangible damages resulting from tort liability under competition law starts running from the date when the party becomes aware of it. The 10-year period starts running from the date when the act resulting in the damages took place.

Customising these rules of the Code of Obligations and applying them by analogy to competition cases requires a comprehensive interpretation. The Competition Law does not have any provision regarding limitation periods for private enforcement. Therefore, if the provisions of the Code of Obligations were to be applied, the general two-year limitation period for private actions in antitrust litigation would start running from the date when the injured party became aware of the competition law infringement and of the perpetrator.

However, in 2015, the Court of Cassation revised its precedent regarding lapse of time regulations and clarified the principles governing the implementation of time limitations with regard to private antitrust actions. In particular, it ruled that the time limitation of eight years, as regulated under article 20 of the [Misdemeanour Act No. 5326](#), shall be applicable for bringing private antitrust claims. In determining the lapse of time, the Court of Cassation put emphasis on the penal characteristics of the administrative fines imposed by the TCA. According to the second sentence of article 72 of the Code of Obligations, longer limitation periods are considered if a right to claim damages arises from conduct prohibited under the criminal law. Therefore, the court set out the two-year time period to claim compensation owing to anticompetitive behaviour (it used to be one year according to the former Code of Obligations) and extended the limitation period to claim treble damages to eight years. Moreover, the judgment of the Court of Cassation provided more legal certainty by acknowledging that the limitation period shall start running from the date of submitting a complaint to the TCA, namely becoming aware of the infringement.

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The Court of Cassation is very consistent with its practice and the court consistently ruled that the applicable limitation period is eight years instead of the two-year period envisaged under the Code of Obligations (Decisions of the Court of Cassation 11th Chamber dated 1 July 2019 and numbered 2019/1672 E and 2019/5015 K, dated 30 March 2015 and numbered 2014/13296 E and 2015/4424 K, dated 27 October 2015 and numbered 2015/3450 E and 2015/11139 K). Additionally, with its very recent decision dated 24 September 2020 and numbered 2015/208 E and 2020/433 K, Izmir Commercial Court of First Instance 1st Chamber stated that the limitation period applicable for bringing private antitrust claims is eight years pursuant to the Misdemeanour Act No. 5326. Thereby, it rejected a time-out claim brought forth by the defendant based on the two-year limitation period stipulated under the Code of Obligations.

The Court of Cassation also clarified the question of whether the TCA's decision becoming final shall be considered as a mandatory condition for bringing the treble damages action. The court of first instance in this case rejected the claims for treble damages on the grounds that the TCA's decision was not final, but the Court of Cassation annulled the ruling and stated in its judgment that the TCA's decision becoming final shall be considered as a preliminary issue rather than a condition to bringing a legal action for damages.

Appeals

18|What appeals are available? Is appeal available on the facts or on the law?

The judgment of the court of first instance may be appealed on substantive or factual grounds and procedural errors. Under the CCP, the rulings of courts of first instance may be appealed to the Regional Courts of Appeal and then to the Court of Cassation. Appealing a judgment before the Regional Court of Appeal may be based on all grounds, including errors of law, facts or procedures.

COLLECTIVE ACTIONS

Availability

19|Are collective proceedings available in respect of antitrust claims?

There were no provisions regarding collective actions under the previous Code of Civil Procedure (CCP). However, the new CCP, which entered into force in 2011, recognises collective action proceedings, although they are very limited in scope. A 'class' comprises a group of people who are members of an association or another legal entity, and it is not possible to widen the scope of this class to other persons who have suffered damages as a result of the same action but who are not the members of the association or legal entity. In other words, it is not possible to define the class on a case-by-case basis, but the class is predefined as the members of the association or legal entity whose rights have been violated. Therefore, under the CCP, collective proceedings are available in respect of antitrust claims, although with a very limited scope.

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Applicable legislation

20 | Are collective proceedings mandated by legislation?

Collective proceedings are not mandated by the Competition Law, only by the CCP. Additionally, some associations have the right to commence collective proceedings within the scope of the Consumer Protection Law. Consumer organisations are allowed to represent consumers regardless of their memberships. However, the scope of this right is limited to violations of the Consumer Protection Law and does not cover disputes arising from competition law. Therefore, consumer organisations cannot commence collective action and claim damages in regard to an antitrust injury.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Because collective proceedings are not specifically envisaged for private enforcement of competition law, the certification process is not available. According to article 113 of the CCP, only an association or a legal entity may commence collective proceedings to protect the rights of its members. The same article also dictates that the legal entity must act in accordance with its statute (eg, its articles of association) and must not exceed the limits set by that statute. Accordingly, this article may be used by way of analogy for the certification process for antitrust injury.

22 | Have courts certified collective proceedings in antitrust matters?

No. The courts have not yet certified collective proceedings in antitrust matters since the legislation for collective proceedings is relatively new under the CCP. Moreover, the law does not specifically envisage such an option for private enforcement of competition law.

However, considering that consumer law allows consumer organisations to launch collective proceedings in certain issues, as well as the CCP provisions, it is arguable before the court that these organisations will also be allowed to use such a right in antitrust issues.

Opting in or out

23 | Can plaintiffs opt out or opt in?

According to article 57(c) of the CCP, the claimants are able to opt in as long as their claims have common legal basis or facts. They may also opt out if they wish to do so. However, by opting out, the claimants may lose the right to raise the same claims again in the future.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

As a general rule, disputing parties are allowed to reach an out-of-court settlement and collective settlements are not mandated by the Competition Law in Turkey. If the parties

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decide to settle out of court, authorisation from the judicial body is not required for the settlement to be valid. Settlement effectively terminates the formal lawsuit before the court, as recognised by article 313 of the CCP.

Pursuant to article 314 of the CCP, parties may decide to settle any time before the court renders its final decision. In cases where parties opt to settle during the judicial review process, the upper court reviewing the case shall decide in line with the will of the parties.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

This is not applicable to Turkey, since it is not divided into multiple jurisdictions.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No. A plaintiffs' collective-proceeding bar has not yet developed in Turkey because collective proceedings is a relatively new institution for the Turkish legal system, given that it was recognised for the first time under the CCP in 2011.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Under the Code of Obligations, normally the injured party is only entitled to claim compensation amounting to the damages suffered. However, the treble damages practice in Turkish competition law is an exception to this rule. The Competition Law specifically provides that the injured party has the right to claim damages, which is the difference between the cost it paid and the cost it would have paid if competition had not been limited. Also, treble damages are available in Turkish competition law where the damages arise from an agreement or a decision of the parties, or from cases involving gross negligence of them, including abuse of dominance cases.

According to the Competition Law, the amount of damages that the injured party (or parties) may claim is the difference between the amount that the party actually paid and the amount that it would have paid had there been no restriction or violation of competition in the market. On the other hand, competitors that are affected by the restriction in the market may request for compensation for all their damages, including the lost profit; that is, all profits the competitors expected to gain are calculated. Previous years' balance sheets are considered for calculation purposes. In accordance with the Code of Obligations, the amount of compensation is determined by the court, depending on the nature of the situation and

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the level of the defendant's fault. If the injured party had any benefits as a result of the infringement, these benefits are deducted from the amount of damages.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

The claimant may also seek interim measures from the court if he or she is harmed by anticompetitive behaviour. In the event of an immediate risk arising from the potential delay of the judgment, the claimant may request the court to seize the assets of the defendant. Furthermore, the courts may issue interim measures ordering the defendant to perform a certain action, such as supplying the claimant with certain goods under circumstances in which the claimant would otherwise lose important customers.

Punitive damages

29 | Are punitive or exemplary damages available?

Upon the claimant's request, the court may order compensation in favour of the claimant amounting to treble the amount of the material damages suffered. Treble damages are intended to serve a purely punitive function.

The current treble damages clause of the Competition Law, amended in accordance with the Competition Law, is optional for the judge, so damages corresponding to the actual harm may be granted to the claimant.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

There is no specific provision regarding interest on damages awarded. On the other hand, there is a precedent of the Assembly of Civil Chambers of the Court of Cassation in 2005 in respect of interest on damages arising from torts that reads as follows: 'The defendants are also liable for the interest on compensation from the date of the occurrence of the illicit act'.

However, in some cases, damages may occur after the competition infringement has emerged. In that respect, injured parties are entitled to indemnity as of the date when the damage from the competition infringement arose. Under Turkish law, the claimant must explicitly claim the interest and specify the date of the damage in the petition. If the claimant does not specify the date when the damage arose, the judge will rule for interest on damages from the date of the judgment.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

Fines imposed by the Turkish Competition Authority (TCA) are not taken into account in setting damages by the courts. Even if the TCA imposes the highest fine, the damaged party is not deprived of the right to request compensation.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The legal costs, including litigation costs and attorneys' fees, are allocated depending on the outcome of the case. Normally, the party that loses the case will bear those legal costs. Attorneys' fees are calculated on the basis of statutory fees.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

In principle, the person exposed to damages is entitled to claim the compensation from one of or all the defendants who severally or jointly caused the damages. This principle is also stipulated under article 57 of the Competition Law.

According to article 61 of the Code of Obligations, joint and several liability is only applicable if the defendants 'sustained the damages severally'. Each defendant is liable for the total damages of the claimant, regardless of its contribution to the total damage.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

In cases where several defendants are involved in the anticompetitive behaviours, any of the defendants can be held liable for the entire scope of damages caused by all the defendants. In this regard, the Code of Obligations regulates that if several persons have together caused damage or are responsible for the same damage for different reasons, the provisions regarding joint and several liability shall be applied accordingly. Therefore, the claimant may recover full damages from any of the defendants, and it is not for the claimant to bring its claims against every person contributing to the damages caused.

However, the Code of Obligations also provides that the determined compensation shall be divided among the defendants who are jointly and severally liable by taking into consideration all the circumstances, the gravity of the fault and the intensity of the characteristic risk imputable to each of them. A jointly and severally liable person who has paid more than his or her share has a right of recourse against the others, and, to this extent, he or she is subrogated to the rights of the injured person. In other words, the civil courts will decide

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whether a defendant who has paid more than his or her part of injury may recover partial reimbursement from the other defendants, and if the defendant has the right to recourse, then the court will also determine the amount for which each defendant is liable. In determining these amounts, the court takes into consideration the degree of seriousness of the fault committed by each defendant and its ultimate effect. Therefore, the defendants may put forward their contribution and indemnity arguments in the same proceedings as the principal claims.

Passing on

35 | Is the 'passing-on' defence allowed?

To the best of our knowledge, there is no precedent on this matter as yet.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There is no special defence that would permit companies or individuals to defend themselves against competition law liability. However, if anticompetitive behaviour results from an obligation under a different area of law, the undertaking concerned may avoid the liability by putting forward the provision of law leading to liability for the breach of competition law.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

In recent years, some amendments to Turkish law were introduced to encourage alternative dispute resolution, such as arbitration and mediation. Therefore, alternative dispute resolution is available to create a time- and cost-efficient way to solve conflicts. Those proceedings are only admissible if an arbitration clause has been agreed between the parties.

However, in terms of damages claims owing to a breach of competition rules, it is not clear whether alternative dispute resolution is possible, as there is no relevant precedent as yet. The need for a precedent stems from the existing public interest in competition law violations.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

There are no updates at this time.

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