Private Antitrust Litigation

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Samantha Mobley

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GETTING THE DEAL THROUGH

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CONTENTS

Preface

Private Antitrust Litigation 2017

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Private Antitrust Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Israel and Ukraine.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, Samantha Mobley of Baker & McKenzie LLP, for her continued assistance with this volume.

GETTING THE DEAL THROUGH

London
August 2016

Plaintiff overview

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Kaplan Fox & Kilsheimer LLP

Introduction

The February death of Justice Antonin Scalia, who had served with relish for 30 years as the Supreme Court's most influential conservative voice, led to a sea change in the legal world. By the end of that month, Dow Chemical Company announced that it had entered into a US$835 million settlement agreement to resolve a price-fixing class action rather than pursue its planned Supreme Court challenge to class certification. The company openly attributed its capitulation to the loss of Justice Scalia, who had written two decisions that were key to its appeal. In its announcement, Dow stated that '[g]rowing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits have changed Dow's risk assessment of the situation' (press release, Dow Chemical Co, 'Dow Announces Settlement in Urethanes Class Action Litigation' (26 February 2016).

The long-term impact of Justice Scalia's absence from the class action stage will not be measurable until his vacancy is filled. In the interim, the court's post-Scalia decisions have taken a cautious, compromising turn that reflects increased leverage for the liberal wing of the bench, who can now force 4-4 ties that will uphold whatever decision is on appeal. This trend of narrow, tightly drawn decisions will surely continue until the new balance of the court is altered after the next presidential inauguration in 2017.

The four opinions discussed here illustrate the impact of the court's current numerical balance on cases affecting the class-action world.

Class arbitration bans

DIRECTV Inc v Imburgia, 136 S Ct 463 (2015)

Two months prior to Justice Scalia's death, the Supreme Court struck yet another blow against consumers seeking court redress against alleged corporate wrongs. In 2005, the California Supreme Court declared that class-arbitration waivers in consumer contracts are unconscionable, and therefore unenforceable under California law. In 2011, the Supreme Court had held California's rule to be pre-empted by the Federal Arbitration Act (*AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2011)). In 2007, while the rule was still in force, DIRECTV entered into a form consumer contract of its own drafting with California customers that included an arbitration clause with a class action waiver and a caveat that the clause would be deemed unenforceable if the 'law of your state' bars the use of the waiver. In 2008, while the rule was still in effect and three years prior to *Concepcion*, the plaintiffs brought a class action in a California state court claiming DIRECTV's early termination fees violated California law. After *Concepcion* was decided, DIRECTV moved to arbitrate the three-year-old suit. Applying the principle of contract construction that ambiguity should be interpreted against the interest of the drafter, the trial court and California Court of Appeal interpreted the phrase 'law of your state' to include the California rule that was in force at the time the plaintiffs agreed to the contract, and that would have led them to expect that a class action was available to them. The Supreme Court disagreed.

The majority's analysis began by acknowledging that the FAA allows parties to choose the law that governs the terms of an arbitration contract, including its enforcement provisions, including the 'law of Tibet, the law of pre-revolutionary Russia' or the law of 2007 California (136 S Ct at 468). The majority also acknowledged that California courts are the ultimate authority on their own law, and may normally apply their own rules of contract interpretation. However, it then disagreed with the California courts that the phrase 'law of your state' was ambiguous as to whether it referred to the laws as they existed at the time the contract was entered, and instead concluded that the phrase could only be interpreted to refer to currently valid laws. Having thus delved into a field of interpretation acknowledged to be reserved for the states, the majority then found that California's interpretation could only be explained by animus to arbitration, violating the principle that arbitration contracts must be placed on 'equal footing with all other contracts' (136 S Ct at 471). The court held California's own interpretation to be pre-empted by the Federal Arbitration Act.

Justice Ginsburg, joined by Justice Sotomayor, dissented. While the majority insisted that their conclusion went no further than 'well-established law', Justice Ginsburg saw that the decision went beyond the court's prior precedents upholding unambiguous class-arbitration bans in contracts of adhesion. After *DIRECTV*, consumers will 'lack even the benefit of the doubt when anomalous terms in such contracts reasonably could be construed to protect their rights' (136 S Ct 476).

Justice Ginsburg noted that, because no rational consumer would fund an individual arbitration to redress a claim worth a few dollars, the Supreme Court's arbitration precedents have 'predictably resulted in the deprivation of consumers' rights to seek redress for losses, and... have insulated powerful economic interests from liability for violations of consumer-protection laws' (136 S Ct at 477). She found nothing in the actual text or history of the FAA to justify this recent approach. The FAA was passed in 1925 as a means of encouraging the enforcement of 'commercial arbitration agreements between merchants with relatively equal bargaining power'(Id). It was not intended to serve, as it does today, as an absolute shield for liability for unlawful corporate wrongs against consumers.

The majority opinion was written by Justice Breyer and joined by Justice Kagan, both of whom had dissented in *Concepcion*, and Justice Kagan had recently written a fiery dissent of her own in another notorious Supreme Court arbitration case, *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304 (2013). Their position in *DIRECTV* is a discouraging sign for plaintiffs and consumer advocates looking for a reversal of course in a post-Scalia Supreme Court.

Class certification

Tyson Foods Inc v Bouaphakeo, 136 S Ct 1036 (2016)

In a major sign of its cautious post-Scalia approach, the Supreme Court in March 2016 upheld the certification of a class of employees that had sued an Iowa meat processor for not paying overtime for time spent donning and doffing protective gear. Because the employer did not maintain time records for each employee's donning and doffing, plaintiffs relied on a statistical study performed by their expert that calculated average times based on a representative sample of employees. The defendant argued that the use of statistics was improper and that each employee should have borne the burden of having to prove that the time they actually spent donning and doffing was sufficient to claim overtime. Because this individualised inquiry would predominate over the questions common to the class, the defendant argued that the classwide treatment was inappropriate.

Allaying the fears of the plaintiffs' bar, the Supreme Court, in an opinion written by Justice Kennedy and joined by the four liberal justices (and with a concurrence by Chief Justice Roberts) declined to set a blackline rule excluding the use of statistical studies in class actions. Instead, the court held that its 'permissibility turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of

the relevant cause of action' (136 S Ct at 1046). The court observed that 'one way' for plaintiffs to show the adequacy of statistical data for proving classwide liability would be to demonstrate that the data could have sustained a reasonable jury finding in each individual action. A *Daubert* challenge could be used to challenge the admissibility of such evidence, if based on implausible assumptions or inadequate methodology, and a jury could otherwise evaluate its persuasive value. The court held that '[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action' (136 S Ct at 1049).

The Supreme Court also punted for now on a second issue that had caused sleepless nights in the plaintiffs' bar. While observing that 'the question whether uninjured class members may recover is one of great importance', the court found it to be a premature question on the record before it, leaving the issue for the district court to resolve in the first instance.

Article III standing

Spokeo Inc v Robins, 136 S Ct 1540 (2016)

In another narrowly drawn decision, the Supreme Court in May 2016 reversed and remanded to the Ninth Circuit a decision that found a plaintiff had article III standing to maintain a prospective class action under the Fair Credit Reporting Act of 1970 (FRCA). Thomas Robins brought suit against Spokeo, a company that gathers and disseminates a wide variety of online data about individuals, such as names, ages, marital status, finances, occupations, hobbies, shopping preferences and musical preferences. The service is allegedly marketed as a way to evaluate prospective employees or romantic partners, and does not require searchers to disclose their identities. Robins alleged that he was injured because at the time he was seeking a job, Spokeo published false information that suggested he was financially secure, employed and married, perhaps suggesting to potential employers that he was overqualified for the positions he sought or unlikely to be willing to relocate for a job. Robins alleged that the false information violated the FCRA, which requires consumer reporting agencies to 'follow reasonable procedures to assure maximum possible accuracy concerning the individual about whom the report relates', and provides a private right of action and statutory damages for violations. The Ninth Circuit found that the publication of false information about Robins was sufficient to give him standing to sue.

The Supreme Court reversed and remanded. The court held that to have article III standing to sue for a statutory violation, a plaintiff must allege an injury that is particularised, ie, one that affects the plaintiff 'in a personal and individual way', and concrete, ie, real and not abstract. The court found that while the Ninth Circuit correctly found that the publication of false information about Robins satisfied the particularity prong, it had erred in failing to assess the plaintiff's allegations against the second prong.

The court did not set a particularly high bar for the Ninth Circuit to meet upon remand. As guidance, it observed that a concrete injury need not be tangible and that a material risk of harm could suffice in circumstances in which harm is difficult to prove or measure. In the context of the case at hand, the court indicated only that not all inaccuracies in disseminated data would be sufficient to cause concrete harm. For example, it would be 'difficult to imagine' that an incorrect zip code, 'without more', could present 'any material risk of harm'. The court left to the Ninth Circuit, however, to determine whether the type of information actually disseminated (misstatements of wealth and employment status of a job seeker) could pose such a risk.

Defence attorneys and corporations hoping for a new weapon against large class action suits for statutory violations were probably disappointed with *Spokeo*, which has not yet presented much of an obstacle to article III standing for plaintiffs alleging intangible injuries. Within two months of the court's decision, the Eleventh Circuit held that a debt collector's failure to provide a plaintiff with statutory required disclosures was sufficient to give rise to a cognisable injury (*Church v Accretive Health Inc*, No. 15-15708, 2016 WL 3611543 (11 Cir 6 July 2016)); a Minnesota district court held that a plaintiff had sustained a cognisable injury to her right to privacy when her driver's licence record was unlawfully accessed in violation of a statute (*Pocnik v Carlson*, No. 13-CV-2093, 2016 WL 3919950 (D Minn 15 July 2016)); and a district court in the Southern District of New York allowed a class action to proceed based on statutory violations of a New York law that required mortgage satisfaction notices to be filed within 30 days, giving rise to the risk of clouded property titles (*Jaffe v Bank of America NA*, 13 CV 4866, 2016 WL 3944753 (SDNY 15 July 2016)). The Ninth Circuit has not yet spoken on whether the injury alleged in *Spokeo* will be deemed sufficiently concrete to confer standing, but there does not seem to be much in the Supreme Court's holding to argue against such an outcome.

Extraterritorial reach

RJR Nabisco Inc v European Community, 136 S Ct 2090 (2016)

A June 2016 Supreme Court decision to preclude foreign plaintiffs from recovering for injuries sustained due to a US corporation's alleged RICO violations demonstrates how easily an upset of the newly numbered court can affect outcomes. Justice Sotomayor recused herself from deciding the case, leaving the conservatives with leverage on a seven-member bench.

In the 1990s, the European Commission's Anti-Fraud Office conducted an investigation that it alleged revealed a widespread illegal cigarette-trafficking and money-laundering scheme by multiple major tobacco companies, including RJR Nabisco (RJR), a US corporation. While the European Community was able to resolve its dispute with most targets through agreements and fines, RJR is alleged to have continued its part in the scheme. Specifically, RJR is accused of participating in a scheme in which Colombian and Russian criminal organisations smuggled illegal narcotics for sale within Europe, where the proceeds were laundered through a chain ending with the purchase of cigarettes from RJR. High-level RJR employees in the US are alleged to have controlled the scheme from RJR's US headquarters; wired the proceeds into US accounts; filed fraudulent documents with US agencies; communicated through US mail and wires; and used proceeds to purchase Brown & Williamson (the US subsidiary of British American Tobacco), which was then used to further the scheme. Foiled by its efforts to obtain an agreement with RJR, the European Community brought a civil RICO suit in the Eastern District of New York. The suit alleged a pattern of racketeering activity consisting of money laundering, providing material support to foreign terrorist organisations, mail fraud, wire fraud and violations of the Travel Act, and claims that the majority of the unlawful conduct took place in the United States.

Relying on *Morrison v National Australia Bank Ltd*, 561 US 247 (2010), the district court dismissed the RICO claims. In *Morrison*, the Supreme Court had held that a US statute may not be applied extraterritorially in the absence of clear manifestation of congressional intent. The district court found that RICO lacked such a manifestation, and therefore could not be applied to enterprises that functioned primarily overseas. The Second Circuit reversed, holding that the reach of RICO is co-extensive with the reach of its predicate crimes, and both the predicate money-laundering and material-support-for-terrorism statutes included the required expression of congressional intent, unlike the mail-fraud, wire-fraud and travel-act statutes. However, the Second Circuit held that prohibition on extraterritoriality was not implicated where the conduct underlying the offences was alleged to be domestic. According to the Second Circuit, the district court's approach would shield 'purely domestic conduct from liability because the defendant has acted in concert with a foreign enterprise' (*European Community v RJR Nabisco Inc*, v 765 F.3d 129, 139 (2d Cir 2014)).

In a separate opinion denying RJR's motion for rehearing, the Second Circuit also held that there is no separate requirement of a domestic injury under RICO's private right of action provision. According to the Second Circuit, the presumption against extraterritoriality is concerned only with what 'conduct falls within a statute's purview' (*European Community v RJR Nabisco Inc*). Therefore the European Community could sue RJR Nabisco for its foreign injuries.

All seven justices who took part in the opinion agreed with the Second Circuit's analysis of RICO's substantive scope, holding that a violation occurs 'based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial' (136 S Ct at 2103). They also agreed with the Second Circuit's view that the location of the enterprise itself is irrelevant to RICO liability, whether or not the predicate offences are extraterritorial, observing that the district court's view would shield foreign enterprises from liability for illegal operations within the United States.

However, Justice Alito, joined by Justices Kennedy, Thomas and Roberts, then went on to hold that because Congress had not provided 'clear direction' that RICO's private right of action provision could be applied to redress foreign injuries, the European Community's claim could not proceed. The four justices reasoned that there was too great a potential for 'international friction' if a US court were to apply its private

treble-damages remedy to injuries suffered abroad by foreign citizens seeking to bypass their own government's less generous remedies.

Justices Ginsburg, Breyer and Kagan dissented to this portion of the decision. Taking a more textual approach to the statute, the three dissenters found little justification for the majority's position in the plain language of RICO's private-right-of-action provision. The provision allows recovery by '[a]ny person injured in his business or property by reason of a violation of' RICO's substantive prohibitions (§1964(c)). The language indicates that the extraterritorial reach of a private right of action is coextensive with that of the underlying predicate offence. In addition, RICO's private right of action was modelled on section 4 of the Clayton Act, the private right of action of the federal antitrust laws, which the Supreme Court has long recognised as providing a remedy for foreign and domestic injuries.

Nor, the dissenters reasoned, is a domestic-injury requirement required to avoid international friction. Instead, making it impossible for plaintiffs suffering foreign injury to sue in US courts for wrongs committed largely in the US by US corporations is more likely to cause offence. That it was the European Community and 28 of its member states that turned to the US courts after finding themselves otherwise powerless to curb two decades of wrongful conduct by a US corporation suggests that the dissent and the Second Circuit had the better of the comity argument.

With the composition of the court in flux, *RJR Nabisco* may not be the last word on the role private plaintiffs may take in pursuing RICO violations for foreign injuries caused by US corporations. Had Justice Sotomayor joined her dissenting colleagues, a four-four split would have affirmed the Second Circuit's approach.

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The EU Damages Directive's framework on passing on of overcharges – does it work?

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Introduction

Private damages actions before the national courts of EU member states and public enforcement of the EU competition law rules by competition authorities are seen as complementary tools, both of which are necessary for an effective enforcement regime. The right for victims of competition law infringements to claim damages, and the importance of such right for the full effectiveness of EU competition law, had been recognised by the European Court of Justice (ECJ) in its landmark *Courage v Crehan* judgment (Case C-453/99, EU:C:2001:465).

The significant divergence of national procedural rules often made it difficult, however, for victims to obtain effective redress. On 10 November 2014, the European Council finally adopted the long-awaited Damages Directive (Directive 2014/104/EU – the Damages Directive), which is designed to eliminate barriers to effective private enforcement that had been identified in various member states' procedural rules. The press release accompanying the Damages Directive cites Competition Commissioner Vestager as stating that:

> *We need a more robust competition culture in Europe. So I am very glad that the Council has now also formally approved the Directive on competition law damages actions. I am very pleased that it will be easier for European citizens and companies to receive effective compensation for harm caused by competition law violations.*

The European Commission (the Commission) identified the following key improvements introduced by the Damages Directive:

- National courts can order companies to disclose evidence when victims seek compensation.
- In addition to Commission infringement decisions, a final infringement decision of a national competition authority will constitute full proof before civil courts in the same member state where the infringement has occurred. Before courts of other member states, it will constitute at least prima facie evidence of the infringement.
- Victims will have at least five years to bring damages claims, starting from the moment when they had the possibility to discover that they suffered harm from an infringement. This period will be suspended or interrupted if a competition authority starts infringement proceedings, so that victims can decide to wait until the public proceedings are over. Victims will have at least one year to claim damages once an infringement decision by a competition authority has become final.
- If an infringement has caused price increases and these have been 'passed on' along the distribution chain, those who suffered the harm in the end will be entitled to claim compensation.
- Consensual settlements between victims and infringing companies will be made easier by clarifying their interplay with court actions. This will allow a faster and less costly resolution of disputes.

In this chapter, we shall look in more detail at one particular improvement identified by the Commission, namely the rules relating to pass-on.

The principle of pass-on as recognised in the case law

As mentioned above, in *Courage v Crehan*, the ECJ explicitly recognised the right of victims of competition law infringements to claim damages. It stated that:

> *[T]he full effectiveness of article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in article 85(1) would be put at risk if it were not open to* any individual *to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.*
> (*Courage v Crehan*, paragraphs 26 and 27, emphasis added)

The ECJ confirmed its position in *Manfredi* (Joined Cases C-295/04 to C-298/04 *Manfredi*, ECLI:EU:C:2006:461), and further clarified that:

> *[...] it follows from the principle of effectiveness and the right of* any individual *to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest. Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible [...].*
> (*Manfredi*, paragraphs 95 and 96, emphasis added)

As is clear from the ECJ's statements, the right to claim damages (covering both actual and profit loss, as well as interest) accrues to *any* person that suffered losses as a result of a competition law infringement. It is therefore irrelevant whether the injured party is a direct or indirect customer of the infringer; if it has incurred damages as a result of the anticompetitive conduct of the infringer, it is entitled to compensation.

The application of the principle as established by the ECJ requires damages to be allocated at the various levels of the supply chain affected by the infringement, and therefore necessarily raises the question of how the deal with the issue of pass-on. In the following section, we shall assess how the Damages Directive has resolved this issue.

The Damages Directive framework of interlocking presumptions and pass-on

Article 3 of the Damages Directive incorporates the ECJ's case law as contained in *Courage v Crehan* and *Manfredi*. Article 3.1 states that: 'Member states shall ensure that any natural or legal person who has suffered harm, caused by an infringement of competition law is able to claim and obtain full compensation for that harm', while article 3.2 confirms that the right for compensation covers actual loss, loss of profit and payment of interest.

Chapter IV of the Damages Directive deals with the issue of pass-on. Article 12(1) of the Damages Directive confirms that any person that has suffered harm as result of a competition law infringement is entitled to full compensation, 'irrespective of whether they are direct or indirect purchasers'. However, the right to full compensation for the victim of a competition law infringement cannot result in overcompensation. This in turn requires, as recognised in article 12(2) of the Damages Directive, that the harm caused by the infringement is correctly attributed at the different levels of the supply chain.

While the Damages Directive recognises the right to full compensation of any person that suffered harm as a result of the infringement at any stage of the supply chain, it is up to the claimant to prove both the existence and amount of the damages suffered and the causal link between the claimed damages and the infringement. However, in line with the Damages Directive's policy objective to facilitate private damages actions, the Damages Directive states at article 17(1) that it is incumbent on the member states to ensure that neither the burden nor the standard of proof required for the quantification of harm makes it excessively difficult or practically impossible to claim damages. In the case of cartels, the Damages Directive goes further, stating that the causation of harm in such circumstances is presumed, although the presumption is rebuttable.

Where the purchaser has passed on some of the harm suffered, in accordance with article 13(1) of the Damages Directive the defendant is entitled to invoke this pass-on as a defence against the claim for damages. The burden of proof of the existence and extent of pass-on rests on the defendant invoking the claim.

Whether pass-on has occurred is a factual question and will depend on the economic situation in which the infringement took place. This seems to be recognised in Recital 41 of the Damages Directive, which states that: '*[d]epending on the conditions under which undertakings are operating*, it *may* be commercial practice to pass-on price increases down the supply chain' (emphasis added). This is in line with economic thinking. Indeed, economic theory predicts that there is likely to be complete pass-on in a situation of perfect competition, where the increase in price of the cartelised good is likely to be fully reflected in the retail price for the product. However, pass-on cannot be presumed. For example, a party that produces a good that incorporates a cartelised input may be unable to pass on the increase in the price of the input if it sells its product on a market where it competes with other suppliers that use non-cartelised inputs for the manufacture of their products.

As regards indirect purchasers, however, in an effort to assist such purchasers in bringing a claim, article 14(1) of the Damages Directive seems to start from the premise that pass-on can be assumed to have occurred, 'taking into account the commercial practice that price increases are passed down the supply chain'. In addition, while the burden to prove both the existence and extent of the pass-on is on the party making a pass-on claim, where the claimant is an indirect purchaser, he or she benefits from a (rebuttable) presumption to have provided proof that pass-on has occurred if the following three cumulative conditions are shown to have been met (Damages Directive, article 14(2)):

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

While the existence of pass-on will be deemed to have been proven if the above-mentioned conditions are fulfilled, the indirect purchaser still needs to quantify the extent of the harm suffered as a result of the alleged infringement.

Comments on, and questions arising from, the Damages Directive's pass-on framework

The Damages Directive reflects both the ECJ's established case law as well as the policy objective to promote private damages actions. This is demonstrated by the fact that the Damages Directive both recognises the issue of pass-on (which, as mentioned above, is inherent in the principle established by *Courage v Crehan* that any party that has suffered damages as a result of a breach of competition law has a right to full compensation), and incorporates a number of presumptions that assist the claimant in bringing a claim for damages, in particular, in relation to pass-on, the presumptions set out in article 14 of the Damages Directive.

The way in which the Damages Directive deals with the issue of pass-on raises, however, a number of comments and questions. While the scope of this short chapter is too limited to assess all of these in detail, we should like to raise the following two points.

First, the assumption contained in article 14(1) of the Damages Directive that pass-on has occurred, 'taking into account the commercial practice that price increases are passed down the supply chain', seems to contradict the economic theory that the Damages Directive itself seems to recognise in Recital 41 that pass-on cannot be assumed. Rather, whether and to what extent pass-on has occurred will depend on the economic situation prevailing on the horizontal and downstream markets for the cartelised good in question. The stated assumption of article 14(1) of the Damages Directive is therefore reflective of the Damages Directive's policy objective, but is not supported by sound economic principle.

Second, the question of whether alleged damage has been caused by the cartel becomes more and more difficult as one goes down the supply chain. It is clear that the further the level of supply is removed from the market where the cartelisation as occurred, the more tenuous the link may become between a price increase on the downstream market in question and the cartelisation that has occurred on the upstream market several levels removed. This can be illustrated by the following example. Say for the sake of argument that a cartel has been proven to exist on the market for the production of a certain chipset, which is used in a product that itself is an input used for the production of television sets. When a price increase occurs in the retail price of those television sets, it is unclear to what extent this can be said to be the result of an increase in the price of the input that includes the cartelised chipset, a price increase of other inputs that do not include the cartelised good but are used in the same television sets, or factors external to the manufacture of the television sets in question that have an impact on the market for household goods including said televisions. Given this scenario, it is unclear which party bears the burden of proof of the causal link between the damage claimed and the existence of the cartel. Does the presumption contained in article 14(2) mean that the indirect purchaser has fulfilled its obligation if, first, it can show that the three conditions of article 14(2) have been met and, second, has quantified the level of damages it has suffered, leaving it to the defendant to argue that there is no causal link between the alleged damage and the existence of a cartel on the upstream market, or does the indirect purchaser's obligation to demonstrate 'the scope' of the damage include on obligation to establish the existence of a causal link?

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Conclusion

As noted above, the pass-on framework contained in the Damages Directive reflects both the ECJ's established case law and the policy objective of facilitating private damages actions. However, the application of this framework raises a number of difficult factual, economic and legal issues. To assist the national courts to deal with the issue of pass-on, the Commission has stated that it will provide guidance to the courts in the form of guidelines to deal with these issues. The Commission will be assisted in drafting the guidelines by an expert study on this topic that was due to be to be completed by the end of May 2016. At the time of writing, no guidelines or draft guidelines have yet been published. It remains to be seen when that happens how the Commission will deal with the thorny factual, economic and legal questions that arise in the context of pass-on.

Australia

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Legislation and jurisdiction

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

Private competition law litigation has been available in Australia as a complement to public enforcement by the Australian Competition and Consumer Commission (ACCC) since the Trade Practices Act 1974 (Cth) (TPA) (now the Competition and Consumer Act 2010 (Cth) (CCA)) was enacted in 1974. A class action regime has been available under the Federal Court of Australia Act 1976 (Cth) (FCAA) since 1992.

Under Australian law, a person or corporation that is harmed by a contravention of the competition law can bring private enforcement proceedings. These proceedings are most commonly in the form of an action for damages and injunctive relief. Between 2000 and 2015, 28 out of the 106 (approximately 26 per cent) proceedings commenced that involved alleged contraventions of the competition provisions of the TPA and CCA were brought by private applicants (Caron Beaton-Wells, 'Private Enforcement of Competition Law in Australia — Inching Forwards?' (2016) 39(3) *Melbourne University Law Review* (advance)). This figure does not include proceedings that were settled out of court or where disputes were negotiated without the need to commence proceedings. Although there are not many private competition law actions in Australia by sheer number, many of the seminal competition law cases in Australia have been private actions (for example, *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 and *Seven Network Ltd v News Ltd* (2009) 182 FCR 160).

Historically, privately litigated cases have tended to involve allegations of abuse of dominance. In more recent times, private litigants have commenced proceedings for contraventions of other competition law provisions to address commercial disputes between parties. For example, the Federal Court of Australia handed down a landmark decision in relation to the bid-rigging cartel provisions of the CCA in *Norcast SarL v Bradken Limited* (No. 2) [2013] FCA 235. However, many cases between private litigants are resolved by way of confidential settlement between the parties, often prior to the final hearing or judgment in the matter. For example, the patent dispute between Apple and Samsung that included allegations of anticompetitive conduct was settled after the matter had been fully heard by the Federal Court of Australia but before the parties received a judgment.

Unlike the proliferation of antitrust class actions in North America, there has been only a modest increase in the number of class actions (also referred to as 'representative proceedings' in Australia) for anticompetitive conduct. While numbers of class actions have risen significantly in Australia in areas such as shareholders claims, industrial and workplace claims and investment and property schemes, there have been only five follow-on representative actions for anticompetitive conduct commenced in Australia's legal history and all of these have been for cartel conduct. Of those five actions, only four have been determined or resolved. This represents only 1.5 per cent of all class actions brought in Australia between 1992 and 2014 (Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: Third Report – Class Action Facts and Figures – Five Years Later' (Research Report, Australian Research Council, November 2014) 10–11). The four representative actions relate to cartels in the following industries: animal vitamins (*Darwalla Milling Co Pty Ltd v F Hoffmann-La Roche Ltd [No 2]* (2006) 236 ALR 322), cardboard packaging (*Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] ATPR 42-361), rubber chemicals (*Wright Rubber Products Pty Ltd v Bayer AG* [No 3] [2011] FCA 1172 and, most recently, in the air cargo industry, which was resolved on 8 October 2015 (*De Brett Seafood Pty Ltd v Qantas Airways Ltd* [No 7] [2015] FCA 979. A fifth action in the premixed concrete industry was discontinued as a class action by court order: *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (Unreported, Federal Court of Australia, Drummond J, 9 July 1997).

The steady growth in the number of private actions (representative and otherwise) for competition law contraventions in Australia has been facilitated by the introduction of the ACCC's immunity policy for cartel conduct, which has encouraged cartel participants to come forward with information and evidence that may be used in follow-on representative proceedings. Private antitrust actions usually follow public enforcement by the ACCC so that private litigants can take advantage of the information unearthed and facts established by the ACCC. Each of the five representative proceedings commenced in Australia (referred to above) has been a follow-on action to a major ACCC investigation.

There continue to be some tensions between the ACCC's regulatory enforcement objectives on the one hand and the growth of follow-on private antitrust litigation on the other. For example, the ACCC has historically been an advocate for greater protection from disclosure of information provided to it in cartel investigations in order to encourage cartelists to self-report and cooperate with the ACCC. But this has the potential to compromise or at least stunt the development of follow-on actions. Further, parties continue to make admissions and settle ACCC enforcement actions on the understanding that the admissions made cannot be relied on in follow-on private actions. While this no doubt facilitates early settlement, suggestions allowing admissions in settlements to be used to pursue follow-on private actions will affect the willingness of parties to cooperate with the ACCC and resolve proceedings by way of settlement.

On 31 March 2015, a national panel tasked with undertaking a 'root and branch' review of Australia's competition law and policy recommended that various provisions of Australia's competition laws be amended to remove barriers to private competition law enforcement in Australia. The government has largely endorsed these recommendations (see 'Update and trends').

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 they are. The CCA allows private claimants to seek damages, declarations, injunctions, divestiture and other orders for contraventions of Australia's competition laws. The position of indirect purchasers is yet to be determined by Australian courts. As these remedies are based on damage suffered or likely to be suffered by the claimant, in theory, both direct and indirect purchasers have standing to commence proceedings for contraventions of Australian competition law, so long as the damage suffered or likely to be suffered can be established.

Additionally, representative proceedings are allowed by Part IVA of the Federal Court of Australia Act 1976 (Cth) (the Federal Court Act).

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

For the relevant legislation, see question 2. Broadly speaking, Part IV of the CCA prohibits a wide range of anticompetitive conduct including:

- per se illegal conduct, namely, cartel conduct, exclusionary provisions, third line forcing and minimum resale price maintenance;
- vertical and horizontal arrangements that have the purpose or effect of substantially lessening competition in any market in Australia;
- anticompetitive mergers and acquisitions; and
- misuse of market power for an anticompetitive purpose.

The Federal Court of Australia (the Federal Court) has jurisdiction to hear all competition law claims brought under the CCA. The Federal Magistrates Court (a lower court) has a limited jurisdiction in relation to private competition law claims. It is only able to hear misuse of market power cases and cannot award more than A$750,000 in damages.

The Australian Competition Law Tribunal was established as a specialist tribunal and is tasked with reviewing decisions made by the ACCC as to whether certain conduct should be authorised, whether access should be granted to essential monopoly services and whether a merger should be cleared.

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 competition law actions can be brought for any breach of the prohibitions contained in Part IV of the CCA (see question 3).

A finding of infringement by the ACCC is not required to commence private competition law proceedings. Importantly, the ACCC does not have the power to determine legal liability and must bring proceedings before the courts. However, successful prosecution of anticompetitive conduct (particularly cartel conduct) by the ACCC has facilitated the commencement of follow-on private competition law litigation by individuals affected by the conduct. Private litigants may obtain access to documents held by the ACCC or benefit from findings of fact made in ACCC enforcement proceedings, or both. Those findings of fact are admissible as prima facie evidence in private proceedings (see question 13).

While the ACCC has been given limited powers to issue infringement notices this power relates only to the Australian Consumer Law and does not relate to anticompetitive conduct prohibitions. In any event, payment of such infringement notices does not constitute an admission of liability.

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?

Nexus with the Australian jurisdiction can be established by reference to a combination of a number of factors, including:

- whether the conduct took place in Australia;
- whether any of the participants involved in the alleged conduct are incorporated, carrying on business in, or are residents or citizens of Australia;
- the type of conduct alleged, for example, jurisdiction will be established for mergers that occur outside Australia if they affect competition in a market in Australia or if market power is misused for an anticompetitive purpose in a trans-Tasman market (being Australia or New Zealand); and
- where supply of goods or services occurs in Australia, even if the anticompetitive conduct takes place outside Australia.

Australian courts have adopted a broad approach as to what constitutes conduct with a sufficient nexus with Australia. For example, in follow-on representative proceedings for cartel conduct in Australia, Australian subsidiaries of overseas parent companies have been used to establish a nexus with a foreign parent company. The court was able to establish jurisdiction by tracing back any communications or interaction between the Australian subsidiary and parent company.

A defendant may challenge the commencement of proceedings under Australian law by seeking to establish that the conduct does not have a sufficient nexus with Australia.

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

Both corporations (including foreign corporations) and individuals (including foreign individuals) can be liable for contraventions of Australian competition law.

Private action procedure

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

Yes, litigation may be funded by third parties in Australia. Third-party litigation funders will ordinarily support litigation where the loss is readily ascertainable: for example, product liability cases, the recovery of losses resulting from cartels, and cases involving the overcharging of goods or services.

The prevalence of third-party litigation funding has increased in Australia. For example, in representative competition law proceedings, individual litigants are often discouraged by the large costs associated with private action. A recent example of third-party litigation funding is the *International Air Cargo* cartel, in respect of which a large number of airlines have been found in proceedings commenced by the ACCC to have conspired to fix prices for certain international air freight services. Representative proceedings, financed by third-party funding, were subsequently commenced in respect of the alleged cartel conduct in Australia.

Australian lawyers may not charge fees based on a proportion of money awarded to the client in the litigation, although conditional fee arrangements ('no win, no fee' costs agreements) are generally permitted in Australia.

8 Are jury trials available?

Jury trials are not available in private civil proceedings in Australia.

9 What pretrial discovery procedures are available?

Preliminary discovery is available under division 7.3 of the Federal Court Rules. A prospective applicant may apply for preliminary discovery if the prospective applicant:

- reasonably believes that he or she may have the right to obtain relief in the Federal Court from a prospective respondent whose description has been ascertained;
- after making reasonable enquiries, does not have sufficient information to decide whether to start a proceeding in the court to obtain that relief; and
- reasonably believes that the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question of relief and would assist the prospective applicant in making the decision.

After proceedings have commenced, a party may apply to the Federal Court for discovery from another party or a third party (division 20.2, Federal Court Rules). This order may be for standard discovery or more extensive discovery. An order for standard discovery compels another party to produce documents:

- that are directly relevant to the issues raised by the pleadings or in the affidavits;
- of which, after a reasonable search, the party is aware; and
- that are, or have been, in the party's control.

The use and scope of discovery in the Federal Court has been curtailed by the Federal Court's Practice Note CM 5. This Practice Note (issued by the Chief Justice of the Federal Court and which is binding on parties to proceedings) seeks to limit discovery to the level necessary to facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

In addition to a discovery order, a party may also seek leave to issue a subpoena to a third party to attend court to give evidence or produce any document or thing specified in the subpoena (Part 24, Federal Court Rules).

A party or third party cannot be compelled to produce information or documents that are subject to legal privilege. (See question 11.)

10 What evidence is admissible?

The Evidence Act 1995 (Cth) governs the admissibility of evidence in the Federal Court. The Federal Court will only admit relevant evidence

and has a general discretion to reject certain evidence. For example, the Federal Court may refuse to admit information that would be unfairly prejudicial or misleading or confusing if this substantially outweighs the probative value of the evidence (sections 135–137, the Evidence Act). The Evidence Act also includes limitations on when and how certain types of evidence can be adduced (if at all), including evidence relating to:

- hearsay;
- a person's opinion;
- a person's credibility;
- admissions;
- privilege; and
- expert evidence.

Expert evidence is commonly used in competition proceedings (section 79, Evidence Act). An expert may give evidence that is wholly or substantially based on specialised knowledge accrued through that person's training, study or experience. All expert witnesses in Federal Court proceedings are required to comply with the Federal Court's Practice Note CM7, commonly referred to as the 'Expert Witness Guidelines'.

11 What evidence is protected by legal privilege?

The Evidence Act (sections 118 and 119) protects legal privilege. It states that evidence must not be adduced in the Federal Court if it is objected to by a client of a lawyer and that evidence would disclose:

- a confidential communication between the client and a lawyer or between two or more lawyers acting for the client, or a document prepared by the client, lawyer or another person, for the dominant purpose of the lawyer(s) providing legal advice to the client; or
- a confidential communication between the client and another person or between the client's lawyer and another person or a confidential document, if that communication or document was made or prepared for the dominant purpose of the client being provided with legal advice relating to an actual, anticipated or pending Australian or overseas proceeding, in which the client is, may be, was or might have been, a party.

Legal privilege will extend to communications with in-house counsel if the communication is for the dominant purpose of the in-house counsel providing legal advice to the client (company) or if it is in relation to obtaining legal advice regarding existing or anticipated legal proceedings.

Legal privilege may be explicitly or impliedly waived. If this occurs, the information may be adduced as evidence (if it is otherwise admissible).

A party cannot refuse to produce information or documents or answer questions as a witness in court on the basis that the information is commercially sensitive or a trade secret. A party may, however, request that the Federal Court make an order that restricts access to particular documents to nominated individuals (section 37AF, Federal Court Act). For example, the order could restrict access to the barristers and solicitors representing the other party in the litigation. To obtain such an order, a party must demonstrate that restricted access is necessary to prevent prejudice to the administration of justice or the security of the Commonwealth. This requires the applicant to adduce evidence of the specific prejudice that would result from disclosure of the relevant information.

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

Yes. A criminal conviction will not prevent a private party initiating a civil competition law action.

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?

A private party must prove each element of the civil contravention. Evidence produced in a criminal proceeding (noting that cartel conduct is the only competition law prohibition that is subjected to both civil and criminal sanctions) must be separately adduced (subject to the rules of evidence) in the civil proceeding if it is to be relied on. Evidence in a criminal proceeding will not automatically be admitted as evidence in any parallel civil proceeding.

In some proceedings, a plaintiff may rely on findings of fact made in a prior proceeding (section 83, CCA). In certain proceedings (including an action for damages or for a compensation order), section 83 allows a finding of fact in competition law proceedings to be prima facie evidence of that fact in a subsequent proceeding. In order to rely on this finding of fact, the applicant must produce a document under the seal of the court that made the finding. This includes, for example, the sealed judgment from a prior proceeding. The applicability of this provision to findings of fact based on admissions (for example, in regulator competition law proceedings where the facts are not contested and the matter is determined by consent) is not settled but is presently subject to a proposal to reform the law to make private law enforcement easier. This may however affect the willingness of parties to settle proceedings with the ACCC in the first place, leading to more contested matters which take longer to resolve.

The ACCC has an immunity and cooperation policy for cartel conduct which sets out the policy of the ACCC in relation to applications for immunity from ACCC-initiated civil proceedings by those involved in cartel conduct, and how cooperation provided to the ACCC by cartel participants will be recognised.

An applicant for immunity or leniency under these policies is not protected from claims being brought against that party by private parties (that is, parties other than the ACCC).

If the ACCC conducted an investigation or inquiries into the alleged contravention before applying its immunity or leniency policy, the ACCC may be in possession of documents relevant to a private action. A private applicant may, in certain circumstances, be able to access some of these documents. For example, the ACCC may be compelled to produce documents by a discovery order, a subpoena or a notice under section 157 of the CCA. A notice under section 157 of the CCA allows a party, in certain proceedings, to provide the ACCC a notice requiring copies of each document in the possession of the ACCC (save for documents created by an officer or consultant of the ACCC) which are connected with the matter in which the proceeding relates and tends to establish the case of the party. However, 'protected cartel information' is exempted from being produced under discovery orders, subpoenas or notices under section 157 (sections 157B and section 157C, CCA). 'Protected cartel information' is information that was provided to the ACCC in confidence and relates to a contravention of the cartel prohibitions.

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

The Federal Court has a general discretion to stay proceedings (division 30.2, Federal Court Rules) if several proceedings are pending in the Federal Court and the proceedings involve a common question of law or fact or are the subject of claims arising out of the same transaction or series of transactions. The Federal Court may also stay proceedings if the parties wish to pursue, or the Federal Court orders, alternative dispute resolution (see question 37).

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 standard of proof in private competition law litigation is whether the applicant (or the respondent, if the burden is shifted) has proved its case on the balance of probabilities (see question 35 for Australia's position on the passing-on defence).

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

There is no typical time frame for a private competition law proceeding. The length of proceedings will vary depending on the matter's complexity, the party's use of discovery, how many parties are involved and the extent to which interlocutory issues need to be resolved. Private competition law litigation may proceed to trial and judgment within approximately 18 to 24 months, but it may also take significantly longer.

The Federal Court provides for 'Fast Track Directions' (Practice Note CM 8), which accelerates proceedings in the Federal Court. This, however, is rarely used in private competition law matters because it is only available where parties anticipate that the trial is unlikely to exceed five days and the use of discovery is curtailed.

Alternatively, parties who wish to accelerate the proceedings may request the Federal Court to order an expedited final hearing under the Federal Court Rules. Any such application will need to be supported by evidence of the need for urgency.

17 What are the relevant limitation periods?

A private competition law action seeking damages or a compensation order must be brought within six years. In particular:

- the time commences in an action for damages from when the cause of action accrues (section 82(2), CCA). This is typically the date when the person suffers the relevant loss or damage; and
- the time commences in an action for a compensation order after the loss or damage was suffered or likely to be suffered (section 87, CCA).

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

A final decision of a single Federal Court judge may be automatically appealed (as of right) to the Full Court of the Federal Court (constituted by three judges).

A decision of the Full Court may be appealed to the High Court of Australia (constituted by up to seven justices) if the High Court grants special leave to appeal. Special leave is discretionary and is generally only granted where:

- a genuine question of public importance arises;
- there is a difference of opinion between, or within, the courts; or
- the interests of justice require it.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Yes, they are.

20 Are collective proceedings mandated by legislation?

Representative proceedings are regulated by Part IVA of the Federal Court Act.

In Australia, collective proceedings known as class actions are a special type of private action. Class actions involve one party that acts as a representative plaintiff. In cases involving cartel conduct, the representative plaintiff commences proceedings to recover loss or damage suffered as a result of the cartel conduct for the benefit, and on behalf of, a defined group of people who have suffered loss or damage known as a 'class'.

Class actions aggregate otherwise small individual damages claims together. As the damages payable to a class of people are much higher than that payable separately to individual private action litigants, this has encouraged a recent increase in the number of:

- institutional investors and litigation funders prepared to invest money in private action proceedings; and
- plaintiff law firms prepared to act on a 'no win, no fee' basis.

Litigation funders and plaintiff law firms will generally cover all the legal costs and only get paid if the cases are successful. This, in turn, has served to encourage the commencement of class actions for cartel conduct that individual parties would otherwise find too costly or high risk to pursue on their own in separate private action claims.

For completeness, we note that the ACCC and Commonwealth Director of Public Prosecutions also have the power to commence representative proceedings on behalf of a group that has suffered loss or damage as a result of cartel conduct.

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

There is no formal certification process, but section 33C of the Federal Court Act imposes a number of requirements that must be satisfied prior to commencing a representative proceeding. These include that there be seven or more people who have a claim against the same person, and the claims arise out of the same or similar circumstances and give rise to substantial common issues of law or fact.

22 Have courts certified collective proceedings in antitrust matters?

Courts are not required to certify representative proceedings.

23 Can plaintiffs opt out or opt in?

Part IVA of the Federal Court Act provides for an opt-out regime for private representative proceedings, meaning that members who do not wish to be subject to the outcome of the proceedings must formally opt out. Members can opt out by completing and lodging the requisite opt-out notice with the Federal Court before the date set by the Federal Court. There have, however, been some steps taken to create 'closed' classes in Australia. Class actions funded using closed classes require each group member to enter into an agreement with the funder or a retainer with the lawyer, or both. Closed class actions create more certainty for litigation funders sponsoring the proceedings (as to the amount of return on their investment) and for respondents defending the class action proceedings (by allowing them to better ascertain their potential liability) and potentially, to promote settlement. For example, in the recent international Air Cargo class action, the relevant class was defined as all those persons resident in Australia as of 11 January 2007 who formally notified their intention to participate in any settlement reached in the proceedings by 15 November 2013 and, during the period 1 January 2000 to 11 January 2007, paid identified amounts (ie, amounts identified by way of invoices, or equivalent demands for payment, or terms of trade, which identified international airfreight as a separate item for which payment was due) totalling more than A$20,000 over the period for the carriage of goods to or from Australia, including in each instance a component by air.

24 Do collective settlements require judicial authorisation?

Once a representative proceeding has been commenced in the Federal Court, parties must obtain the Federal Court's approval prior to settling the proceeding in accordance with section 33V of the Federal Court Act.

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?

Although Australia is divided into several state jurisdictions, representative proceedings are conducted at the federal level in the Federal Court under Part IVA of the Federal Court Act. Accordingly, representative proceedings are brought nationally.

26 Has a plaintiffs' collective-proceeding bar developed?

The steady increase in representative proceedings has led to a small number of Australian law firms and legal counsel gaining specialist knowledge and experience in conducting and advising on representative proceeding cases. These law firms and legal counsel also advise on, and conduct, representative proceedings in a number of other contexts, including product liability cases and shareholder actions.

Remedies

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

In a civil proceeding initiated by a private party, the Federal Court may order:

- compensatory damages for any loss or damage suffered by a person and attributable to the contravening conduct: section 82; and
- any other orders as the court thinks appropriate to compensate a person who has suffered (or is likely to suffer) loss or damage flowing from the contravening conduct: section 87. This may include, among other things, declaring a contract void, varying a contract and ordering the payment of compensation.

An award of damages requires the party to demonstrate actual loss or damage (in contrast with the compensatory orders under section 87) and that this was caused by the contravening conduct.

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

A private litigant may seek interim or permanent injunctions (section 80) or a declaration that certain persons have contravened the CCA (section 21, Federal Court Act).

The court has a wide discretion when deciding whether to grant an injunction. The court may issue a final injunction in such terms as it considers appropriate given the scope and purpose of the CCA.

Where a party is seeking a permanent injunction, the court may, pending determination of that permanent injunction, grant an interim injunction (either prohibitive or mandatory) if it considers it desirable to do so (section 80(2)). When deciding whether to order an interim injunction

Update and trends

On 27 March 2014, a national panel was tasked with undertaking a 'root and branch' review of Australia's competition law and policy. Access to justice by private individuals and entities using Australia's competition law was one of the top five issues identified in submissions to the review panel, and on 31 March 2015, in its final report, the review panel made three recommendations to promote private competition law actions and the recovery of third-party damages in Australia. On 24 November 2015, the Australian government released its response to that final report, supporting two of the recommendations unconditionally and the third in principle.

The first recommendation, recommendation 26, was to (among other things) remove the requirement for private parties to seek ministerial consent before relying on extraterritorial conduct in private competition law actions. The Australian government agreed that the requirement for private parties to seek ministerial consent in connection with proceedings involving conduct that occurs outside Australia is an unnecessary roadblock to possible redress for private parties.

The second recommendation, recommendation 41, was to amend the section in the CCA that enables findings of fact made in ACCC enforcement proceedings to be used as prima facie evidence of these facts in follow-on proceedings, without the private litigant having to prove the facts again (section 83) in view of a number of court decisions that have suggested that the operation of section 83 is confined to circumstances where findings of fact are made by a court following a contested hearing, and not to admissions of fact. As many ACCC enforcement proceedings are resolved by way of settlement and the making of admissions, this interpretation of section 83 has had the effect of limiting the ability of third-party litigants to pursue follow-on actions without having to re-prove facts (see question 13). To address this concern, the review panel has recommended that section 83 be amended to make it clear that the section applies to admissions of fact made by a party in resolving proceedings with the ACCC, in addition to the court's findings of fact in contested proceedings. Concerns were raised that an amendment of this kind would have an adverse impact on the willingness of parties to cooperate with the ACCC, as admissions of fact could be used by private litigants to seek compensation in follow-on proceedings. While the panel noted these concerns, it considered that it was doubtful that the proposed amendment to section 83 would materially alter a respondent's decision to settle proceedings as, among other things, a plaintiff would continue to be required to prove loss and damage and the respondent would remain free to adduce evidence contrary to the admission of fact in subsequent proceedings. In its response, the Australian government has unconditionally accepted this recommendation and indicated that it will develop exposure draft legislation for consultation with the public and states and territories to allow private parties to rely on admissions of fact made in another proceeding.

The third recommendation, recommendation 53, dealt with the current impediments facing small businesses and consumers in bringing private actions. These include cost, time and resources. The panel recommended that:

- where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes;
- where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation; and
- resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

In its response, the Australian government has indicated that it will ask the ACCC to ensure that it takes steps to be more transparent with complainants and to connect small businesses and consumers with alternative forms of dispute resolution. The government also noted that it has taken steps to improve small business access and awareness of ADR by establishing the ASBFEO. The ASBFEO will refer small businesses to existing agencies that can help them address disputes. The ASBFEO will also offer its own outsourced ADR service.

It remains to be seen whether the review panel's recommendations and the Australian government's response will unlock the potential of private enforcement to address and deter anticompetitive conduct as well as address some of the current challenges facing private litigants in antitrust actions in Australia.

(whether prohibitive or mandatory), a court must be satisfied that there is a serious question to be tried or that the applicant has a sufficient likelihood of success in the final hearing. If the court is satisfied that there is a serious question to be tried or a sufficient likelihood of success, the court will only issue an interim injunction where the balance of convenience is in favour of granting the interim injunction.

The court may accept an enforceable undertaking by the affected party at the interlocutory stage in lieu of ordering an interim injunction.

29 Are punitive or exemplary damages available?

Exemplary or punitive damages are not available in competition litigation in Australia.

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

In an action to recover money (including damages or the value of any goods), there is a rebuttable presumption in favour of the Federal Court ordering interest on the judgment amount at such rate as the Federal Court deems appropriate. The interest can be ordered on part or all of the judgment amount and for all or part of the period from the time the cause of action accrued to the date of judgment.

A party can also pursue a respondent for interest from the date the judgment is entered, at rates prescribed by the Federal Court.

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

An award of damages in Australia is a remedial order and is designed to compensate the person who suffered loss or damage. As it is a remedial order, the Federal Court does not take into consideration any fines that may have been paid for the same contravening conduct.

The reverse does not hold true, however: if the Federal Court imposes a fine or pecuniary penalty and also orders the person to pay compensation to a person for loss or damage and the contravener is not able to pay both, the Federal Court must give preference to the compensation order (section 79B).

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

The general rule is that the losing party pays the successful party's costs. Generally, the successful party is entitled to its costs on a 'party-party' basis. Party-party costs are costs reasonably and properly incurred by the party in respect of the litigation, subject to the direction of the Federal Court. This requires the successful party to prove that their claimed costs were reasonable and in practice, most successful litigants only get a portion of their total costs under this approach.

The Federal Court may also award costs to the successful party on an 'indemnity' or 'solicitor–client' basis. This means that the successful party is entitled to their full costs incurred in respect of the litigation. This is at the discretion of the Federal Court. An example of where an order for indemnity costs may be made includes the situation where a party fails to accept an offer of settlement and subsequently achieves an outcome that is less favourable than the proposed settlement offer.

33 Is liability imposed on a joint and several basis?

Liability in Australia is imposed on a joint and several basis. Each person found to have been involved in the contravention is liable to the plaintiff for the plaintiff's loss or damage.

A plaintiff may bring an action against one or multiple respondents involved in the contravention. If the plaintiff brings an action against only one of the parties responsible, the respondent may seek to join the other alleged contraveners in the proceeding. Regardless of whether all of the parties responsible for the contravention are joined in the proceeding, the relevant respondents will be liable for the total of the loss or damage flowing from their contravention.

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

It is not settled law in Australia whether contribution and indemnity is available in competition law proceedings. There is no express provision in the CCA permitting contribution or indemnity. One view is that the laws of equity may allow this but this has not been tested.

The CCA prohibits a corporation from indemnifying its officers against a civil liability or legal costs incurred in unsuccessfully defending an enforcement action (section 77A). Practically, corporations typically deal with this by making the payment of legal costs incurred in defending an enforcement action as a conditional loan which must be repaid if the allegations under the CCA are proven.

35 Is the 'passing on' defence allowed?

There is no passing-on defence in Australia.

However, as an award of damages assesses what loss or damage was suffered, the Federal Court will take into consideration any loss or damage that was passed on to others by the plaintiff when calculating the appropriate quantum of damages suffered by the plaintiff.

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

The CCA contains a number of defences and exceptions to competition law actions, including:

- joint ventures – allows arrangements that would otherwise breach the cartel conduct and exclusionary provision prohibitions of the CCA (sections 44ZZRP, 44ZZRO and 76C) if there is joint production or supply of goods or services by the joint venture, the joint venture is recorded in a contract, and the potentially offending conduct is for the purposes of the joint venture;
- where arrangements are authorised by the ACCC or the Competition Law Tribunal – this requires businesses to demonstrate that the public benefits associated with the arrangements outweigh any detriments;
- where all the parties to the arrangement are related bodies corporate; and
- a number of exceptions under section 51 that apply to non-cartel matters including:
  - conduct authorised under other legislation which expressly excludes the application of the CCA;
  - arrangements in respect of conditions of employment, including remuneration, hours of work and working conditions and post-employment restrictions;
  - arrangements requiring compliance with specifications prescribed by the Standards Association of Australia;
  - the protection of intellectual property rights in certain limited circumstances; and
  - the protection of goodwill after the sale of a business.

37 Is alternative dispute resolution available?

Under the Federal Court Rules, the parties must consider options for alternative dispute resolution (ADR), including mediation, as early as is reasonably practicable (Division 28.1, Federal Court Rules.)

If the parties consider that ADR is appropriate, they may apply to the Federal Court for an order that the proceeding or relevant part of the proceeding be referred to an arbitrator, mediator, or suitable person and that the proceedings be adjourned or stayed until that process concludes or is terminated. The Federal Court may also order parties to attend ADR if it considers ADR to be appropriate.

Before initiating proceedings in the Federal Court, both the applicant and the respondent must file a 'genuine steps statement'. This requires both parties to outline what steps have been taken to resolve the dispute and if no steps have been taken, why this is the case.

Broadly speaking, parties have a right to bring, pursue and defend civil proceedings but the administration of those proceedings is in the hands of the court and it is the duty of parties and their lawyers to assist the court in conducting proceedings quickly, efficiently and inexpensively (sections 37M and 37N, Federal Court Act).

In early 2016, the Australian government launched the office of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), whose role it is to provide access to ADR to assist businesses to resolve complaints.

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Legislation and jurisdiction

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

Private antitrust litigation in Austria has significantly gained importance since the introduction of the Austrian leniency programme in 2006, based on the Austrian Competition Act 2005 (CA). The subsequent increase of public law cartel enforcement decisions by the Austrian cartel courts also enhanced the number of 'follow-on' damage claims brought before Austrian civil law courts.

The main private antitrust enforcement cases currently pending before Austrian civil law courts are based on the *Elevator Cartel* case, under which the Austrian cartel courts imposed a fine of €5.4 million on Austrian suppliers of elevators for having engaged in a cartel on the Austrian market for the supply and maintenance of elevators and escalators. After the respective infringement decision by the Austrian cartel courts became final in 2008, a significant number of public and private customers of the cartelists initiated private antitrust litigation before the Austrian civil law courts. In those currently pending proceedings, some of the main legal issues in relation to private antitrust actions are at stake and will eventually be decided by the Austrian Supreme Court.

The Austrian legislature attempted to further promote private antitrust litigation by way of an amendment to the CA, which entered into force on 1 March 2013. This amendment introduced new statutory rules on issues such as the calculation of damages or the binding effect of infringement decisions by the cartel courts for civil law litigation. Further amendments will be necessary pursuant to Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (the Antitrust Damages Directive), which is due for implementation into the national laws of the EU member states on 27 December 2016.

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?

To date, Austrian law does not provide for any specific statutory rules on private antitrust litigation. Thus, private antitrust actions are governed by the rules of general Austrian civil law, as codified in the Austrian Civil Law Code and, in terms of procedural issues, by the Austrian Civil Procedure Act. In addition, damage claims for competition law infringements can be based, under certain circumstances, on the Austrian Act against Unfair Competition.

In a 2012 ruling (7 Ob 48/12b), the Austrian Supreme Court confirmed that indirect purchasers may also, in principle, bring private damage actions against the members of a cartel, provided that they can prove that the direct purchasers have passed on the cartel damage to them. In this context, the Austrian court referred, inter alia, to the precedents set by the EU courts in the *Courage v Crehan* and *Manfredi* cases (pursuant to which in principle 'everybody' is entitled to ask for compensation for damages incurred through a competition law infringement).

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

The relevant legislation for private antitrust action is embodied in the general Austrian Civil Law Code. Some further (mainly procedural) aspects of private antitrust litigation were recently introduced in section 37a CA.

Austria has not established specialised tribunals for private antitrust litigation, so that the general civil law courts are competent to deal with private enforcement actions. The parties to the civil law proceedings have the right to appeal to higher regional courts and, subsequently, the Austrian Supreme Court (see question 18).

None of the mentioned courts has a specialised competition law division.

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 (ie, cartel cases, abuse of dominance matters and generally in the context of all agreements infringing applicable competition laws at EU or Austrian level).

A finding of infringement by a competition authority is not required to initiate a private antitrust action. Nonetheless, a finding of infringement by a competition authority significantly facilitates the private plaintiff's factual pleading in the civil law proceedings: pursuant to the Cartel Act, the Austrian civil courts are bound by findings of infringement made by the Austrian Cartel Court, the European Commission, or any national competition authority of an EU member state. Austrian law hence goes beyond the requirements of the Antitrust Damages Directive, pursuant to which decisions taken by authorities of other member states need only be admitted as prima facie evidence of an infringement (article 9 paragraph 2 Directive 2014/104/EU). The binding effect of decisions by competition authorities covers both the finding of unlawfulness of the conduct in question, and the mens rea (intent or negligence) on the part of the undertakings concerned.

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 jurisdiction of Austrian courts for private actions against cartel members is governed by Council Regulation (EC) No. 44/2001 of 22 December 2001 (Brussels I Regulation), the Lugano Convention on Jurisdiction and by the Austrian Act on the Jurisdiction of Civil Courts.

Pursuant to the Brussels I Regulation (article 6 paragraph 1), a person or undertaking domiciled in a state covered by the regulation can be sued in Austrian courts if it is jointly liable with another defendant falling under Austrian jurisdiction, provided that there is a sufficiently close connection between the respective claims against such defendants.

In this regard, the Austrian Supreme Court confirmed in a judgment (5 Ob 39/11p) that cartel members are jointly liable for any losses resulting from their competition law infringement and, hence, article 6 paragraph 1 of the Brussels I Regulation usually applies to private antitrust actions against a group of defendants. Thus, as regards cartel cases, a claim against all members of the cartel can be brought in Austria if any of the cartelists can be sued before Austrian courts (in particular, because such cartelist is domiciled in Austria).

In the same decision, the Supreme Court also held that Austrian courts have jurisdiction over a claim against a 100 per cent parent company of an entity involved in a cartel, even though such parent company is domiciled outside Austria.

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

Private antitrust litigation in Austria is possible both against corporations and individuals. Pursuant to the Austrian Supreme Court decision (5 Ob 39/11p), executives of undertakings involved in an antitrust infringement may be directly liable for the damage caused, if they actively participated in the infringement, or if they were aware or should have been aware of the infringement, but failed to act against it.

Private litigation against undertakings and individuals from other jurisdictions is possible if Austrian courts have international jurisdiction over the respective matter (see question 5).

Private action procedure

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

Private antitrust litigation may be funded by third parties in Austria, such as litigation financing companies.

Contingency fees are generally prohibited in Austria, but only in the sense that a (legal) adviser must not be entitled to a share of the successfully recovered damages. It is, however, admissible to agree on a certain lump sum or success fee to the extent that such fee is not determined as a specific portion of any amounts awarded to the client.

8 Are jury trials available?

No, there are no jury trials available for private antitrust litigation matters in Austria.

9 What pretrial discovery procedures are available?

Generally speaking, there are no pretrial discovery procedures available under Austrian civil procedure or competition laws. As a general rule, under Austrian civil procedure, the burden of proof of all facts supporting the plaintiff's claim rests with the claimant. However, there are several proceedings pending before Austrian civil law courts in which the question to what extent such burden of proof is shifted to the defendants (ie, the cartelists) in private enforcement cases is yet to be decided. Under Austrian law, plaintiffs have only limited rights to request access to evidence resting with a defendant or third parties. Such rights generally only arise where:

- the defendant has itself referred to such document in its pleading;
- the document in question is a common deed of the plaintiff and the defendant; or
- where the plaintiff has a contractual right against the defendant for submission of the respective evidence.

More extensive discovery rights will, however, be introduced in the context of the implementation of the EU Antitrust Damages Directive, eg, the possibility for national courts to order disclosure of evidence containing confidential information where they consider it relevant to the action for damages (article 5 paragraph 4 of the directive).

As an alternative to pretrial discovery, potential claimants may also seek to obtain evidence by way of access to the file of a competition authority. Austrian law previously practically ruled out such access, by making access to the Cartel Court's file conditional upon consent of all parties to the respective antitrust proceedings, including the presumptive defendants (section 39 CA). In its judgment in the *Donau Chemie* case (C-536/11), the European Court of Justice (ECJ) found, however, that section 39 CA was in violation of the principle of effectiveness of EU law. Pursuant to a recent judgment of the Austrian Supreme Court, section 39 CA therefore no longer applies in cases involving infringements of EU competition law. Potential claimants will be granted access if they are able to establish a legal interest in the content of the file, and if their interest outweighs the interest of the parties to the Cartel Court proceedings in protecting the documents from disclosure. Reasons to restrict access to file may include, among others, the protection of business secrets and the effectiveness of leniency programmes (16 Ok 10/14b).

10 What evidence is admissible?

Private antitrust claims in Austria can be based on any available evidence, including, in particular, (written or electronic) documents, witness statements and expert opinions (the latter are particularly important for the calculation of the amount of potential damages).

11 What evidence is protected by legal privilege?

There is no legal privilege available in Austria for attorney–client communication in civil litigation cases.

Thus, in the event that a claimant in fact gets hold of respective communication between the defendant and its legal advisers, Austrian civil procedure law does not prevent the plaintiff from using such evidence in the proceedings.

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

Yes, private actions are also available when there has been a criminal conviction in respect of the antitrust infringement concerned.

In any event, however, in Austria a criminal law liability for antitrust infringements generally only arises for bid-rigging practices.

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?

Yes, any evidence sought by a claimant in records of criminal proceedings can be used in private actions. In fact, the Austrian Supreme Court held that, as an exception to the generally strict confidentiality of the files of cartel court proceedings (as provided for in section 39 CA; see, however, the reference to the ECJ ruling in section 9), the cartel court is legally obliged to submit its records upon request to the public prosecutor investigating criminal law aspects of an antitrust infringement. Austrian criminal procedure law entitles private claimants to join the criminal proceedings as a 'private party' for the purpose of enforcing their civil law claims. As such, the individual or company has the right to inspect the files of the criminal case. Hence, if a criminal prosecution is initiated, private claimants might circumvent the rules on access to the cartel court's files (yet, only bid rigging constitutes a criminal offence in Austria, whereas other anticompetitive practices do not fall under the Austrian Criminal Code).

Leniency applicants are not protected from follow-on litigation in Austria. Furthermore, Austrian law does not provide for a privileged treatment of leniency applications in terms of confidentiality. However, a leniency application provided by oral statement to the Competition Authority is merely part of the authority's internal procedural files, and thus not subject to disclosure. Amendments to the CA will be necessary with regard to privileged treatment of leniency applicants in view of the Antitrust Damages Directive, pursuant to which national courts cannot at any time order a party or a third party to disclose leniency statements for the purpose of actions for damages (article 6 paragraph 6 lit a of the directive).

Austrian competition authorities (the Austrian Federal Competition Authority and the Austrian Federal Cartel Prosecutor) usually do not disclose evidence obtained in their investigations to potential private claimants. The Austrian Federal Competition Authority holds the (legal) view that it is legally restrained from granting third-party access to its procedural files.

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

A civil law court can order a stay of proceedings if and to the extent its findings are dependent on the outcome of other proceedings already pending before other public authorities. Private claimants in civil law antitrust litigation cases may therefore petition the court to suspend the case until a final ruling in any (parallel) Cartel Court proceedings is rendered. Yet it is eventually within the discretion of the civil law court whether to allow such request, or to continue the private law proceedings.

The courts may also stay proceedings if related actions within the meaning of article 30 of Regulation (EU) No. 1215/2012 are pending in another EU member state.

In practice, however, the question of suspension of private enforcement proceedings has been of rather little relevance so far in Austria, since most

of the private antitrust litigation was initiated only after a final ruling was issued in the public enforcement cases.

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 Austrian civil procedure law, the burden of proof for the occurrence of the antitrust infringement, the damage and the existence of the causal link between the infringement and the damage generally rests with the claimant. In a number of pending cases, however, the Austrian civil law courts will have to decide on the question whether and to which extent the burden of proof is shifted upon the defendants (ie, the cartelists) in private enforcement cases.

The applicable standard of proof is 'high probability' of the facts alleged by the plaintiff; absolute certainty is therefore not required.

Austrian civil procedure law does not provide for any legal presumptions or a reversal of the burden of proof with respect to certain facts supporting the plaintiff's claim. However, under section 273 of the Austrian Civil Procedure Code, the courts may estimate the amount of damages resulting from a competition law infringement, provided that such amount could be established by the claimant only with unreasonable difficulties. In practice, this juridical right to estimate the plaintiff's loss incurred by the anticompetitive behaviour is an import tool to facilitate the claimant's case, given that it is often very difficult for the plaintiff to precisely assess its losses suffered due to the infringement. The exact balance between the claimant's onus to present the underlying facts for the damage calculation and the court's capacity to estimate the damage is yet to be clarified in the case law. It is to be expected that this question will be dealt with by the Supreme Court in the course of appeal proceedings regarding the several pending private litigation actions in the 'elevator cartel' cases.

The application of the passing-on defence in Austrian private antitrust litigation cases is not yet fully clarified by the courts. However, it is likely that the passing-on defence is in principle available in Austria, since it is a general principle under Austrian civil law that damages incurred by the plaintiff must be adjusted by any benefits received from third parties (such as, in the context of cartel damage claims, the next market level). The extent to which Austrian civil law courts will eventually allow the passing-on defence will probably depend upon the circumstances of each individual case. Since the application of this concept shall not result in an unjust enrichment of the defendant, it is, for instance, questionable whether the courts will accept the passing-on argument in cases where indirect purchasers would be practically unable or unlikely to bring a claim against the infringing parties.

In any event, Austrian civil procedure law would require the defendant to prove that the claimant has actually passed on the loss resulting from the antitrust infringement to the next market level. The standard of proof in this context is again 'high probability'; there is no difference to the standard of proof required on the claimant's side.

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

There is no statutory time limit for civil law proceedings under Austrian law. The duration of the individual proceedings is mainly depending on the complexity of the underlying factual and legal circumstances. First-instance proceedings usually last from approximately one year to approximately 1.5 years (in very complex cases, however, even longer). In total, including all instances before reaching a final judgment, the duration of private antitrust litigation cases in Austria can currently be estimated at around two to three years. In the future, once the main open legal issues in relation to private enforcement in Austria are clarified in the case law, the length of the proceedings could, however, become significantly shorter.

There are certain procedural possibilities for the parties to accelerate proceedings, albeit only to a limited extent.

17 What are the relevant limitation periods?

The relevant limitation period is three years from the point of time when the plaintiff became aware (actual knowledge; ought to know is not sufficient) of all the factual circumstances necessary to bring the damage action. This period will have to be extended to at least five years in the context of the transposition of the EU Antitrust Damages Directive into Austrian law.

In a recent judgment (6 Ob 186/12i), the Austrian Supreme Court held, for instance, that media reports on a cartel being subject to proceedings before the cartel court, which, however, did not enable potential cartel victims to ascertain that they were affected by the cartel (and to which extent), were not sufficient for the limitation period to start to run. The court held that the period commenced only upon the binding (final) decision by the last-instance Cartel Court on the respective competition law violation was published.

According to section 37a(4) CA, the limitation of damages actions is stayed for the duration of proceedings by competition authorities leading to an infringement decision. The limitation period only resumes six months after a final decision or other termination of the proceedings.

If an antitrust infringement involves a criminal offence (in Austria, this is only the case for bid-rigging practices) or in the event of a deliberately caused damage, a 30-year limitation period applies.

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

The parties to private antitrust litigation proceedings can appeal decisions of first-instance courts on both facts and law to the competent higher regional courts. Decisions of the latter can be appealed only on grounds of law before the Austrian Supreme Court. Such appeals against the second-instance courts must, however, either be allowed by the second-instance court itself, or the Supreme Court (such admittance requiring that a substantive question of law is at stake).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Austrian civil procedure law does not explicitly provide for collective proceedings, neither specifically for antitrust claims, nor in respect for other civil law litigation.

However, as the Austrian Supreme Court has already confirmed (4 Ob 116/05w), it is admissible under Austrian law that a group of claimants assigns their respective claims to one plaintiff who subsequently brings a unified action against the defendant. The exact conditions for such 'collective proceedings' to be admissible under Austrian law are, however, still not fully clarified. Under section 227 of the Austrian Civil Procedure Act, several claims of different plaintiffs can only be brought in a unified procedure if the same civil law court is competent for each of the individual claims. The Austrian Supreme Court furthermore held that the respective individual claims must be based on essentially the same factual and legal foundation.

Against this backdrop, collective proceedings are therefore available under current Austrian civil procedural law in respect of antitrust claims. So far, however, collective proceedings, in particular involving a larger number of end customers, have not been initiated in Austria.

20 Are collective proceedings mandated by legislation?

No.

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?

See question 19.

23 Can plaintiffs opt out or opt in?

See question 19.

24 Do collective settlements require judicial authorisation?

No.

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?

Austria is not divided into multiple jurisdictions in terms of civil procedure law.

26 Has a plaintiffs' collective-proceeding bar developed?

No.

Remedies

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

The successful plaintiff shall be compensated for the actual loss incurred by the behaviour of the defendant. Austrian law does not provide for a punitive sanction system.

As a general rule, damages are calculated by the difference in the financial situation of the claimant between the current financial status with the infringement and a hypothetical scenario without the infringement. Losses incurred to the claimant include also lost profits in case the defendant acted with gross negligence. Based on the ECJ ruling in the *Kone* case (C-557/12), the Austrian Supreme Court recently also held that 'umbrella'-damages caused by a cartel (ie, damages caused by, for instance, price increases by undertakings that did not participate in the infringement but followed the detrimental market developments resulting from the cartel) can be recovered by the plaintiff (7 Ob 121/14s).

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

Apart from damage claims for antitrust law violations, plaintiffs can request, depending on the circumstances of the individual matter, inter alia, the restitution of an unjust enrichment of the defendant, the termination of an anticompetitive practice (by ordering the defendant either to cease a respective behaviour, or to actively perform in a certain way, for instance supplying the plaintiff with certain goods, etc), or to have a certain contractual relationship infringing competition law declared null and void.

Interim remedies (injunctive relief) are available under Austrian civil procedure law under certain conditions (in particular, serious endangerment of the plaintiff to recover his or her damages or enforce his or her other claims without the injunction). Interim injunctions are available for different purposes, such as to seize assets of the defendant or to impose the obligation on the defendant to perform certain activities or terminate anticompetitive behaviour until the decision is rendered in the main proceedings.

29 Are punitive or exemplary damages available?

No, punitive or exemplary damages are not available in Austria.

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

Austrian law provides for a statutory law interest rate on damages in the amount of 4 per cent (9.2 per cent above the European Central Bank's base rate for claims brought by undertakings which are based on unjust enrichment of the cartelists).

Interest accrues from the point of time when the damage has occurred.

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

No, the fines imposed by the competition authorities are not taken into account by civil law courts when deciding on private action damage claims.

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

The party succeeding in the civil proceedings is entitled to be compensated for its legal costs (the amount of which is determined by statutory law, depending on the amount in dispute). Legal costs include both the court's fees and the costs of external counsel.

In the event that a claim is only partly successful, the court allocates the costs on a pro rata basis between the parties.

33 Is liability imposed on a joint and several basis?

In its judgment 5 Ob 39/11p, the Austrian Supreme Court confirmed that the members of a cartel are jointly and severally liable for the damages caused by their infringement. This principle is now mentioned explicitly in the Antitrust Damages Directive. As part of the implementation, joint and several liability of undertakings that received immunity from fines in return for their cooperation with a competition authority shall be restricted (article 11 paragraph 4 of the directive).

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

Yes. A defendant who has compensated the plaintiff disproportionately (due to its joint and several liability) can take recourse action against the other defendants. The criteria for allocation of the overall damage claim among the participants of the anticompetitive practice have not yet been determined by Austrian case law, but it is likely that the concept of equity (significance of contribution of the individual members of the infringement, etc) will apply.

Defendants who have disproportionately compensated plaintiffs can only take recourse action against the other defendants after the judgment or settlement in the principal proceedings. A defendant may, however, notify other infringers of the plaintiff's claim during the principal proceedings and thus give them the opportunity to intervene. If the other defendants do not intervene in the principal proceedings against the first defendant despite having been notified accordingly, they cannot raise any objections in the recourse proceedings that they could have raised beforehand in the principal proceedings against the first defendant.

35 Is the 'passing on' defence allowed?

See question 15.

Pursuant to the explanatory remarks of the 2013 amendment of the CA, the legislature indicated that the defence shall, in principle and taking into account the circumstances of the individual case, be allowed under Austrian law. The legislature, however, also mentioned that the availability of the passing-on defence shall be governed by the civil law concept of the offsetting of benefits received by the party incurring the loss, which has

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been interpreted rather narrowly by the Austrian civil law courts so far (the infringing party shall only be released from its liability under certain narrow circumstances). In a recent decision, a second-instance regional court denied (as obiter dictum) the applicability of the passing-on defence, arguing that it could result in an unjustified release of the damaging parties (since the indirect purchasers might not bring a claim against the cartelists). However, the applicability of the passing-on defence on private antitrust litigation in Austria has still to be eventually clarified by the Austrian Supreme Court.

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

There are no specific competition law-related defences available for the defendants in private antitrust litigation cases.

However, defendants can of course employ all generally available legal arguments under Austrian civil law, such as, for instance, an insufficient causal link between the infringement and the damage occurred or the failure of the plaintiff to sufficiently prove the infringement itself.

37 Is alternative dispute resolution available?

There are no formal alternative dispute resolutions available. However, in-court and out-of-court settlements are of course admissible. If an arbitration clause has been agreed upon in a contract, respective competition law-related disputes are subject to arbitration proceedings.

Canada

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Legislation and jurisdiction

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

Changes in procedural rules have given rise to a dramatic increase in private antitrust litigation in Canada since the mid-1990s.

The first change was the introduction of modern class action regimes in the various Canadian jurisdictions, coupled with a more permissive approach to contingency fees and, more recently, third-party funding, which have led to a wide range of private antitrust class actions being launched across the country. The majority of these cases deal with North American or global cartels and follow on from US or European investigations and litigation.

The second notable procedural change was the more recent amendment to the Canadian Competition Act (the Act) that now permits claimants to have direct access to the Competition Tribunal (the Tribunal) in certain situations (see question 3).

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?

As described more fully below, private antitrust actions are expressly contemplated in Canada by the Act.

In common law provinces, an antitrust action may also be based on the tort of conspiracy and a variety of economic torts, as well as on restitutionary theories. Depending on the province where the claim is brought, relying on a common law cause of action may result in a longer limitation period than that which is available under the Act. Relying on a common law or equitable cause of action may also support requests for relief such as interlocutory injunctions, disgorgement or other equitable relief that is not available under the Act.

In Quebec, an antitrust action may also be based on the general rules of civil liability (article 1457 of the Civil Code), and the same remarks as noted above would apply (the time limitation in Quebec is typically three years).

The Supreme Court of Canada held in late 2013 that indirect purchasers may bring claims.

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

The Act governs competition issues arising from commercial activity throughout Canada. The Act provides two different venues for pursuing private actions, depending on the type of alleged misconduct.

Section 36 allows private actions in civil courts where the defendant has committed a criminal offence under the Act. Section 36 also allows actions where the defendant fails to comply with an order of the Tribunal. The Federal Court of Canada and the provincial superior courts are courts of competent jurisdiction for the purposes of bringing an action under section 36 of the Act.

Section 103.1 of the Act also gives private parties a limited right to initiate proceedings before the Tribunal if they are affected by certain restrictive trade practices. Any person may apply to the Tribunal for leave to make an application for a finding that another person is improperly refusing to deal or is engaged in exclusive dealing or tied selling. However, the Tribunal cannot award damages in these circumstances.

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 antitrust actions are available where the defendant has engaged in conduct that would be a criminal offence under the Act. No prior finding of misconduct is required. However, a finding of misconduct by the Tribunal or by a criminal court against an entity that is later subject to private litigation on the same point cannot normally be relitigated by that entity, because of the application of principles of estoppel. See also question 13 regarding the effect of criminal convictions on subsequent private litigation.

The criminal offence provisions are found in Part VI of the Act. The Canadian government overhauled Part VI in March 2009. The amendments narrowed the range of criminal behaviour under the Act by repealing the price discrimination, promotional allowances, predatory pricing and price maintenance provisions. Conspiracy, bid rigging, deceptive telemarketing, misleading advertising and pyramid sales remain criminal offences in Part VI.

The most important amendments, from a private enforcement perspective, are the changes to section 45 dealing with conspiracy. Previously, section 45 required that the conspiracy prevent or unduly lessen competition. This requirement has been removed, creating a per se offence. Now any agreement between competitors to fix prices or allocate markets violates the conspiracy provisions regardless of the conspiracy's impact on competition. We expect to see an increase in private antitrust actions because the creation of a per se offence makes proving cartel conduct easier for potential plaintiffs.

Section 46 of the Act deals with foreign-directed conspiracies: it is an offence for any corporation that carries on business in Canada to implement a policy of a corporation or person outside of Canada that would violate the conspiracy provisions of the Act.

Private antitrust actions are also available in other (non-criminal) matters if a defendant fails to comply with an order of the Tribunal.

Finally, as noted in question 2, antitrust actions may be available based on civil conspiracy or other common law, equitable or civil law theories.

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?

Canadian courts in the common law provinces (ie, outside Quebec) have determined that they have jurisdiction over foreign defendants who are alleged to have entered into a foreign conspiracy directed at the Canadian market that caused loss or damage to Canadian claimants. In general, these courts will take jurisdiction over a private antitrust action if the court finds that there is a real and substantial connection between the alleged misconduct and the jurisdiction. Canadian courts apply relatively generous rules of service of civil process on parties outside Canada.

Until recently, courts in Quebec had taken a narrower approach to jurisdiction and had refused to assert jurisdiction over foreign defendants with no establishment in the province where no harm was suffered in the province other than a mere pecuniary loss. However, this stance was reversed in a recent decision of the Supreme Court of Canada in which the court adopted a more expansive approach to jurisdiction and to the definition of 'harm'.

Parties can influence the jurisdiction in which a claim will be heard both formally and informally. At a formal level, defendants can attack the jurisdiction of a Canadian court either on the basis of jurisdiction simpliciter (lack of personal jurisdiction) or forum non conveniens (a discretionary refusal to exercise jurisdiction in favour of another more preferable jurisdiction). At an informal level defendants and plaintiffs can sometimes negotiate venue, both within Canada and (less commonly) as between Canada and another country.

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. In practice, defendants in most private cartel actions are corporations, although individuals have also been sued, usually for tactical reasons. As indicated above, Canadian courts may in some circumstances assume personal jurisdiction if a foreign corporation or individual is alleged to have committed an offence abroad that affects Canada.

Private action procedure

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

Litigation may be funded by third parties. Third-party litigation funding is still in its infancy in Canada. Law societies are monitoring third-party litigation funding but no steps have been taken to regulate it.

Contingency fees are available throughout Canada. Contingency fees are the preferred method of compensation for plaintiffs' counsel in class actions. The legislation in several jurisdictions requires plaintiff class action fees to be approved by the court. Counsel must demonstrate that the fees charged are reasonable.

Certain provinces also have publicly run funds which are designed to provide financial support to class action claimants.

8 Are jury trials available?

The ordinary rules of civil procedure apply to private antitrust actions. In all Canadian provinces other than Quebec, a party can require issues of fact and damages to be assessed by a jury. Typically, to request a jury the party must serve a jury notice on the opposing party before the close of pleadings or shortly after the notice of trial is issued. The opposing party may bring a motion to strike out the jury notice. The most common ground for striking out a jury notice is that the case is inherently complex. Unlike the US, jury trials in civil actions in Canada are not a common method for adjudicating private actions, and competition or antitrust class litigation will rarely involve a jury.

No juries are available for matters heard by the Tribunal or by the courts of the province of Quebec.

9 What pretrial discovery procedures are available?

Documentary and oral discovery are available in all jurisdictions, with some differences as to procedure.

In the common law provinces and before the Federal Court, the parties have an obligation to produce all documents relevant to the matters at issue. The definition of 'documents' is wide and includes all relevant data and information in electronic format. However, Canadian courts have increasingly applied the concept of proportionality to discovery disputes, and formal rules requiring proportionality in discovery have been adopted in several Canadian provinces.

After each party has delivered its documents, oral discoveries begin. Each party is entitled to examine one representative of every party adverse in interest to it.

The person being examined is required to answer every question that is relevant to the matter in dispute. The party conducting the examination is entitled to read in portions of the discovery transcript of the adverse parties as evidence at trial.

In Quebec, the parties are required to produce only the documents on which they intend to rely at trial. During the examination process that follows they may be requested by the other parties to provide additional relevant documents.

Third-party oral discovery is available on an exceptional basis. Courts are reluctant to require non-parties to be subjected to oral discovery, and do so only where the plaintiff can demonstrate that it will otherwise suffer unusual prejudice. Third-party documentary discovery is more frequently ordered.

10 What evidence is admissible?

The rules of evidence apply to private competition litigation and dictate what evidence is admissible. Generally, parties are entitled to provide whatever factual or expert opinion evidence they think is necessary to prove their case. Evidence is primarily entered orally, with the opposing party given broad rights to cross-examine. Most rules of evidence deal with admissibility of evidence and try to prevent access to potentially misleading information. Most corporate records will be admissible.

11 What evidence is protected by legal privilege?

Legal privilege falls into two main categories: solicitor–client privilege and litigation privilege. Solicitor–client privilege applies to all communications between a lawyer and client that were made for the purpose of giving or receiving legal advice and that were made in confidence. Advice from in-house counsel is privileged provided that the advice meets the three requirements of legal privilege described above. In other words, if in-house counsel is providing legal advice in confidence, then that advice will be privileged. In-house counsel communications providing business advice are not privileged.

Litigation privilege applies to communications of a non-confidential nature between counsel and third parties and even includes material of a non-communicative nature, provided that the communication or material was created specifically in contemplation of litigation. Litigation privilege ends when the litigation ends, while solicitor–client privilege survives the termination of litigation.

Trade secrets are not privileged. However, it may be possible to get a protective or sealing order that limits the degree to which the secrets, if otherwise producible, may be accessed or disseminated by the opposite party or at trial.

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

Private actions are available where there has been a criminal conviction in respect of the same matter. However, there need not be a prior criminal conviction for a plaintiff to bring a private antitrust action: a plaintiff may bring an action for loss or damage as a result of 'any conduct that is contrary to any [relevant] provision' of the Act, whether or not there has been a conviction. From a practical perspective, many private actions arise after a conviction, because the conviction serves as prima facie proof of the illegal conduct for the purpose of establishing civil liability. Increasingly, however, class actions are being brought prior to conviction, but after disclosure of an investigation.

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?

Subsection 36(2) of the Act provides that the judicial record relating to a criminal conviction under the Act is proof that the convicted person engaged in the criminal conduct, in the absence of evidence to the contrary. This provision applies whether the conviction was the result of a negotiated plea bargain or a contested trial. Amnesty and leniency applicants are not protected from follow-on litigation.

The Competition Bureau will not routinely disclose documents obtained during their investigations, although they may be compelled to disclose some materials on motion by private plaintiffs. Some documents prepared for the purposes of amnesty or leniency discussions may be privileged, but certain aspects of a proffer may be disclosable.

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

The rules of civil procedure provide the grounds whereby a defendant can petition the court for a stay of proceedings. While there are some differences in the rules between provinces, generally a defendant can ask the court to stay an action on the following four grounds: (i) the court has no jurisdiction over the subject matter; (ii) the plaintiff does not have legal capacity; (iii) the action is frivolous or an abuse of process; or (iv) another proceeding is pending in another jurisdiction between the same parties

Update and trends

While too soon to be definitive, there may be an emerging development with respect to the treatment of expert evidence presented on motions to certify class proceedings. Until late 2013, the trend was for certification courts to treat plaintiffs' expert evidence with great deference – courts were reluctant to examine it closely, and forbidden to weigh it against contrary evidence from defence experts. In 2013, however, the Supreme Court of Canada held that certification must be a 'meaningful screening device', and that experts' proposed methodologies must be 'sufficiently credible or plausible', demonstrate a 'realistic prospect' of proof on a class-wide basis and be 'grounded in the facts of the case' and not be 'purely theoretical or hypothetical'.

Since then, some certification and appellate courts have refused to certify proposed classes that relied on theories of generic harm without expert evidence and that asserted unsustainable common approaches to harm in cases alleging defects across a variety of distinguishable products. Other decisions currently pending will help resolve the degree to which expert evidence can successfully propose approaches capable of determining only 'average' or 'aggregate' class harm.

in respect of the same subject matter. In Canada this last ground is the most common reason for a defendant to seek a stay in a competition class action. Multiple actions on behalf of national classes for the same competition case are often commenced by counsel in different provinces. Because there is no Canadian equivalent to the US multi-district litigation (MDL) system and no organised means of consolidating actions commenced in different provinces, if the parties cannot agree, the defendants will seek to have the actions stayed in all but one of the provinces.

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 standard of proof in any civil action, including private antitrust litigation, is on the balance of probabilities. The Supreme Court of Canada recently held that the balance of probabilities is the only standard of proof, even in an action based on an alleged breach of a criminal provision. The plaintiff bears the burden of proving all of the essential elements of the case. The defendant bears the burden of proving the elements of any affirmative defence on a balance of probabilities. As noted in response to question 13 above, subsection 36(2) of the Act provides that the judicial record relating to a criminal conviction under the Act is proof that the convicted person engaged in the criminal conduct, in the absence of evidence to the contrary. There are no presumptions as to the likelihood or extent to which a cartel affected a market. Passing on is not available as a defence, but an indirect purchaser must prove passing on in order to establish damages.

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

There is no typical timetable for class or non-class proceedings. The provincial courts and Federal Court have rules that set out pro forma deadlines for each step in a proceeding. However, in complex proceedings such as antitrust actions it is common for the parties to agree to extend the deadlines or for the deadlines to be extended by the courts. There is typically less flexibility in proceedings before the Tribunal, where the parties may be given little latitude to depart from the strict timelines set out in the statute and rules.

In common law provinces, class actions cannot proceed unless and until the court has granted a motion certifying the class. The provincial legislation contains time limits within which a certification motion must be brought. However, as in regular actions, it is common for this deadline to be extended by the court. Certification motions are not usually commenced until at least six months after a case is commenced, and usually take at least 10 additional months to be resolved.

In Quebec, the launching of a class action must first be authorised by the superior court. Once the court has authorised the action (this process normally takes several months), the plaintiff has three more months to institute the class action itself. Thereafter pro forma deadlines apply, but are typically extended.

Proceedings can only be accelerated in exceptional circumstances. A party seeking to expedite a proceeding must satisfy the relevant court that the matter is too urgent to be conducted according to the usual timelines.

17 What are the relevant limitation periods?

Section 36(4) of the Act sets out the limitation period for actions brought under section 36. No action can be brought after two years from the later of the day on which the conduct was engaged in or the day on which any criminal proceedings relating to the matter were finally disposed of. With the delays that are common in disposing of a prosecution, the two-year period for initiating an action may in fact become quite extended.

Depending on the jurisdiction, the limitation period may be different if the action is based on a common law tort or other cause of action. These limitation periods vary by province. The provincial periods are generally subject to a 'discoverability' requirement that delays the start of the period until the plaintiff knew or ought to have known of the main facts giving rise to the cause of action.

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

There is an automatic right of appeal from final decisions in all civil actions, including antitrust actions, to the relevant provincial or federal court of appeal. Appeals from an appellate court can be made to the Supreme Court of Canada, but only if leave to appeal is granted. Appeals are available on both the facts and the law, although the standard of review for each is different. The dismissal of a certification motion (or, in Quebec, a motion for authorisation) is a final decision and can be appealed. A decision granting certification or authorisation is interlocutory – depending on the jurisdiction, defendants are either entitled to appeal (eg, British Columbia), entitled to seek leave to appeal (eg, Ontario) or not entitled to appeal at all (eg, Quebec).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings, known in Canada as class proceedings, are available in respect of private antitrust litigation.

20 Are collective proceedings mandated by legislation?

All Canadian jurisdictions but one now have formal class action procedural legislation.

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

Outside Quebec, the test for certifying a proposed class proceeding is more or less the same. It generally requires the plaintiff to satisfy five criteria:

- the pleading must disclose a cause of action;
- there is an identifiable class of two or more people;
- the claims of the class members must raise common issues;
- a class proceeding would be the preferable procedure for resolving the common issues; and
- the representative plaintiff would fairly and adequately represent the class, has produced a workable plan of proceeding and does not have interests in conflict with other class members on the common issues.

Quebec's rules for authorisation are somewhat different. There is no formal 'preferability' requirement, expert evidence is rarely permitted, and only individuals and organisations with 50 employees or fewer may be members of Quebec classes.

22 Have courts certified collective proceedings in antitrust matters?

After a long period with only a few contested certification motions in competition law cases, all of which failed, many antitrust cases have now been certified. The courts have also certified or authorised numerous antitrust class actions, on consent, to facilitate settlements.

23 Can plaintiffs opt out or opt in?

Opt-outs are permitted in Canada. When a class is certified, the prospective class members must be notified of the existence of the proceeding and informed of their right to opt out and the process for doing so.

Some provinces require non-residents to opt in before they can become class members.

24 Do collective settlements require judicial authorisation?

All class settlements require judicial authorisation. The courts are mainly concerned with whether the settlement is fair and adequate to the class and whether there is an appropriate plan for distributing the settlement proceeds.

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?

It is common for antitrust class actions in Canada to be commenced in one jurisdiction on behalf of residents of other jurisdictions as well. Sometimes these actions propose national classes including all Canadians. There has not yet been a definitive ruling as to whether the courts of one jurisdiction are entitled to resolve an action on behalf of a national class and thereby bind residents of other jurisdictions. In practice, many of these cases have settled, and out-of-province class members have been deemed by the approving courts to have released their claims, without any detailed comment as to the effectiveness of these releases.

It is also common for class counsel in different jurisdictions to commence coordinated actions in their respective jurisdictions that, when taken together, constitute a 'virtual' national class. However, there is no Canadian equivalent of the US MDL system and no organised means of consolidating actions commenced in different jurisdictions.

26 Has a plaintiffs' collective-proceeding bar developed?

A plaintiffs' class-proceeding bar has developed across the country. This bar is relatively small and, with respect to private antitrust litigation, currently involves only a limited number of firms. These firms either litigate on a national basis or have developed relationships with firms in other jurisdictions so that they can coordinate national litigation.

Remedies

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

Section 36 of the Act states that a person who has suffered damage is entitled to recover an amount equal to the loss or damage proved to be suffered. This provision also allows the plaintiff to recover the full cost of investigating and bringing the action as well as pre- and post-judgment interest (see below). Damages are also available if the action is based on a common law cause of action or on the principles of civil liability (in Quebec).

Only actual (single) damages, and not multiple damages, are awarded in Canada.

Some plaintiffs have also made restitutionary, disgorgement and constructive trust claims in antitrust actions. The availability of such relief in this context has not been resolved in Canada.

In private cases before the Tribunal only prospective behavioural remedies are available in private proceedings; neither penalties nor damages may be awarded.

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

Interlocutory injunctions and interim remedies are not available in actions brought under section 36 of the Act. However, interlocutory injunctions and interim remedies may be available if the claim is brought under the common law tort of conspiracy or pursuant to the principles of civil liability (in Quebec). Generally speaking, a plaintiff seeking an interlocutory injunction must demonstrate (i) a good arguable case; (ii) irreparable harm; and (iii) that it is favoured by the balance of convenience.

Only behavioural relief is available in cases brought before the Tribunal by a private party, on either an interim or permanent basis. For example, the Tribunal can order a supplier to accept a customer in refusal to deal cases.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are available in Canada, but they are only awarded in extraordinary circumstances and in relatively modest amounts.

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

Both pre- and post-judgment interest are available on damages awards in most jurisdictions. The rates of interest are set by the relevant legislation. Plaintiffs are typically entitled to pre-judgment interest from the date of the cause of action arose until the order disposing of the case. Thereafter, post-judgment interest accrues on the amount of the judgment.

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

Fines are not a factor when determining damages in a private antitrust action. A successful plaintiff is entitled to be compensated for its losses. Fines are not a relevant factor in determining the plaintiff's losses. However, the imposition of a fine may reduce or eliminate the likelihood of punitive damages.

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

Each party to a litigation must initially bear its own legal costs. However, courts will typically award costs to the successful party at the end of the litigation. The common law courts will look at a number of factors such as settlement offers, the importance of the issue being litigated and behaviour of the parties when considering the quantum of the costs award. In a normal case the successful party can expect to recover between one-third and one-half of its actual costs. In Quebec, however, costs awards are nominal. The Tribunal also has complete discretion to award costs for cases brought before it. Class actions are an exception, however, as many provinces and the Federal Court have rules providing that no party shall

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pay the other's costs for either just the certification stage or the entire proceeding, except in extraordinary circumstances.

33 Is liability imposed on a joint and several basis?

It is common for two parties who are responsible for committing a tort (or a civil fault) to be held jointly and severally liable for the damage caused by them ('solidarily' in Quebec).

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

Canadian courts have not yet ruled on whether normal common law or statutory rules regarding contribution and indemnity among defendants will apply to members of an antitrust cartel. Private contribution and indemnity agreements (sometimes called 'judgment sharing agreements') are generally permissible as among defendants in Canada, and there is no reason to believe that they would not be available to defendants in a private antitrust action.

In Quebec, when defendants are held 'solidarily' liable they are each liable towards the aggrieved party for the entire loss. They may, however, have recourses as between themselves to apportion their liability.

Claims for contribution and indemnity are normally brought as part of the original proceeding by way of cross-claims (against codefendants) or third-party claims (against non-parties).

35 Is the 'passing on' defence allowed?

The Supreme Court of Canada determined in late 2013 that the passing on defence is not available to defendants in antitrust cases.

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

The Competition Act contains a number of defences to the various criminal provisions. For example, section 45 of the Act (conspiracy provisions) provides a defence in respect of agreements that are 'ancillary' to broader or separate agreements or arrangements that do not contravene the Act and that include the same parties.

37 Is alternative dispute resolution available?

Alternative means of dispute resolution are available in Canada, including mediation and arbitration. Alternative dispute resolution is not commonly used in private antitrust actions, but in principle there is no reason why the parties could not consent to arbitration or mediation. In some provinces one party can compel the others to engage in compulsory mediation.

China

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Legislation and jurisdiction

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

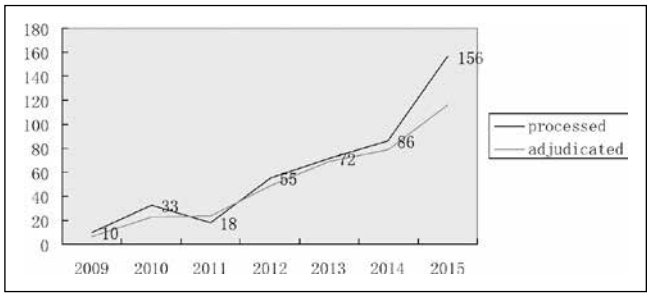
The Antimonopoly Law (AML) of the People's Republic of China entered into effect in 2008. The AML covers horizontal and vertical monopoly agreements among undertakings, abuse of dominant position by undertakings, concentration of undertakings and administrative monopoly by administrative authorities and other public agencies authorised to perform public functions.

To better illustrate the definition of relevant market, the Antimonopoly Commission of the State Council issued the 'Guidelines on Defining Relevant Market' (the Guidelines) in 2009. The economic methodology of demand-side substitution, supply-side substitution and the economic analysis tool of hypothetical monopolist test are introduced in the Guidelines and followed by the courts in antitrust adjudications.

In 2012, the 'Interpretation on Application of Laws in Hearing Civil Disputes Arising from Monopolistic Conduct' (the AML Interpretation) was issued by the Supreme People's Court. The AML Interpretation clarifies issues concerning jurisdiction, burden of proof, evidentiary rules and expert witnesses.

In 2015 and 2016, drafting the six antitrust guidelines, including the 'Guidelines on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition', the 'Antimonopoly Guidelines for Auto Industry', the 'Guidelines on Leniency Policy', the 'Guidelines on Commitment of Undertakings', the 'Guidelines on Calculating the Illegal Gains and Fines for Monopoly Conducts' and the 'Guidelines on Procedures of Monopoly Agreements Exemption', has obviously become one of the main tasks of the antimonopoly enforcement agencies (AMEAs). For those who deal with the practice of the AML in China, attention should be paid to the drafting of these guidelines, which will undoubtedly have substantial influence in the future.

As for the cases brought to court, the following chart shows the antitrust cases processed and adjudicated from 2009 to 2015.



The People's Court processed fewer than 50 antitrust cases at first instance before 2012, while in 2015 this number exceeded 150. The graphs show an increasing trend of antitrust litigation in China in the foreseeable future.

The following are landmark private antitrust litigation cases in China:

- *Qihoo v Tencent*;
- *Huawei v InterDigital*;
- *Rainbow v Johnson & Johnson*;
- *Mishi v Qihoo 360*; and
- *Ningbo Magnet Companies v Hitachi Metals*.

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 not mandated in the AML.

For contractual disputes or tort disputes, undertakings may bring antitrust civil litigations under the AML. Article 50 of the AML provides that, where the monopolistic conduct of an undertaking has caused losses to others, it shall bear civil liabilities according to law.

An undertaking may also bring antitrust administrative litigation under article 53 of the AML, where it is dissatisfied with the decision made by the AMEAs.

There is no criminal liability for monopolistic conduct under the AML.

Since the AML and other regulations make no distinction between direct and indirect purchasers, the general rules should apply.

Pursuant to article 119 of the Civil Procedure Law, the claimant should have a direct interest in the case. Although the definition of 'direct interest' remains unclear, considering article 1 of the AML Interpretation, claimants who have standing to bring a lawsuit are not only limited to direct purchasers or those directly affected, but also include those who suffer direct or indirect loss, or parties disputing a contract or disputing the terms of articles of association of industry associations. Therefore private parties, including indirect purchasers, who suffer loss from conduct in violation of the AML, or who rely on the AML in disputes concerning contracts or articles of association of industry associations, may bring lawsuits under the AML. In practice, despite the lack of legal basis, the Beijing Intellectual Property Court expressed its opinions on this issue in *Tian Junwei v Abbott* – a case brought by an end consumer acting as an indirect purchaser and claiming for loss on the basis of an administrative penalty decision against Abbott – and held that Tian Junwei, as an indirect purchaser, had the right to bring an antitrust action in court.

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

The AML provides the substantive grounds for bringing private antitrust litigation as follows:

- private antitrust litigation against horizontal monopoly agreements: article 13 (horizontal monopoly agreements) and article 16 (monopoly agreements by industrial associations) of the AML;
- private antitrust litigation against vertical monopoly agreements: article 14 (resale price maintenance (RPM)) of the AML; and
- private antitrust litigation against abuse of dominance: article 17 of the AML.

Pursuant to article 3 of the AML Interpretation, intermediate people's courts of cities where the people's governments of provinces, autonomous regions and municipalities directly under the central government are located, those of cities separately designated in the state plan, and those designated by the Supreme People's Court shall have jurisdiction over private antitrust lawsuits as courts of first instance. Meanwhile, subject to the approval by the Supreme People's Court, basic people's courts may also try those cases.

The main procedural rules for bringing private antitrust actions in China are laid down in the AML, the AML Interpretation, the Civil Procedure Law and the Civil Procedure Law Interpretation.

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?

According to practice, the following conduct is subject to private antitrust actions:

- horizontal or vertical monopoly agreements reached between undertakings;
- abuse of dominant market position; and
- abuse of administrative power to eliminate or restrict competition.

The concentration of undertakings is eligible for private action, because the Regulations on Causes of Action in Civil Cases promulgated by the Supreme People's Court confirms concentration of undertakings as a type of civil case. In practice, however, merger cases have not yet been raised.

Neither the AML nor the AML Interpretation requires a finding of infringement by an AMEA as a precondition to initiate a private antitrust action. On the contrary, pursuant to article 2 of the AML Interpretation, a private antitrust action can be brought directly before the court.

Nevertheless, the decisions of the AMEAs are useful in follow-on litigation; the finding of AML violation by the AMEAs can be submitted as persuasive evidence in private antitrust actions. Since the AMEAs at central level normally have more resources and experience than their subordinates at provincial level, their findings of infringement are usually more likely to be accepted by the court.

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 nexus required in antitrust litigation is the same as in other civil actions, and the parties have the liberty of forum-shopping in accordance with laws and regulations.

Generally, the court may exercise jurisdiction over a defendant who resides or conducts business within the territory of the said court, regardless of the defendant's nationality.

For contract disputes, parallel jurisdictions would exist between the places where the defendant is domiciled and where the contract is performed.

For tort disputes, they shall come under the jurisdiction of the court of the place where the tort was committed, where the tortious consequence takes place or where the defendant is domiciled.

A plaintiff may choose from the above venues to file the lawsuit.

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

Yes. A private action can be brought by or be brought against any citizen, legal person or other organisation, regardless of nationality, place of domicile or habitual residence. For foreign defendants who have no domicile or residence within China, the jurisdiction may be exercised upon claims arising from its conduct or property. As for private antitrust litigation, the court's jurisdiction may be founded, if the alleged conduct, wherever it occurs, has an effect on the market competition in China.

Private action procedure

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

There are no champerty rules established in China. If a party has financial difficulties in bringing a lawsuit, he or she could borrow money from a third party under a debtor-creditor relationship. The third-party creditor does not share profits or bear the risks of the litigation.

Contingency fees are permitted in a private antitrust litigation, but should not be higher than 30 per cent of the subject matter as specified in the agency contract.

8 Are jury trials available?

There is no jury system in China. However, China is applying and developing the people's juror system. The people's jurors are selected from citizens within the relevant court's jurisdiction. For first-instance cases, the people's jurors make up a collegial panel together with judges, and the collegial panel should be presided over by a judge. The people's jurors participate in finding of facts and application of law. They have the same power as judges, such as addressing independently in deliberation, and casting votes for panel decisions, etc.

9 What pretrial discovery procedures are available?

There are no pretrial discovery procedures in China.

However, according to the Rules of the Supreme Court on Evidence in Civil Proceedings (the Evidence Rules), the court may, at its own discretion or in response to application from the parties, organise an evidence exchange before trial. A member of judicial staff should preside over the exchange and record the evidence exchanged. When a party seeks to submit new evidence in rebuttal after receiving the evidence from the opposite, the court should inform the parties to exchange again. As a general rule, evidence exchange should be conducted on no more than two occasions unless the case is particularly significant, difficult or complex in nature.

10 What evidence is admissible?

Article 63 of the Civil Procedure Law divides the admissible evidence into seven categories: statements of the parties, documentary evidence, physical evidence, audiovisual materials, testimony of witnesses, expert opinions and records of inspection. The said evidence should be verified before it can be taken as a basis for ascertaining facts. Generally, the notarised facts and documents may be directly admitted by the court, except when there is evidence to the contrary sufficient to invalidate the notarisation.

For the purpose of verifying the authenticity of the evidence, article 70 of the Civil Procedure Law requires that the parties should present the originals of documentary evidence and physical evidence, and if the party has difficulty in presenting the originals, the copies, photographs, duplicates or transcripts may be presented instead.

When documentary evidence in a foreign language is to be presented, it must be accompanied by a Chinese translation.

For evidence originating from outside mainland China, the parties have to fulfil certain formalities before presenting it to the court; otherwise the evidence would be inadmissible. For evidence originating from Hong Kong, Macao and Taiwan, it should be notarised by a local notary office or attesting officer, and certified by China Legal Service (in Hong Kong and Macao), or coordinated by Straits Exchange Foundation (in Taiwan). For evidence originating from outside Chinese territory, it should be notarised by a local notary office and authenticated by the Chinese embassy or consulate in the locality.

In addition, the court may, at its own discretion or in response to application from the parties, investigate and collect evidence from relevant entities or individuals.

Expert opinion is admissible in a private antitrust litigation. According to article 12 of the AML Interpretation, a party may apply to the people's court to have one to two persons with expertise to appear in court to explain specialised issues involved in the case.

11 What evidence is protected by legal privilege?

Under Chinese law, there is no such concept as attorney–client privilege. In other words, confidential communications between attorneys and clients are not privileged.

Article 38 of the Lawyer's Law of China forbids lawyers from revealing information that the client or others decline to reveal to third parties, including trade secrets, privacy, and etc. However, this article does not relieve attorneys from the obligation to disclose this information in a judicial action. According to article 72 of the Civil Procedure Law, a court may order an attorney to give testimony about the knowledge of the pending case, including a client's privacy or trade secrets.

In addition, information that would otherwise be protected by attorney–client privilege in foreign jurisdictions is still under the said disclosure obligation.

The AML Interpretation provides that if the evidence involves state secrets, trade secrets, personal privacy or other content that shall be kept confidential pursuant to the law, the court may, at its own discretion or upon the application of the parties, take protective measures, such as having a private trial, restricting or prohibiting from copying, disclosing only to the lawyers involved and ordering the parties to sign an undertaking.

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

Antitrust infringements cannot give rise to criminal liability under the Criminal Law of the People's Republic of China (the Criminal Law).

However, there is one type of antitrust conduct, bid-rigging, which may be subject to the Criminal Law. According to article 223 of the Criminal Law, bid-rigging could be punished with a term of imprisonment of less than three years or a criminal fine, or both.

Any victim harmed by the bid-rigging may file a civil case concurrently with the criminal charge or file a separate civil case.

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 Civil Procedure Law Interpretation further provides that facts that have been affirmed in the judgment that has taken effect do not need to be proved, except where a party concerned has enough contrary evidence to contradict them. Therefore, the civil claimant may present the relevant criminal judgment as evidence to assert facts in the civil proceeding. However, undertakings usually would not be subject to criminal liability for monopolistic conduct.

The National Development and Reform Commission and the State Administration for Industry and Commerce both apply leniency rules for reducing administrative penalties to those who confess first and provide substantial evidence to prove the antitrust cases. However, there are no rules protecting leniency applicants from follow-on litigation brought against them.

The AMEAs do not routinely disclose documents obtained in their investigations to a private claimant. However, for administrative decisions, the AMEAs may release to the public the facts and findings of the antitrust investigation, which could be used by the claimant in the follow-on private antitrust litigation.

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

There are no specific provisions in the AML addressing the stay of proceedings in a private antitrust action. The general rules of civil procedure concerning the stay of proceedings should apply.

Pursuant to article 150 of the Civil Procedure Law, an action shall be stayed in any of the following circumstances:

- one of the parties dies and it is necessary to wait for his or her successor to state whether he or she wishes to participate in the action;
- one of the parties has lost the capacity to engage in litigation, and his or her statutory agent has not been determined yet;
- the legal person or other organisation acting as one of the parties has terminated, and the successor to its rights and obligations has not been determined yet;
- one of the parties is unable to participate in the action due to an event of force majeure;
- the case in question is dependent upon the outcome of the trial of another case that has not been concluded; or
- other circumstances require the stay of proceedings.

Proceedings shall be resumed after the cause of stay has been eliminated.

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 standard of proof in civil proceedings, 'the high degree of probability' applies in private antitrust litigation.

Pursuant to article 73 of the Evidence Rules, where the parties concerned produce contradicting evidence to prove a fact, but neither has enough evidence to rebut the evidence of the other party, the court shall, by taking the case into consideration, determine which evidence is obviously more persuasive, and shall affirm the evidence that has more probative value. If the facts of a case are not identifiable because of the inability to determine the persuasiveness of the evidence, the court shall enter a judgment according to the rules for distributing the burden of proof.

In a civil action, the burden of proof usually lies with the claimant. That is, the claimant shall prove the facts on which the claims are founded, while the defendant shall present evidence to support the objections and counterclaims. The party that fails the burden of proof shall bear the adverse consequences.

Horizontal agreements

As a rule of thumb, the following horizontal agreements entered into between competitors are presumed to have anticompetitive effects according to the AML Interpretation:

- price fixing;
- limiting output or sales;
- segmenting sales markets or input purchasing markets;
- certain conduct hindering the development or adoption of new technology or new facilities; and
- joint boycott transactions.

The defendant shall have the burden to prove the above horizontal agreements do not have the effect of eliminating or restricting competition. For the standing, the horizontal agreement and causation of loss, the plaintiff shall bear the burden of proof.

Vertical agreements

As a rule of thumb, vertical agreements entered into between an undertaking and its trading counterparts are not presumed to have anticompetitive effects. The plaintiff shall bear the burden of proof for the standing, the vertical agreement, anticompetitive effects, loss and causation.

Abuse of dominance

According to the AML Interpretation, the court may find public utility enterprises or other undertakings having monopolistic status granted by law as dominant in the relevant market, based on the specific situations of the market structure and the competition, subject to the contrary evidence. In practice, the dominance has to be proved by the plaintiff. The plaintiff shall bear the burden to prove the standing, market definition, dominance, abusive conduct, anticompetitive effects, loss and causation.

Neither the distinction between direct purchaser and indirect purchaser nor the passing-on defence is specifically provided by the AML or the AML Interpretation. According to the general rules relating to burden of proof, the burden lies with the defendant who seeks to raise the passing-on defence to prove that the plaintiff passed on the whole or part of the overcharge resulting from the monopolistic conduct to its customers.

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

Litigants are generally limited to one appeal. In general, the decision by the court of second instance is final and legally effective.

The timetable for civil proceedings is dependent upon the complexity of the case. The court shall abide by the trial time limit set by the Civil Procedure Law. Pursuant to article 243 of the Civil Procedure Law Interpretation, the trial time limit refers to the period from the date of placing the case on the docket to the day when a judgment is pronounced or a mediation statement is served, excluding the period for announcement, examination by experts, reconciliation period of the parties, hearing of any objection to jurisdiction or dealing with a jurisdictional dispute raised between the courts concerned.

Generally, when handling a case to which ordinary procedure is applicable, the court shall conclude the first-instance case within six months from the date of placing the case on file. Where an extension is required under special circumstances, a six-month extension may be given subject to the approval of the president of the court, provided that any further extension shall be reported to the court of higher level for approval.

If a party disagrees with a first-instance judgment made by a local court, the party may appeal for a second-instance trial with an appeal petition to a higher-level court within 15 days from the date on which the written judgment was served.

The second-instance court shall conclude the case within three months from the date of accepting the appeal. Any extension of the time limit necessitated by special circumstances shall be subject to approval by the president of the court. Since the Civil Procedure Law and relevant regulations shed no light on the trial time limit of second instance cases, the second-instance court may extend the trial time limit at its own discretion when hearing complicated cases.

Considering the fact that the court is authorised to extend the time limit, it is quite understandable and normal to take a year or two to conclude a complicated civil case. And when the case involves expert examination, objection to jurisdiction or reconciliation, the proceeding may be dramatically lengthened.

The trial time limit for first and second instance cases shall not be applied to foreign-related civil cases. The Civil Procedure Law Interpretation provides guidance to determine foreign-related civil cases:

- a party or both parties involved in the case are foreigners, stateless persons, foreign enterprises or organisations;
- a party or both parties involved in the case have their habitual residence outside the territory of the People's Republic of China;
- the subject matter involved is outside the territory of the People's Republic of China;
- the legal fact that establishes, changes or terminates the civil relation occurs outside the territory of the People's Republic of China; or
- other circumstances.

Therefore, it is almost impossible to predict the timetable of foreign-related civil cases.

The aforementioned trial time limit in first- and second-instance cases shall also apply to collective actions.

17 What are the relevant limitation periods?

According to the AML Interpretation, the period of limitation of actions for claiming the damages arising from monopolistic practices shall be two years, commencing from the date on which the claimant knows or should know that its rights and interests were infringed.

If the claimant reports the alleged monopolistic practice to the AMEAs, the limitation period shall be suspended from the date of the report. If the AMEAs decide not to institute a case, to cancel the case or to terminate the investigation, the limitation period shall recommence from the date on which the claimant knows or should know the non-filing, cancellation of the case or the termination of the investigation. Upon investigation, if the AMEAs conclude that the action constitutes a monopolistic practice, the limitation period shall recommence from the date on which the claimant knows or should know that the decision of the AMEAs has become effective.

If the monopolistic practice has been continuing for more than two years by the time the claimant files an action in court and the defendant raises the limitation period in the defence, the damages shall be calculated two years from the date the claimant files the action in the court.

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

Within statutory appeal time limits, any party who disagrees with the first instance judgment may appeal to a higher-level court with an appeal petition on the grounds that the first instance decision applied the law incorrectly, identified the facts inaccurately or unclearly, lacked sufficient evidence or violated statutory procedure.

If the parties concerned do not appeal, the first-instance judgment will be legally effective; if either party appeals, a bench of adjudicators will review the facts and the law of the case, and the judgments and rulings of the people's court of second instance shall be final.

However, the party who considers the final judgment as wrong may file for retrial on statutory grounds. The retrial will examine the existence of statutory grounds to determine whether to conduct a retrial. The retrial may also be initiated by the court system correcting itself.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Yes, collective actions are provided for in the Civil Procedure Law. If the object of the action is of the same category and a party consists of numerous persons, and upon institution of the action the number of persons is not yet determined, the court may issue an announcement for no less than thirty days, stating the particulars of the case and the claims, and requesting that the individuals concerned register with the court within a certain period of time. Individuals concerned shall prove the legal relationship with the opposing party and the damage suffered thereby; otherwise, the individual concerned will not be registered. Individuals concerned who have registered with the people's court may elect a representative to engage in litigation. Judgments or rulings rendered shall be binding on all the individuals concerned who have registered with the court. Such judgments or rulings shall apply to individuals concerned who did not register with the court but instituted actions during the limitation period.

20 Are collective proceedings mandated by legislation?

Collective proceedings are not mandated by the Civil Procedure Law. However, according to article 6 of the AML Interpretation, if two or more claimants file the lawsuits separately in the same competent court for the same monopolistic practice, the people's court may consolidate the cases.

If two or more claimants file the lawsuits with different competent courts separately for the same monopolistic practice, the court which the subsequent case was filed shall, within seven days after knowing of the other case filed earlier, order the transfer of the case to the court that accepted the case at an earlier date; and the court to which the case has been transferred may consolidate the cases. During the defence stage, the defendant shall take the initiative to provide the people's court accepting the lawsuit with the relevant information concerning the same cause of action for which the lawsuits are filed against it in other courts.

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

Pursuant to article 54 of the Civil Procedure Law, for a collective action to be admissible the following requirements should be met:

- the object of the action must be of the same category; and
- a party must consist of numerous persons and on institution of the action the number of persons shall not yet be determined.

22 Have courts certified collective proceedings in antitrust matters?

There have been no collective proceedings regarding antitrust issues published as of June 2016.

23 Can plaintiffs opt out or opt in?

China applies the opt-in principle for collective proceedings. As mentioned in question 19, the individuals concerned may choose to register with the court within a certain period of time to become a member of the claimant group.

There are no provisions concerning the opt-out right of the claimant in collective proceedings. Considering the fact that the opt-out right is not specifically denied by law, the claimant should have the right to quit the collective proceedings.

24 Do collective settlements require judicial authorisation?

According to the Civil Procedure Law, collective settlement does not require judicial authorisation, but should be approved by the claimants.

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?

A national collective proceeding is possible. As noted, following the announcement of the court, individuals concerned from other provinces may register to be a member of the claimant group.

As indicated above, the actions filed separately may be consolidated. According to article 6 of the AML Interpretation, if two or more claimants file the lawsuits separately in different competent courts for the same monopolistic conduct, the court that accepts the case at a later date shall transfer the case to the court that accepted the case at an earlier date; and the court to which the case has been transferred may consolidate the cases. During the defence stage, the defendant shall inform the court if there are other lawsuits filed to other competent courts for the same conduct.

26 Has a plaintiffs' collective-proceeding bar developed?

No plaintiffs' collective-proceeding bar has developed yet.

Remedies

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

Pursuant to the AML and the AML Interpretation, a claimant may request:

- compensation for the losses caused by the accused monopolistic conduct;

- cessation of the infringement;
- compensation for reasonable expenses incurred for investigation, attorney and other measures necessary to stop the monopolistic conduct; and
- the relevant agreement, decision of industrial associations or other documents in violation of the AML to be declared invalid.

The damages allowed in antitrust actions are limited to actual loss, and multiple damages are not available under the AML.

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

According to articles 100 and 101 of the Civil Procedure Law, the following interim remedies are available for either party to apply in both pretrial and trial stages:

- property preservation;
- evidence preservation; and
- temporary injunction.

In order to obtain an interim remedy, the applicant should present sufficient evidence to prove the risk of irreparable loss or damages it may suffer. The court may also require the applicant to provide security depending on the circumstances.

29 Are punitive or exemplary damages available?

No, the claimant may only claim damages actually incurred. There are no punitive or exemplary damages available under the AML.

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

According to the Civil Procedure Law and its judicial interpretation, if a party subject to execution fails to perform the payment obligation within the time limit specified in a judgment, ruling or other legal document, the party shall pay twice the amount of interest on the debt for the period during which the performance is deferred. If a party fails to perform other obligations, the party shall pay a fine for delayed performance.

The interest incurred for failure to pay, and fine incurred for delayed performance, accrue from the expiry date of the time limit specified in a judgment, ruling or other legal instrument.

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

The purpose of the fines imposed by the AMEAs is to sanction the AML violations and to deter others from violating the AML. However, the purpose of damages in private antitrust actions is to compensate the losses caused by the monopolistic conduct. Since the nature of the fines and the damages are different, the court may not take into account the fines imposed by the AMEAs.

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

Generally, legal costs generated in private antitrust actions include a litigation fee and reasonable expenses to investigate the alleged conduct (eg, attorneys' fees).

The litigation fee, which should be paid to the court, consists of the following three categories:

- case acceptance fee;
- application fee; and
- the travel expenses, accommodation expenses, living expenses, and subsidy for missed work incurred by the witnesses, authenticators, interpreters and adjusters for appearing before the people's court on the date designated by the court.

The amount of the litigation fee depends upon the monetary value of the claim, the number of issues applied and the complexity of the whole case.

The claimant shall pay a case acceptance fee in advance when instituting a civil proceeding. The losing party is ordered to undertake all the legal costs. However, where each party succeeds on some matters and fails on others, the court may order that the litigation fee be shared or that each party bear its own costs.

Update and trends

The People's Court has become sophisticated. In *Qihoo v Tencent*, *Huawei v InterDigital* and *Rainbow v Johnson & Johnson*, the People's Court issued well-reasoned judgments. Economists and industry experts have been introduced into court hearings and play an important role.

IP-related private antitrust litigation has become popular. After *Huawei v InterDigital*, Arima and ZTE filed private antitrust actions against InterDigital in China. Many other types of IP-related antitrust actions are emerging.

Internet-related private antitrust action is still a hot topic. China has a large population of internet users, and internet-related undertakings are springing up everywhere. Competition issues are being raised in this fast-growing market. *Tangshan RenRen v Baidu*, *Beijign Shusheng v Shengda* and *Qihoo v Tencent*, etc, are all internet-related private antitrust litigation cases. We may expect more similar cases to be filed in the near future.

33 Is liability imposed on a joint and several basis?

Under the Tort Law, two or more tortfeasors whose infringement causes damage to others shall be jointly and severally liable. On the other hand, in the case that the breach of contract by several parties infringes upon the personal or property interests of the non-default party, the breaching parties are also jointly and severally liable.

Therefore, if an antitrust action is brought against two or more defendants for their anticompetitive conduct, each defendant may be held joint and severally liable for the full amount of the claimant's damage.

The compensation should be allocated in accordance with their apportioned shares of the responsibility. Where it is impossible to find their respective shares, all defendants should be held liable for an equal amount of compensation.

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

Yes. The Tort Law provides that, where a defendant jointly and severally liable pays compensation of more than its liability for the damages, the defendant is entitled to claim a contribution or indemnification from other defendants. The aforesaid claims can be asserted in a different suit, ie, after the judgment or settlement.

35 Is the 'passing on' defence allowed?

Yes. Since in antitrust actions, the claimant may only claim for actual losses or damages, the defendant may argue that, by passing on the overcharge to an indirect customer, the claimant suffers no injury or less injury.

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

Yes. Defendants may defend themselves by claiming lack of evidence to prove the dominance, incorrect market definition, no anticompetitive effect, the lack of causation between the alleged conduct and the damage, the lack of standing to sue and the expiry of statute of limitations, etc. Actually, defendants may use any defence that would be used in civil actions.

The following circumstances of exemptions for horizontal monopoly agreements or the RPM are provided in article 15 of the AML:

(i) improving technologies, or engaging in research and development of new products;
(ii) improving product quality, reducing cost, and enhancing efficiency, unifying specifications and standards of products, or implementing specialised division of production;
(iii) increasing the efficiency and competitiveness of small and medium-sized undertakings;
(iv) serving public interests in energy conservation, environmental protection and disaster relief;
(v) mitigating a sharp decrease in sales volumes or obvious overproduction caused by economic depression;
(vi) safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts; or
(vii) other purposes as prescribed by law or the State Council.

For situations specified in items (i) to (v), the undertakings shall, in addition, prove that the agreements reached will not substantially restrict competition in the relevant market and that they can enable consumers to share the benefits derived therefrom.

37 Is alternative dispute resolution available?

In civil proceedings, the parties may conclude a mediation statement during the mediation process held by the court, or reach a settlement on their own.

As an alternative to private antitrust actions, arbitration is also a resolution for undertakings. However, so far, no statistics or reports reveal any antitrust arbitrations.

In addition, the injured party may also report monopolistic conduct to the AMEAs to stimulate an investigation.

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Legislation and jurisdiction

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

The area of private antitrust litigation is in its infancy in Denmark, but it is growing and a rise in the number of cases can be expected as the principles to be applied in such litigation, regarding both the procedural issues as well as the conditions for liability, are clear.

Damages claims of this kind are often settled out of court without publicity.

There are only a few published court cases concerning actions for damages for breach of competition law. These include the Supreme Court's judgment of 20 June 2012, where a broadband provider Cybercity was awarded 10 million Danish kroner in damages as victim of an abuse of dominant position, and in the Maritime and Commercial High Court's judgment of 15 January 2015, where the Danish chemical company, Cheminova, as purchaser from a cartel was awarded 10.7 million Danish kroner in damages from AzkoNobel (cf the Commission decision of 19 January 2005).

Some major damages cases, also related to abuse of dominance, are currently pending and may bring further clarification in the years to come.

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?

In Denmark there are no specific statutory rules for private antitrust actions. These cases therefore follow the ordinary rules in the Administration of Justice Act.

The Danish Competition and Consumer Authority (DCCA) is competent to investigate and decide on matters involving violations of the Danish Competition Act, but is not competent to deal with claims for damages. The DCCA cannot issue fines but can ask the public prosecutor to prosecute infringements of the Danish Competition Act. When infringements are prosecuted before the courts, the public prosecutor may include simple damages claims on behalf of victims. However, in practice such claims are more likely to be left for ordinary civil proceedings.

Actions may be brought before the competent court by a plaintiff with the necessary standing by filing a writ with exhibits and against payment of a small court fee.

There is no special legislation concerning damages for breach of EU or national competition law, and such actions are therefore mainly based on case law concerning liability in tort.

The factors that the plaintiff needs to establish in order to obtain damages are:

- a violation of the competition law which may be attributed to the perpetrator;
- a loss caused by this violation;
- the likely size of the loss; and
- the foreseeability or adequacy of the loss.

It is occasionally argued that a violation of the Danish Competition Act is not in itself sufficient to establish a liability, which arguably requires a fault. In the preparatory works of the Competition Act, it is stated that a violation of the competition rules will 'typically' (according to general rules of Danish law) constitute an unlawful act for which the injured party may claim damages.

In damages actions based on infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the jurisprudence of the Court of Justice will also apply, such as the joint cases C-295/04 and C-298/04, *Manfredi*, as well as the rulings in Case C-453/99, *Courage v Crehan*, and most recently Case C-557/12, *Kone*, concerning umbrella pricing. The effectiveness of articles 101 and 102 TFEU may be invoked in damages cases involving infringements of EU competition law.

An indirect purchaser is not barred per se from bringing a damages action based upon an infringement of competition law. The purchaser will, however, have to demonstrate individual standing.

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

The relevant legislation is found in the Administration of Justice Act.

The Danish courts comprise the District Courts, a specialised Maritime and Commercial High Court, two High Courts and the Supreme Court. All of these courts are competent to hear actions for damages. As a main rule, cases can only be tried in two instances and will normally start in the district court. All courts have the right to refer questions to the Court of Justice under the procedures set out in article 267 TFEU.

The courts only allow actions that pursue a sensible and fair goal. To have standing before the courts, the plaintiff must have a legal interest, in other words, a concrete, specific and individual interest in the decision.

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 possible in all antitrust matters, including cases based on cartel infringements and cases involving abuse of dominance.

A preceding finding of an infringement by the DCCA is not required, as the courts may assess directly whether competition law has been infringed. However, an infringement decision taken by the competition authorities may, in practice, establish at least a presumption that there has indeed been an infringement of competition law, and if a company that has been held to infringe the law by a decision of the DCCA does not appeal to the Competition Appeals Board or does not bring a decision of the Competition Appeals Board before the courts within the prescribed time limits, the decision becomes binding upon the company. It is undecided whether the Danish courts in such a case would be bound by the decision taken by the DCCA or the Competition Appeals Board in the case of a subsequent private action.

In practice, injured undertakings normally seek to have the DCCA investigate and decide on a case prior to bringing actions for damages or other infringement actions before the courts. The DCCA is not competent to deal with claims for damages.

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 provisions concerning the jurisdiction of the courts are set out in the Administration of Justice Act, sections 235–248.

There are 24 judicial districts within Denmark. As a rule, cases shall be brought before the district court in the judicial district where the defendant is domiciled.

Legal persons are domiciled where the legal person's headquarters are situated (see the Administration of Justice Act, section 238(1)).

Other criteria such as 'the place of performance of an obligation' (contractual matters), or 'the place where a harmful act occurred' (torts) are also applicable.

The Brussels I Regulation 44/2001 did not originally apply in Denmark, but has subsequently been extended to apply in Denmark by agreement between Denmark and the EU (19 October 2005). The agreement has been approved by Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2006/325/EC), and has been incorporated into Danish law by Act No. 1563 of 20 December 2006 on the Brussels I Regulation, etc.

As regards jurisdiction between Denmark and non-EU member states, section 246 of the Administration of Justice Act specifies in which situations Danish courts have jurisdiction. This is, among others, the case in the following situations:

- where the defendant has a business or exercises business activity within Denmark and the legal dispute relates to the activity of that business;
- in cases concerning contractual matters which may be brought before the courts at the place of performance of the obligation in question. This provision is not applicable to monetary claims unless the claim relates to a stay in Denmark and the claim was expected to be fulfilled before the defendant left the country; and
- in cases in respect of tort damages which may be brought before the court where the harmful act occurred. The case law seems to suggest that this provision may also be applied to damages actions based on competition law infringements (see the judgment of the Maritime and Commercial High Court in *Cheminova*, UfR 2009.1265 S).

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

Private actions, including damages actions, may be brought against the undertaking liable for the infringement of competition law. In practice, it is the absolute main rule that damages actions are directed against the undertaking and not the individuals, but that individuals who are responsible for a violation may be liable to fines and, in serious cartel cases, to prison sentences.

Directors and board members may be held personally liable if they have intentionally or negligently harmed the company (see the Companies Act, section 361). This could, in principle, be the case if these individuals had participated in a breach of competition law.

Private action procedure

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

Litigation may be funded by third parties.

According to the current ethical rules applying to lawyers, lawyers may represent parties on a 'no win no fee' basis as long as the fees are not calculated in function of the size of the award. However, contingency fee agreements are, in principle prohibited, and lawyers may not require a higher salary than what is deemed 'reasonable' (see the Administration of Justice Act, section 126).

8 Are jury trials available?

No, jury trials are not available in damages cases.

9 What pretrial discovery procedures are available?

The Administration of Justice Act does not include any rules on pretrial discovery procedures.

Pursuant to the Administration of Justice Act, section 343, the court may – if so requested by a party having sufficient legal interest – allow for the pretrial taking or recording of evidence. This procedure does not allow for discovery as such, but it does allow for the court to serve a disclosure order ('edition') to the extent that the general disclosure order conditions under the Administration of Justice Act are met.

On request from a party, the court may order disclosure by a party, or by a third person, of relevant documents in his or her possession or custody relating to matters in question in the action (see the Administration of Justice Act, sections 298(1) and 299(1)). The court may also call ex officio on a party to disclose documents (see the Administration of Justice Act, section 339(3)).

The requesting party must specify the facts that he or she wishes to prove via the requested documents, and the disputed fact must be of relevance for the case (see the Administration of Justice Act, section 300). There must be a probability that the requested document will contain the necessary information.

Requests for disclosure of this kind are, however, rarely made and rarely accommodated as the courts enjoy a wide discretion as to whether to grant disclosure of documents.

Further, information which the party or third person would be exempted or excluded from providing as a witness are not covered by these rules.

10 What evidence is admissible?

The parties' options to produce evidence are, in principle, unlimited (see the Administration of Justice Act, section 341). The parties can, in principle, present any item and any witness that is suited to confirm or deny the probability of information as long as it is relevant for the case, and as long as the witness does not fall within the provisions excluding or exempting witnesses.

Certain categories of people are exempt or excluded from the duty to act as witnesses. Certain professions (doctors, lawyers, public servants, etc) have a duty of confidentiality, which to a certain extent must be respected. A defendant's close relatives (including cohabiters) are exempted from the duty if they so wish (see the Administration of Justice Act, sections 169–172). Further, if the testimony would harm the witness or his or her close relatives by giving rise to punishment, loss of welfare or other considerable harm, the witness is exempt from the duty to act as witness.

Moreover, the Administration of Justice Act contains provisions which regulate the use of surveyor experts. A surveyor expert may reply to specific questions posed by parties with the permission of the court.

A survey can only be held at the request of the parties, but the court may also call on the parties to request a survey. The court decides whether the request is to be allowed, and the court appoints the surveyor.

The survey and the testimony of the surveyor are generally accorded high evidential value by the courts.

Instead of a court-appointed survey, parties may seek to invoke or rely on unilaterally obtained expert opinions. Normally, it is not advisable for the parties to rely solely on such opinions to the extent that they have been unilaterally obtained, as their evidential value will be reduced to the extent they are not considered inadmissible. Unilateral reports may also be refused evidential value in some cases.

Furthermore, the courts will generally only admit expert opinions that have been procured unilaterally prior to the commencement of the court proceedings. If an expert opinion has been procured subsequent to the initiation of the court proceedings, it will normally not be admissible if the counterparty objects.

11 What evidence is protected by legal privilege?

The Administration of Justice Act, section 170, governs the taking of testimony of the external legal counsel to the party in question. The main rule is that the external legal counsel cannot be asked to give testimony with respect to information gained in his or her capacity as external legal counsel to the party, as opposed to information gained in another capacity, such as in his or her capacity as a board member.

Save from defence counsels in criminal proceedings, the court may nevertheless order the external legal counsel to testify when such testimony is deemed to be decisive to the outcome of the proceedings, and further provided that its importance to the other party or to society as such warrants its taking. This procedure is rarely used. No similar exception applies to in-house lawyers.

The same exemption principle applies with regard to written evidence, such as legal opinions from external legal counsel. As a general rule, this is also privileged.

As concerns trade secrets, the main rule is that trade secrets are privileged or exempted from disclosure pursuant to the Administration of Justice Act, sections 298–299, to the extent warranted by the application of the exemption principle in the Administration of Justice Act, section 171(2).

In such situations, it is also important to note how far back the requested data dates, whether it can be provided easily or not, and whether or not disclosure of the data is likely to impair the competitive position of the disclosing party.

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

Private actions are also available after the defendant has been convicted. A fine paid by an infringing undertaking is paid to the state and does not serve to compensate any victims.

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?

A finding of an infringement in a criminal proceeding may, of course, serve as very strong evidence of liability, and can in practice be viewed as res judicata.

Leniency applicants are not protected from follow-on claims for damages, but neither the Competition and Consumer Authority nor the public prosecutor will normally disclose documents obtained in an investigation to private litigants. A judgment in a criminal case will normally be made available to private litigants.

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

A defendant may petition the court for a stay of the proceedings pursuant to the Administration of Justice Act, section 345, for the purposes of awaiting an administrative decision or a court decision which may affect the outcome of the proceedings. This could include a stay for a referral of preliminary questions to the Court of Justice in the proceedings, for a pending referral to the Court of Justice in another case which is relevant to the outcome of the proceedings, or for a judgment from the Supreme Court in another case relevant to the outcome of the proceedings.

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?

In Denmark, the courts are generally free to assess evidence.

This implies that the judge has the right, as well as the duty, to assess the value of evidence (including public documents, deeds, etc) submitted without regard to statutory provisions (see the Administration of Justice Act, section 344(1)). There is no hierarchy of forms of evidence expressed in statutory provisions.

Accordingly, it is the judge who assesses when a party has met the burden of proof, with the result that the burden of counter proof shifts to the other party.

As a general rule, it is for the injured party to prove his or her case, including the infringement, the fault, the loss, the size of the loss caused by the infringement, the causality, and the foreseeability or adequacy of that loss. In particular, circumstances or, with respect to particular elements of a case, the burden of proof, may shift to the defendant, especially as regards claims or arguments presented by the defendant.

Other elements the judge may consider are, for example, which party had the best opportunity to secure evidence. Furthermore, if a party is claiming something unusual, there is a tendency for this party to bear the onus of proof. If a party fails to give information when requested by the other party or fails to follow the court's request, for example, for further and better particulars, this may be taken into account by the court as evidence against him or her and have a prejudicial effect (see the Administration of Justice Act, section 344(2)(3)).

The 'passing-on defence' is accepted as a matter of Danish law. In practice, no clear rule of the burden of proof has been established concerning this matter.

As regards the standard of proof, a high degree of probability is generally required to prove that there is a basis for liability in matters relating to torts.

The standard of proof required to prove certain facts, for example the establishment of causation or the establishment of loss, is not always likely to be the same. If, for example, in an action for damages it is established that the defendant is liable, the courts have in some cases lowered the requirements to prove causation.

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

A court case in first instance will normally take between eight months and two years, depending upon whether a surveyor expert statement is needed or not, while a court case through two instances will normally take around two to three years. It is, however, not uncommon that court cases through two instances last longer.

In general, it is not possible to accelerate proceedings (for example, summary judgments are not available).

17 What are the relevant limitation periods?

Claims for damages based on competition law infringements are subject to the standard limitation periods for liability in tort claims pursuant to the Danish Act on Limitations.

Claims for liability in tort are hence statute-barred after three years (to be counted from the occurrence of the damages or, if the damage is not demonstrable, from the time where damages were detected or ought to have been detected for the first time).

Further, there is a general objective or absolute long-stop date – 10 years – after which no action can be brought irrespective of the knowledge of the plaintiff. This latter limitation period is to be counted from the completion of the harmful action giving rise to the damages claim.

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

Appeals are available both on the facts and on the law.

A judgment by a Danish court in first instance is, with rare exceptions, appealable to a higher instance.

The Danish court system is based on a 'one appeal only' main principle.

This implies that the judgments of the district courts and the Maritime and Commercial High Court may, as a rule, be appealed only to the relevant High Court.

A second appeal from the High Court to the Supreme Court can only be granted following an appeal permission given by the Appeals Permission Board, which will only be given if the case is deemed to be of general public importance.

Moreover, instead of being appealed to the relevant High Court, a judgment of the Maritime and Commercial High Court may be appealed directly to the Supreme Court if the case is deemed to be of general public importance or if other special reasons speak in favour of the Supreme Court processing the appeal.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings or class actions are, in principle, available to antitrust actions claims subject to the same conditions governing (other) collective proceedings pursuant to Chapter 23a of the Administration of Justice Act.

20 Are collective proceedings mandated by legislation?

Collective proceedings are mandated and governed by Chapter 23a of the Administration of Justice Act.

A class action can be filed if the following requirements are met (see the Administration of Justice Act, section 254(b)):

- the claims are uniform;
- the legal venue for all the claims is in Denmark;
- the court has jurisdiction to try at least one of the claims;
- the court has substantial jurisdiction to try at least one of the claims;
- a class action is the best way to handle the claims;
- the group members can be identified and informed about the case in an appropriate matter; and
- a group representative who can represent all the plaintiffs can be appointed by the court.

In the claim form, the plaintiff must describe the group filing the claim. The court reviews whether the conditions for a class action are fulfilled.

Update and trends

The implementation of Directive 2014/104/EU – the Damages Directive – is still an open matter that may have an impact on the amount of litigation.

The court appoints a group representative who attends to the group's interests in the case. The different group members are not parties to the case.

Under section 26 of the Competition Act, the consumer ombudsman may be appointed as a group representative in a class action concerning claims for damages following an infringement of the Competition Act or of articles 101 and 102 TFEU. However, this has not yet happened in practice.

The normal regulation of court cases in the Administration of Justice Act otherwise applies to class actions.

Once the court has approved the class action and set down the framework for the case, the group members will be informed about the case as mandated by the court, for example, by public advertising.

The court will set a deadline for the persons covered by the group to opt in (or opt out) of the class action. A judgment in the case will be binding for all group members who have opted in.

In special circumstances where there is basis for an opt-out class action, all persons covered by the description and who have not opted out in due time will be bound by the judgment (see the Administration of Justice Act, section 254e(8)). Such cases are, for example, where there is a large number of claims of smaller value, where the claims cannot be expected to be tried individually before the courts.

Further, Chapter 23 of the Administration of Justice Act provides that multiple plaintiffs can join their cases – with each case being tried as an individual case – against the same defendant if similar conditions are met.

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

As mentioned above, the court decides whether a class action is permissible as a class action or if the claims should be filed individually.

22 Have courts certified collective proceedings in antitrust matters?

There are not yet any examples of collective proceedings in antitrust matters.

23 Can plaintiffs opt out or opt in?

Both options are available (see above).

24 Do collective settlements require judicial authorisation?

Pursuant to Chapter 23a of the Administration of Justice Act, settlements of approved class actions undertaken by the group representative must be approved by the court in accordance with the Administration of Justice Act, section 254h.

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?

There are 24 jurisdictional districts in Denmark.

Private actions relating to the same defendant and the same subject-matter cannot and will not in practice be brought simultaneously in more than one jurisdictional district, implying in turn that it is possible to have a national collective proceeding against a defendant based on the same subject matter.

26 Has a plaintiffs' collective-proceeding bar developed?

No, and so far there have been few class actions in Denmark.

Remedies

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

Compensation in the form of either damages or restitution constitute possible compensation remedies.

Compensation in the form of damages is subject to the general practice on liability in tort, implying inter alia that the injured party have to prove that said party has incurred a loss.

Restitution may be relevant, for example, with respect to the repayment of overcharged fees as a result of the defendant's abuse of dominance (see, for example, the Supreme Court judgment reflected in UfR 2005.2171 H).

In principle, it may also be possible to obtain relief from abusive contractual provisions or to obtain injunctions and court orders to secure certain legal positions.

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

Interim remedies, such as injunctions, are available provided the conditions set out in Chapter 40 of the Administration of Justice Act are met.

The main conditions for the imposition of an injunction are according to the Administration of Justice Act, sections 413–414:

- the plaintiff holds the legal right subject to the petition for the injunction or the order;
- the actions of the defendant necessitate the imposition of the injunction or court order; and
- the plaintiff will incur 'irreparable harm' if no injunction or court order is served and the ordinary remedies and deterrents provided for under the law, such as damages and penalty, do not suffice adequately.

29 Are punitive or exemplary damages available?

No.

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

Interest is awarded in accordance with the provisions in the Danish Act on Interest.

In general, the plaintiff may claim interest from the day the plaintiff institutes legal proceedings, for example, by handing in a writ to the court.

Interest may, however, be awarded earlier as interest according to the Interest Act is awarded 30 days after the day the plaintiff forwards a request of payment of the principal (on condition that the request provides the debtor with information that makes it possible for the debtor to evaluate the justification and size of the principal). Under special circumstances, interest can be awarded from an even earlier date, the time of the damage. This happened in the above-mentioned *Cheminova* case.

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

The DCCA does not issue fines. Fines are as main rule issued by the courts, but can also be voluntarily accepted by a perpetrator without a court case on the initiative of the Public Prosecutor.

Fines are not taken into account when setting damages.

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

In general, the party who loses the case bears the legal costs (see the Administration of Justice Act, section 312).

The courts decide which party shall bear the legal costs and award a certain amount of costs, which are often insufficient to cover the real size of the costs. The successful party can recover the costs awarded according to the court's decision.

The courts have published guidelines for recovery of costs. These guidelines are based on the value of the case, the court fee, and an average fee to the lawyers. Even though the courts are not bound by the guidelines (the courts can, for example, take into account specific costs related to surveyor experts), the courts' guidelines will in general constitute a good estimate of the costs that can be recovered.

In general, the successful party will not recover all its costs as the guidelines published by the courts are based on – often significantly – lower legal fees than those collected in practice.

33 Is liability imposed on a joint and several basis?

Liability may be imposed jointly and severally depending on the merits.

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

Defendants may claim to be indemnified from one or more other defendants, who are also party or parties to the damages proceedings. This may be done by way of submitting a separate indemnification claim against the other defendant in the same proceedings but can also be pursued after a judgment or settlement.

35 Is the 'passing on' defence allowed?

The 'passing on' doctrine is applied by the Danish courts, also in competition cases, and the defendant can argue that the plaintiff was not injured because it passed on any overcharges attributed to abusive or anticompetitive behaviour to a subsequent purchaser. While the burden of proof for such statement initially would normally lie with the defendant, no clear rule of the burden of proof has been established in practice. In principle, final users or consumers affected by a violation may also file a claim directly against the perpetrator.

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

There are other lines of defence similar to those invoked in other areas of actions for damages based on liability in tort.

This could be contentions for lack of causation, lack of proximate cause, no incurred liability, failure to mitigate the loss, limitation (time-barring) of the damages claim or forfeiture of the damages claim due to non-action from the plaintiff.

37 Is alternative dispute resolution available?

The parties may agree on arbitration or meditation, or simply negotiate a settlement out of court or agree on a pretrial settlement. In the first instance, the courts are obliged to seek to mediate a settlement (see the Administration of Justice Act, section 268).

There are no available statistics concerning alternative means of dispute resolution, but there are examples of successful settlements of claims out of court, for example, an undertaking having suffered damages caused by abuse of dominance obtained financial compensation without having to introduce litigation.

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Legislation and jurisdiction

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

England and Wales has proved to be a popular jurisdiction in which to bring private antitrust claims. In addition to 'stand-alone' and 'follow-on' actions (the former requiring the claimant to prove the infringement; the latter relying on an infringement decision of the UK or EU competition regulators), competition law issues are regularly invoked in the context of other commercial disputes.

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 other EU member states, although the implementation of the EU Directive on Antitrust Damages Actions (the Damages Directive) (which must be implemented by member states by 27 December 2016) is expected to introduce more extensive disclosure rules in other member states. 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 to the litigation. 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. Following the introduction of the revised Competition Appeal Tribunal Rules (SI 2015 No. 1648) (the CAT Rules) on 1 October 2015 the rules for disclosure in the Competition Appeal Tribunal (CAT) are similar to those in the High Court.

Specialist courts
The CAT is a specialist competition court which, since the Enterprise Act 2002 (EA02) came into force in June 2003, has had jurisdiction to hear follow-on damages claims. The purpose was to create a specialist forum in which such claims could be brought, with procedural rules more flexible than the Civil Procedure Rules (CPR) applicable in High Court proceedings. Following the commencement of the antitrust provisions of the Consumer Rights Act 2015 (CRA15) on 1 October 2015, the CAT is now able to hear both stand-alone claims and follow-on claims. Procedure in the CAT is governed by the CAT Rules which were revised and reissued on 1 October 2015. Follow-on claims and stand-alone actions can be brought in the High Court. The Competition Law Practice Direction provides for competition litigation in the High Court to be heard in two specific divisions (Chancery and the Commercial Court), with judges in those courts receiving competition law training.

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 costs. In the CAT, there is no such general rule and costs awards are made as the tribunal sees fit. The CAT Rules provide that when determining the amount of costs the CAT may take account of a number of factors including whether a party has succeeded on part of its case, even if that party has not been wholly successful.

Fee arrangements, including damages-based agreements (DBAs), 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. Changes to the basic rules for conditional fee arrangements in April 2013 mean that the 'uplift', or success fee, is no longer recoverable in costs from the losing party in most cases (including antitrust cases). Instead, the success fee must be paid by the claimant from the damages awarded.

Consumer Rights Act 2015
The specific antitrust provisions of the CRA15 came into force on 1 October 2015. The CRA15 seeks to, among other things, make it easier for consumers and businesses to gain access to redress where there has been an infringement of antitrust law. Section 81 of the CRA15 brought into force Schedule 8, which amended both the Competition Act 1998 (CA98) and the EA02, 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 SMEs. In addition, as described above, a number of changes were introduced by the revision of the CAT Rules. These changes are discussed in further detail below.

EU Damages Directive
EU governments formally adopted the Damages Directive on 10 November 2014. The Damages Directive must be implemented by national governments by 27 December 2016. The directive is designed to make it easier for claimants to claim damages from those found to have infringed competition law, in particular because it will introduce UK-style disclosure rules (with protection for leniency statements and settlement submissions, which are not withdrawn) in EU member states. In addition, it confirms the position that decisions of the Commission/CMA will be binding as to the existence of an infringement in damages actions; it confirms the existence of the 'pass-on' defence for defendants; and ensures that the limitation period for bringing damages actions is at least five years (in the UK, barring some limited exceptions, it is six years in the CAT and the High Court). The UK government Department for Business, Innovation and Skills (BIS) published a consultation (which closed on 9 March 2016) on its proposals for implementing the Damages Directive. At the time of writing the response to the consultation was still being considered by BIS.

Brexit
Shortly before the time of writing, the UK voted via a referendum to leave the European Union. The consequences of this for private antitrust litigation in England and Wales are not year clear and will depend on the nature of the UK's negotiated withdrawal and any deal struck between the EU and the UK government. For the time being EU law will continue to apply. We understand that the government may still press ahead with the implementation the Damages Directive into UK law. On this basis, any changes that are required as a result of the UK's negotiated withdrawal could be

implemented subsequently. In any event, the current private antitrust litigation regime will not be significantly altered by the implementation of the directive, which is in large part based on existing UK court procedure.

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 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; *Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ 637 para 156). The breach is of section 2(1) of the European Communities Act 1972, which imports the provisions of the Treaty on the Functioning of the European Union (TFEU) (in the competition law context, articles 101 and 102 TFEU) into English law; or of the provisions of Chapters I or II of the CA98.

Follow-on damages claims brought in the CAT are based on sections 47A and 47B of the CA98 as amended by the EA02. 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 EU competition authorities (ie, follow-on claims) or, since 1 October 2015 (following implementation of the CRA15), where a claimant brings an action for an 'alleged infringement' of competition law, a stand-alone action.

Section 47B CA98 (as amended by the CRA15) allows collective proceedings to be brought in the CAT. In contrast to the old section 47B, collective proceedings are no longer limited to opt-in 'consumer' claims brought on behalf of individual consumers by a specified body (the Consumers' Association). Under the new section 47B a collective proceeding may be commenced by someone proposing to be the class representative; will combine two or more claims; and may be brought on an opt-in or opt-out basis, ie, 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.

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 articles 101 or 102 TFEU or Chapters I or II of the CA98 has standing to bring a claim in the High Court or alternatively the CAT (section 47A CA98).

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

The CAT has jurisdiction to deal with follow-on and stand-alone damages actions as provided for in sections 47A and 47B of the CA98. In addition to the CAT, claimants can bring an action in the High Court for breach of statutory duty arising out of a breach of articles 101 or 102 TFEU or Chapters I or II of the CA98.

High Court

Both follow-on and stand-alone claims can be brought in the High Court. All claims, whether arising in relation to an infringement of articles 101 or 102 TFEU or of Chapters I or II of the CA98, should be brought in the Chancery Division or Commercial Court (see the Competition 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 County Court should be transferred to either the Chancery Division or, where appropriate, the Commercial Court.

Both follow-on and stand-alone claims that relate to infringements of articles 101 and 102 TFEU are based on breach of statutory duty. In relation to follow-on damages actions, sections 58 and 58A of the CA98 state that the court must accept the decision of the European Commission or the CMA 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). An infringement decision is considered to be final when the time for appealing against the infringement decision expires without appeal. Alternatively, if an appeal has been brought, an infringement decision will be final when:

- the appeal has been withdrawn, dismissed or otherwise discontinued; or
- the appeal has confirmed the infringement decision and the time for making any further appeal expires without a further appeal having been brought or there are no possible further avenues of appeal.

CAT

Both stand-alone and follow-on claims can be brought in the CAT. These are brought under sections 47A and 47B of the CA98 as amended by the CRA15. Sections 58 and 58A CA98 (as amended by the CRA15) states that the CAT will be bound by an infringement decision once it becomes final, as outlined for the High Court, above.

Section 47A applies to persons who have suffered loss or damage as a result of an infringement or alleged infringement of UK or EU competition law (Chapters I or II of the CA98 or articles 101 or 102 of the TFEU). Previously, because the CAT was only permitted to hear follow-on claims, there were a number of important cases on the nature of the CAT's jurisdiction. The Court of Appeal, for example, held that the part of a claim could be struck out if it did not form part of the regulator's infringement decision (*English Welsh and Scottish Railways v Enron Coal Services* [2009] EWCA Civ 647). In another case it held that the CAT did not have jurisdiction to hear a claim against a UK subsidiary which had not been an addressee of the decision (*Emerson Electric Co and Others v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559).

Following amendments introduced by the CRA15 to section 47B CA98, collective proceedings are not (as they once were) limited to consumer claims brought on behalf of individuals by a specified body. Instead, any two or more claims may now be combined in a collective proceeding. Collective proceedings may be opt-in or opt-out (ie, 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). Under section 47B(11) an opt-out proceeding will not include any class member who is not domiciled in the UK at a specified time. Those claimants must opt into the proceedings. The CAT must decide whether a claim should proceed on an opt-in or opt-out basis.

Transfer between the High Court and the CAT

Section 16 of the EA02 provides for the transfer of damages claims between the High Court and the CAT and vice versa. Specifically, it provides that regulations can be made in order to allow the High Court to transfer cases to the CAT. The CRA15 amended section 16 of the EA02 to allow regulations to be made in connection with the transfer from the CAT to the court of all or any part of a claim made in proceedings under section 47A of the CA98. The Section 16 Enterprise Act 2002 Regulations 2015 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. 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 CA98 be transferred to the High Court (CAT Rule 71). The CAT Rules also outline the procedure which 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 pursuant to the Section 16 Enterprise Act 2002 Regulations 2015. No party opposed the transfer of proceedings to the CAT. In his judgment Barling J outlined the reasons why the present proceedings were suitable to be heard in the CAT. These included that the proceedings were lengthy (nine weeks); they were complex with the latest agreed list of 20 separate issues running to 16 pages, which would involve considerable economic evidence and argument; and that there would be in the region of 1,000 pages of expert evidence as well as oral expert evidence. There was no risk that, as a result of transfer, the trial window would be jeopardised. In addition Barling J also noted that, as he was available to sit as chairman of the CAT panel, the transfer would not result in loss of such familiarity gained of the issues in the proceedings. He held that, in all the circumstances, including the parties' wishes, a transfer to the CAT was appropriate.

The first contested application for transfer under the new CAT Rules was 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. A key practical factor was the extent to which transfer would create any delay or increase in costs; and an important consideration would be the extent to which the two key distinguishing features of the CAT as compared with the High Court (a panel comprising two extra members with economics and other specialist competition experience, and logistical and legal support) arose. When weighing these factors Birss J said that no transfer should be made without some positive reason for doing so. The High Court held 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 and therefore Birss J rejected the application.

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 European competition law (Chapters I or II of the CA98 and articles 101 or 102 TFEU respectively). Private actions in the High Court can either be brought 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). Both stand-alone and follow-on claims can now be brought in the CAT.

A relevant finding of infringement by the Commission or the CMA is binding on the High Court or the 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. This position will be confirmed once the Damages Directive is implemented. It will require each member state to ensure that an infringement of EU competition law found by a final decision of its national competition authority or review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under national or EU competition law. In addition, the Damages Directive once implemented into UK law will require that where a final decision is taken in another member state that decision may be presented before the High Court or CAT as at least prima facie evidence that an infringement of competition law has occurred.

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 the defendant is domiciled in a member state, jurisdiction will be governed by Council Regulation 1215/2012/EU (the Brussels Regulation), which replaced the previous Brussels Regulation (44/2001/EC) for cases commenced on or after 10 January 2015, though it is, for current purposes, in very similar terms. Defendants domiciled in Norway, Switzerland and Iceland are subject to the provisions of the Lugano Convention, which is also similar in its terms.

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 codefendants to an existing action); article 25 (jurisdiction agreements); article 26 (submission to the jurisdiction); and article 30 (related actions).

Article 4(1) of the Brussels Regulation provides that 'persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state'. Under article 63 of the Regulation, a corporation is 'domiciled' in the UK if it is incorporated or has its registered office in the UK, or its central administration is controlled or exercised in the UK. This is subject to the limited exceptions of articles 24 to 26 (exclusive jurisdiction in certain limited areas, jurisdiction agreements and submission to the jurisdiction respectively) and article 9 (lis pendens), but also to provisions in articles 7(1), 7(2) and 8.

Article 7(1) relates to contract claims and states that, in matters relating to a contract, a person domiciled in a member state may, in another member state, be sued in the courts for the place of performance of the obligation in question. Unless otherwise agreed, this is the place where the goods were or should have been delivered or, in relation to a contract for services, where the services were or should have been provided. If the obligation being sued for is non-payment, it will be the member state in which payment was due to be made.

Article 7(2) provides that 'a person domiciled in a member state may be sued in another member state, ... in matters relating to tort, delict, or quasi-delict in the courts of the place where the harmful event occurred or may occur'. Long-standing EU case law interprets this to give the claimant a choice between the place where the damage was sustained and the place where the event giving rise to it took place. This provision is more relevant to private antitrust litigation than is article 7(1), given that infringements of competition law are treated as torts of breach of statutory duty. In *SanDisk Corporation v Philips Electronics* [2007] EWHC 332 (Ch), which related to an article 102 TFEU case, the court held that if the event setting the tort in motion took place in England or Wales, the English courts could have jurisdiction under this provision. In that case, however, the link to the UK was tenuous and the court concluded that jurisdiction could not be established on the facts. In *Cooper Tire & Rubber Company v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm) (upheld on other grounds on appeal in *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864), which related to an article 101 TFEU case, the court considered that the mere fact of the first meeting taking place in England and Wales would be insufficient to establish that the 'wrongful act' took place there. In *Deutsche Bahn AG v Morgan Advanced Materials plc* [2013] EWCA Civ 1484, the Court of Appeal, in dismissing applications for permission to appeal, held that under the first limb of article 7(2) there was no basis for an argument that a claimant must be the immediate victim of a harmful event. That would have involved an analysis of the connection between a claimant and the jurisdiction, rather than between the defendant and the jurisdiction. The Brussels Regulation was concerned with the latter. On the facts of the case, all of the alleged damage was damage which occurred in the UK. The court also held that in circumstances where the CAT had expressly directed a party who was contesting jurisdiction to take steps in proceedings, that party would not be 'entering an appearance' for the purpose of article 26 of the Brussels Regulation (see further below) and could continue to contest jurisdiction while at the same time contesting the merits of the case, provided that the intention to contest jurisdiction was shown clearly at the outset.

In *Iiyama Benelux BV and Others v Schott AG and Others* [2016] EWHC 1207 (Ch) the claimants (sellers of computer monitors) sought damages for an infringement of article 101 based, in part, on a number of decisions of the Commission including a cartel in relation to certain manufacturers of cathode ray tubes and another in relation to glass. The defendants applied for the claim to be struck out on two grounds: first that the alleged follow-on claims did not reflect the Commission decisions, and second that the claims lacked sufficient territorial connection with the EEA for article 101 to apply. In relation to the first ground, the High Court held that the claimants did not purchase products on any European market that was found by the decisions to have been rigged by the cartelists. All sales by the cartelists were some way down the supply chain from the ultimate purchases by the claimants. The decision in relation to glass found that a cartel intended to operate in the European market and intended to affect prices in the European market. In the cathode ray tube decision, the Commission decided that there was a worldwide cartel that operated so as to affect European sales. The claimants had wrongly sought to rely on decisions finding that cartels had been implemented in Europe in relation to a claim relating to purchases that had originally taken place in Asia. In relation to the second ground of appeal, Mann J held (following *Woodpulp* (*Ahlstrom Osakeyhtio v Commission* [1988] ECR 5193)) that there was no arguable case that the cartels relied on were implemented in the EEA. The mere fact that there was some end-of-the-road effect in the pricing of Iiyama purchases in Europe did not mean that the cartel was implemented there. The High Court also considered the application of the 'qualified effects doctrine' and whether it was sufficiently arguable that the offending behaviour had an immediate, substantial and foreseeable effect in the EU. Mann J found that the case on substantiality and foreseeability was very thin. In considering

immediacy the High Court found that the consequences of the non-EU cartels fixing their prices for glass and cathode ray tubes would have been felt in the market in which they were sold, not the EU market. Even if the effect of those sales was ultimately felt in the EU this was a 'knock-on' effect not an immediate one (following *Intel Corp v Commission* [2014] (T-286/09). On that basis, the qualified effects test did not generate a sufficient EU connection to allow the conduct relied on by the claimants to be considered as an article 101 infringement.

Article 8(1) of the Brussels Regulation provides (in relation to claims against a number of defendants) that claimants can bring a claim in the courts for the place where any one of the defendants is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. This enables a number of defendants from different member states to be sued in one action in England provided one of them (the 'anchor defendant') is domiciled there. It can also be relied on to sue a number of different companies within the same group in England. In reality, the majority of claims involve those brought by companies claiming to have been the victims of a cartel (typically, direct purchasers claiming they were overcharged by the cartel) and therefore tend to be brought as follow-on damages actions following a CMA or Commission decision finding a breach of Chapter I of the CA98 or article 101 TFEU. In such cases, the claimant may want to bring an action against all or some of the addressees of the CMA/Commission decision, so would seek to find an anchor defendant domiciled in England, bring the claim on the basis of article 2(1), and then bring in the remaining addressees on the basis of article 8(1).

The leading case on jurisdiction in this context is *Provimi v Aventis* [2003] EWHC 961 (Comm). The case arose out of the Commission's 2001 decision in the *Vitamins* cartel. A claim was brought in England by a German claimant (Trouw) against four companies in the Roche group, including the Swiss parent company F Hoffmann-La Roche AG and three subsidiaries that were English, Swiss and German. Of these, only F Hoffmann-La Roche was an addressee of the Commission's infringement decision. Jurisdiction was argued as a preliminary issue. The court held that Trouw had an arguable claim that the English subsidiary (Roche Products Limited) had 'implemented' the cartel by selling vitamins at the cartel prices, even if it had no knowledge of the cartel itself. This decision enables proceedings to be brought in England against a number of defendants on the basis of an English anchor defendant which is merely a subsidiary of one of the addressees of a Commission decision, in circumstances where the subsidiary neither played a direct role in the cartel nor had knowledge of it.

The effect of the judgment in *Provimi* was unsuccessfully challenged in the case of *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2010] EWCA Civ 864. The *Cooper Tire* case related to a follow-on action from the Commission's cartel decision in *Synthetic Rubber*. None of the addressees of the Commission's decision was English. However, a number of tyre manufacturers who had bought and used synthetic rubber brought an action for damages in the High Court relating to their purchases across Europe, on the basis that English subsidiaries of some (but not all) of the cartelists had implemented the cartel in the UK by selling products at cartel prices. These English subsidiaries would, as in *Provimi*, be able to serve as the 'anchor defendants' and a basis on which the other parties to the cartel (with no English subsidiaries) could be brought into the proceedings under article 8(1) of the Brussels Regulation. The Court of Appeal refused to grant a strike-out application lodged by some of the defendants, holding that the claim could be brought in England. In the court's view, although the anchor defendants were not addressees of the Commission's decision, the pleadings were sufficiently broadly drafted to encompass the possibility that they had knowledge of, or were party to, the cartel. The court considered that, since cartel agreements tend to be secret by their very nature, the strength or otherwise of the claimant's argument as to the knowledge possessed by the English subsidiaries could not be assessed until after disclosure. The result is that the English courts will have jurisdiction to hear Europe-wide cartel damages claims where the pleadings allege that an English-domiciled subsidiary of a cartelist implemented the cartel and either had knowledge of, or was party to, the anticompetitive conduct. The Court of Appeal in *Cooper Tire* considered the pleadings to be sufficiently widely drafted to encompass the possibility that the English-domiciled subsidiary implemented or had knowledge of the cartel.

Cooper Tire confirmed the attractiveness of England and Wales as a jurisdiction in which to bring Europe-wide cartel claims. It appears that, according to the Court of Appeal judgment, provided claimants can properly draft their pleadings to allege knowledge by an English subsidiary of the cartel arrangements, this may be enough to constitute the jurisdictional hook required to bring the claim in the English court. The effect of *Provimi* and *Cooper Tire* is that a claimant seeking damages for loss suffered as a result of a breach of European competition law can sue for its entire loss in the English courts irrespective of where the loss was suffered provided it can identify an English subsidiary of one of the addressees of the decision (which will be assumed to have implemented the anticompetitive conduct), or if its claim is sufficiently widely drafted as to allege or allow for the possibility that the English subsidiary had knowledge of or was party to the cartel. This is regardless of whether the claimant had any dealings with the English subsidiary. The English subsidiary does not have to be an addressee of the Commission's decision itself.

Toshiba Carrier UK v KME Yorkshire Limited [2012] EWCA Civ 1190 was an appeal against unsuccessful strike-out and summary judgment applications by UK anchor defendants on the basis that they were not addressees of a Commission decision ([2011] EWHC 2665 (Ch)). The case related to a claim for damages arising out of the Commission's cartel decision in *Industrial Tubes*, which was addressed to non-UK entities. The defendants to the claim included KME Yorkshire Ltd, a subsidiary of one of the cartelists, which was not an addressee of the decision. At first instance, the court refused to grant the strike-out and summary judgment applications, holding that the claim raised against the UK defendants was both a follow-on claim and a stand-alone claim. The court also found that, in so far as it was necessary to prove knowledge on the part of the UK defendants as to the cartel agreement or arrangements, an initial failure to plead knowledge had been remedied in correspondence between the parties' solicitors.

The Court of Appeal upheld the first-instance judgment. While noting that the claimants' pleaded case was 'far from a model of clear and comprehensive drafting' and that the claim form fired a 'blunderbuss of alternative allegations', the Court of Appeal found that the allegations made by the claimants were sufficient to ground a cause of action against KME Yorkshire Ltd for infringement of article 101 TFEU, and a corresponding breach of statutory duty, to withstand an application to strike out the claim or for summary judgment in favour of the defendants. This was because acts of implementation of a cartel alone are capable of amounting to concerted practices where they are carried out pursuant to an anticompetitive agreement made between others and with knowledge of that agreement, and the claimants had sufficiently pleaded this stand-alone claim. Regarding the assertion made by the defendants that there was a lack of evidence to support the allegations made against KME Yorkshire Ltd, the Court of Appeal found that the High Court was perfectly entitled to exercise its discretion by refusing summarily to dismiss the claim despite the paucity of evidence to support the allegations, as it was in the nature of anticompetitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anticompetitive conduct of members of the same group of companies. Because the claimants had been found to have made a stand-alone claim against KME Yorkshire Ltd alleging that it participated in and implemented the cartel arrangements with knowledge of the cartel agreement, it was unnecessary to decide whether the anticompetitive acts and intentions of a parent company were to be imputed to its subsidiaries in the context of article 101 TFEU. However, having considered the *Cooper Tire* and *Provimi* judgments, Etherton LJ expressed his own view that it was clear that, 'save in a case where the parent company exercises 'a decisive influence' (in the language of EU jurisprudence) over its subsidiary or the same is true of a non-parent member of the group over another member, there is no scope for imputation of knowledge, intent or unlawful conduct.'

England is an attractive jurisdiction for many claimants, and defendants are wise to the liberal scope of jurisdiction under the Brussels Regulation following *Provimi* that will allow claims to be brought there. As a result, defendants are seeking other ways in which the jurisdiction of the English courts might be limited. In this regard, the 'Italian torpedo', typically used in intellectual property cases, has been deployed in competition cases where a defendant seeks to pre-empt a claimant's choice of jurisdiction by commencing proceedings seeking a negative declaration as to liability in another European jurisdiction. Articles 29 and 30 of the Brussels Regulation provide for courts to dismiss or stay proceedings where the same cause of action or a related action is brought in the courts of a different member state. In *Cooper Tire*, in an action following on from the Commission's decision in the *Synthetic Rubber* cartel, companies belonging to the Eni Group applied to the Italian courts for a declaration that the cartel did not exist, that the Eni companies had never adopted anticompetitive

behaviour in relation to the activities covered by the Commission's decision and that the alleged cartel had had no effect on prices, and that the defendants could not complain that they had suffered damage as a result of the cartel. When subsequently sued in England, the defendants sought to rely on articles 29 and 30 of the Brussels Regulation to dismiss or stay the English proceedings, on the basis that the Italian courts were the courts first seised. The Italian court issued a preliminary ruling on the negative declaration in 2009 stating that it considered the use of the Italian torpedo to be 'unconstitutional'. That ruling was appealed. In the meantime, in proceedings before the English High Court, the court determined that it did have jurisdiction to hear the claim (brought by the defendants to the Italian proceedings), that the court was not required to grant a stay under article 29 of the Brussels Regulation, and that the court should not exercise its discretion to grant a stay under article 30 of that Regulation (see *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2009] EWHC 2609, upheld on appeal in *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Incs* [2010] EWCA Civ 864).

If a court outside the EU is seised of the same or a related cause of action before the English court is seised, the English court has discretion to stay its proceedings provided that a judgment given by the non-EU court is enforceable in England and a stay is necessary for the proper administration of justice (articles 33 and 34 of the Brussels Regulation).

Article 25 of the Brussels Regulation provides that if parties have agreed that a court of a member state is to have jurisdiction to settle legal disputes between them, then those courts will have jurisdiction. The Brussels Regulation provides that, unless the parties have agreed otherwise, that jurisdiction will be exclusive. There are a number of formal requirements for article 25 to apply (eg, the jurisdiction agreement needing to be evidenced in writing or by prior course of dealing, as well as not being null and void as to its substantive validity under the law of the chosen court, including its conflict of laws rules). As a number of private antitrust litigation claims in England are brought by customers of parties to a cartel, there may in such cases be contracts in place between the parties (eg, relating to their supply contracts) that specify a jurisdiction clause. Whether the clause is drafted widely enough to fall within the scope of article 25 will be a matter of interpretation. In *Provimi* such a clause which stated that 'any controversies' that could not be settled would be brought before the courts in Switzerland was held not to include disputes over an overcharge on cartel products and therefore did not constitute a jurisdiction clause under article 25. This is a relatively narrow interpretation of article 25 and may limit a claimant's ability to rely on this jurisdiction gateway going forward. Note, however, that the decision was reached on a preliminary issue and leave to appeal was granted although the case settled before the appeal was heard. In *Ryanair Limited v Esso Italiana Srl* [2013] EWCA Civ 1450, Ryanair brought a claim for breach of contract and breach of statutory duty arising from a decision of the Italian competition authority which had found Esso Italiana and others guilty of operating a cartel in relation to the supply of jet fuel to various Italian airports. Ryanair argued that the English courts had jurisdiction in relation to the contractual claim as a result of a non-exclusive jurisdiction clause which provided that for the purposes of 'disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the Courts of England'. Ryanair also argued that the English courts had jurisdiction over the breach of statutory duty claim as the infringement of article 101 TFEU was an essential element of the breach of contract claim. The Court of Appeal held that the breach of contract claim had no prospect of success and accordingly the jurisdiction argument in relation to the breach of statutory duty claim was not pursued further. However, the court went on to state that it also saw nothing to justify a finding that the parties to the contract could reasonably be regarded as intending that a pure claim for breach of statutory duty against a cartel of Italian suppliers of fuel oil at Italian airports for breach of EU or Italian law should fall within the jurisdiction provisions of an English law contract.

Under article 26 of the Brussels Regulation, any defendant (not only one domiciled in a member state) entering an appearance in the courts of the member state is deemed to submit to that member state's jurisdiction. The exception is where the defendant is appearing to contest the court's jurisdiction, provided it raises the jurisdictional challenge at the first available procedural opportunity under relevant national law. Anything going beyond a challenge to jurisdiction will be considered to be 'entering an appearance' and will therefore be taken as submission under article 24 (although note the Court of Appeal's findings in *Deutsche Bahn AG v Morgan Advanced Materials plc* [2013] EWCA Civ 1484 above).

The jurisdiction rules of the Brussels Regulation (and Lugano Convention) only apply to defendants domiciled in a member state or in Norway, Switzerland and Iceland (as above). For defendants domiciled elsewhere, the residual common law jurisdiction regime will apply. In such cases, jurisdiction depends on whether the defendant is located within England and Wales. If so, the English courts have jurisdiction, although they can stay proceedings on application if it is shown to them 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 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 CPR (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. In practice, the majority of private antitrust litigation in England and Wales is likely to be brought following on from cartel decisions of the UK or EU competition regulators whose decisions are usually addressed to at least one undertaking within the EU, and therefore with at least one subsidiary domiciled in a member state. Recourse to the common law jurisdiction regime is therefore only likely to be necessary in a minority of cases.

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 TFEU and Chapters I and II of the CA98. As regards defendants from other jurisdictions, as noted above, the Brussels Regulation allows for defendants not domiciled in England and Wales to be sued in the English courts under relevant provisions of that regulation.

In *Safeway Stores Ltd v Twigger* [2010] EWCA 1472, Safeway brought an action against its former directors and employees to seek to recoup the amount of an agreed fine that would be paid following settlement in the OFT's (as it then was) *Dairy* investigation. The investigation alleged breaches of Chapter I of the CA98 against a number of dairy companies and supermarkets in the UK. The OFT's case was settled in respect of Safeway's liability (which had been the subject of a takeover by Morrisons). It was agreed that Safeway would pay a fine that would be subject to a reduction if it continued to cooperate with the OFT's investigation until the issuance of a decision. Following receipt of the statement of objections but prior to the decision, Safeway issued proceedings against its former directors and employees alleging breach of contract and negligence, and seeking to recover the full amount of the fine from them. The Court of Appeal unanimously held (reversing the decision of Flaux J at first instance) that Safeway's claim should be struck out, holding that the ex turpi causa maxim applied to preclude Safeway from seeking to recover from the defendants either the amount of the penalty imposed by the OFT or the costs incurred as a result of the OFT's investigation. An undertaking that infringes provisions of the CA98 relating to anticompetitive activity and is duly penalised by the CMA therefore cannot recover the amount of such penalties from its directors or employees whose actions allegedly caused the infringement.

Private action procedure

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

Costs can be significant in the context of litigation in the English courts (see question 32), 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.

Conditional fee arrangements (CFAs) may be entered into in the context of English litigation. 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 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. Changes to the basic rules for CFAs in April 2013 mean that the 'uplift', or success fee, is no longer recoverable in costs from the losing party in

most cases (including antitrust cases unless the claimant is in liquidation or administration). Instead, the success fee must be paid by the claimant from the damages recovered.

DBAs have been introduced as an additional type of funding (as provided for by the Courts and Legal Services Act 1990 (as amended) and the Damages-Based Agreements Regulations 2013). Under these agreements, 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) CA98 although CFAs are permitted.

Third-party funding by a professional funder is also an option. In the competition law context, *Arkin v Borchard Lines Limited* is an example of the claimant pursuing a claim funded by a professional funder. In that case, 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 ([2005] EWCA Civ 655).

Potential litigants may also have legal expenses insurance, or may be able to take out after-the-event insurance to cover their legal costs. Following the changes in April 2013, an after-the-event insurance premium cannot be recovered from the losing party (except, again, in certain cases including insolvency-related proceedings and publication claims).

8 Are jury trials available?

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

9 What pretrial discovery procedures are available?

High Court

Disclosure in the High Court is governed by CPR 31, which until April 2013 provided for three broad categories of disclosure: 'standard' disclosure, 'specific' disclosure, and 'pre-action' disclosure. The rules now 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 which 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 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 which adversely affect their own case, adversely affect another party's case, or support another party's case. Privileged documents (see question 11) need to be identified in the disclosure statement but 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. 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.

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.

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) states that pre-action disclosure can only be ordered where the respondent is likely to be a party to subsequent proceedings; the applicant is also likely to be a party to those proceedings; if proceedings had started, the documents or classes of documents of which disclosure is sought would fall within standard disclosure; and 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. Note that 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. That request related to a potential claim under articles 101 and 102 TFEU and was brought in the Commercial Court. The defendants denied there had been any anticompetitive conduct and resisted the applications for pre-action disclosure. The court agreed with them that as a matter of both jurisdiction and discretion the material sought was not necessary for Hutchison 3G to plead its case, that the claim was speculative in terms of liability, that the scale of the disclosure requested was very large and unfocused and was likely to go further than that which would be required under standard disclosure, and that the costs and difficulty of obtaining the documents requested were prohibitive.

The status of leniency applications and settlement agreements with the Commission or CMA has also been the subject of dispute in the context of High Court proceedings in recent years. In relation to leniency applications, a distinction should be drawn between the application itself, and the documentation submitted in support (which will usually be contemporaneous documents, for example, minutes of cartel meetings, evidence of contacts between competitors, etc).

The European Court of Justice (ECJ) Case C-360/09 *Pfleiderer v Bundeskartellamt* and the judgment of the High Court in *National Grid Electricity Transmission plc v ABB Ltd* [2012] EWHC 869 (Ch) have gone some way to clarifying the position in relation to the disclosure of documents submitted to national competition authorities and the European Commission under their respective leniency regimes.

The *Pfleiderer* judgment arose out of a decision of the German national competition authority (the Federal Cartel Office (FCO)) which found an infringement of article 101 TFEU by a cartel of European manufacturers of decor paper. Following the decision, Pfleiderer, a purchaser of decor paper, applied to the FCO seeking access to the material on its file on the cartel, including documents relating to leniency applications, with a view to bringing follow-on damages actions. The FCO rejected Pfleiderer's request in part and Pfleiderer then brought an action before the Bonn court challenging the FCO's decision, seeking access to the complete file. The Bonn court made a reference to the ECJ.

In its judgment, the ECJ stated that in considering an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, 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. As such, the ECJ held that EU law does not preclude a damages claimant from being granted access to documents relating to a leniency procedure but that it is for the courts and tribunals of the member states, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by EU law.

The *Pfleiderer* judgment was considered in the English High Court in *National Grid Electricity Transmission plc v ABB Ltd* [2012] EWHC 869 (Ch). In the course of the litigation, National Grid applied for disclosure of certain documents which may have contained information supplied in the context of leniency applications. These documents broadly fell within three categories:

- the confidential version of the Commission's decision;
- ABB's (ie, the immunity applicant's) reply to the Commission's statement of objections; and

- replies to requests for information made by the Commission. National Grid did not apply for disclosure of the corporate statements themselves.

The judge (Roth J) invited, and received, an amicus curiae observation from the Commission in relation to disclosure of certain leniency documents submitted to it as part of its leniency regime. The observations stated, among other things, that 'the Commission's long-established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection both during and after its investigation.' Having considered these observations, Roth J held that Pfleiderer, which was a decision in relation to the leniency programme of the national competition authority in Germany, equally applied to the Commission's leniency programme and, accordingly, to the disclosure application in issue. He also held that it was not exclusively the Commission's jurisdiction to determine the disclosure of leniency materials submitted to it and that a national court could conduct the Pfleiderer balancing exercise, weighing the interest in disclosure as against the need to protect an effective leniency programme.

Roth J held that a number of factors were relevant in the balancing exercise. The first of these was whether such disclosure would increase the leniency applicants' exposure to liability or would put these parties at a relative disadvantage as against the parties that did not cooperate.

Roth J stated that he did not think this was a realistic prospect in the circumstances of the case. Second, he considered relevant the potential effect of a disclosure order in this case in deterring potential leniency applicants as regards other cartels that are yet to be uncovered. Third, Roth J considered whether the disclosure sought was proportionate, an argument which he considered in light of whether the information was available from other sources and the relevance of the leniency materials being sought. As regards the first of these, Roth J held in the circumstances of the case, there were no other means available (at least not without excessive difficulty) for National Grid to derive the information. The question of relevance needed to be determined on a document by document basis, an exercise which Roth J subsequently undertook. Ultimately, Roth J ordered only very limited disclosure of the documents requested.

The Damages Directive requires national governments to legislate to ensure that leniency statements and settlement submissions are protected from disclosure in damages claims at any time (before or after the file is closed) (article 6(6)). In addition, national courts are permitted to order disclosure of other information prepared for the purpose of proceedings of a competition authority and information prepared by the authority in the course of its proceedings, but only after the competition authority has closed its proceedings (article 6(5)). This will include settlement submissions that have been voluntarily withdrawn by a party.

In a related development in the National Grid claim, following an application for specific disclosure by National Grid, Roth J ordered disclosure of certain documents held by the French-domiciled defendants, despite their argument that providing such disclosure would put them at risk of criminal prosecution in France by virtue of the 'French blocking statute' ([2013] EWHC 822 (Ch)). Roth J proceeded on the basis that the production of the documents would infringe the French blocking statute but held that the existence of the blocking statute was not a sufficient reason for not ordering disclosure in this case as the likelihood of any prosecution being brought was very low. This decision, together with a decision arising out of the *Servier* litigation, was upheld on appeal (*Secretary of State for Health v Servier Laboratories Limited*; *National Grid Electricity Transmission plc v ABB Limited* [2013] EWCA Civ 1234).

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* [2014] EWHC 3513, the claimants claimed damage in respect of loss that they alleged was caused by the conduct of British Airways (BA) 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. In addition, the court ordered that the claimants could not bring proceedings against anybody other than those already listed (in the Part 20 proceedings) without permission of the court. The court held that these arrangements were consistent with the Court of First Instance's judgment in *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* [2007] T474/04 in protecting trade secrets and confidentiality. Separately, in May 2015, the Commission published a non-confidential version of the decision.

The Court of Appeal overturned this judgment on appeal. It found that the judge was not entitled as a matter of law to relax or amend the *Pergan* safeguards (to protect the presumption of innocence) recognised by the Commission in its publication of the provisional non-confidential decision. There was no principled basis for an approach which permits a judge in national court proceedings to allow a claimant in a damages action to achieve an advantage (access to an unredacted, non-*Pergan* protected, version of the decision) which such a party could not obtain at the Community level. The General Court in *Pergan* was well aware that disclosure in that case would create a risk that Pergan would be subject to damages actions in national courts and that one purpose of Pergan's application was to ensure that particular information did not reach potential claimants. Delay by the Commission in the production of the non-confidential decision did not relieve the High Court of its mutual cooperation obligations under article 4(3) TFEU and in this case there was a real risk that the judge's order would conflict with any future decisions by the Commission on outstanding redaction applications. Permission to appeal the decision to the Supreme Court was denied.

In a further related development, in December 2015 the General Court annulled the Commission's decision in *Air Cargo* as against a number of the addressees. The Commission announced that it will not appeal the judgment. The High Court judge responsible for the ongoing litigation suggested that she would write to the Commission to ask whether it had decided to adopt a new decision and whether it had decided to withdraw the decision against British Airways and other airlines that did not appeal the decision.

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, as noted above, 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. 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 CA98). A party's duty to disclose documents is limited to documents which are or have been in its control. In practice, as with High Court proceedings, the CAT orders disclosure after close of pleadings. 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.

In addition to this 'standard disclosure' in the CAT, it is also possible for parties to request specific disclosure, in particular because the requirement to disclose documents with pleadings only applies to documents supporting the case. In this respect, the CAT has adopted the general rules of disclosure set out in the CPR (see *Aqua Vitae (UK) Limited v DGWS* [2003] CAT 4). In order 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 tribunal will look at the case as a whole (*Albion Water Limited v Water Services Regulation Authority* [2008] CAT 3).

The CAT Rules introduced more detailed guidelines for disclosure in proceedings in the CAT. The CAT may at any point give directions as to how disclosure is to be given including what searches are to be undertaken, whether lists of documents are required, the format in which documents are to be disclosed and the requirements in relation to documents which no longer exist (CAT Rule 60(3)). The CAT will decide whether and when a disclosure report and electronic documents questionnaire should be filed (CAT Rule 60(2)). Under CAT Rule 60(1)(b), a disclosure report (which will be verified by a statement of truth) will describe:

- briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;
- where and with whom those documents are or may be located;
- in the case of electronic documents, how those documents are stored;
- an estimate of the costs of giving disclosure; and
- which directions are to be sought regarding disclosure.

Under CAT Rule 60(1)(c), an electronic documents questionnaire is in the form of the questionnaire in the schedule to Practice Direction 31B of the CPR.

The CAT Rules propose that the claimant or claimants submit a claim form which states (among other things) whether the claim is in respect of an infringement decision (and if so whether that decision has become final), a concise statement of the relevant facts and of any contentions of law which are relied on and the relief sought (CAT Rule 30(3)). The CAT Rules require a claimant to annex a copy of the infringement decision (in the event that they have a copy of it): 'copies of any documents referred to in the claim form' and 'such other documents or annexes as may be specified by practice direction' (CAT Rule 30(5)).

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). In order for the CAT to make an order, similar requirements to those set out in CPR Part 31 for the High Court apply. CAT Rule 62(3) states that the CAT may make an order only where:

- the respondent is likely to be a party to subsequent proceedings;
- the applicant is also likely to be a party to those proceedings;
- the CAT would, if proceedings had started, have ordered disclosure; and
- disclosure before proceedings have started is desirable either in order to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings, or to save costs.

The CAT Rules 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 in order to dispose fairly of the claim or to save costs (CAT Rule 63). Under CAT Rule 53(2)(l) the CAT may give directions 'for the disclosure and the production of by a party or third party of documents or classes of documents'.

In addition, the CAT Rules provide that a person may apply, without notice, for an order permitting the withholding of disclosure of a document on the ground that disclosure would damage the public interest (CAT Rule 64). Such an application must be supported by evidence and, for the purpose of deciding an application, the CAT may require the person seeking to withhold the document to produce it to the CAT, and invite any person, whether or not a party, to make representations (CAT Rule 64(6)).

The CAT Rules also outline that a party to whom any document has been provided by the CAT, by any other party as part of the proceedings, or in accordance with an order under CAT Rule 63 (an order for disclosure against a person who is not party to the proceedings) may use that document only for the purposes of those proceedings (CAT Rule 102). This rule will apply except where:

- a document has been read to or by the CAT, or referred to, at a hearing which has been held in public;
- the CAT gives permission; or
- the party who produced or disclosed the document and the person to whom the document belongs agree.

This exception will not apply to a document or part of a document provided within a confidentiality ring, if the CAT gives permission for further use of that document. The CAT may, either of its own initiative or on the application of a party, make an order restricting or prohibiting the use of any document provided in the course of proceedings, even where the document has been read to or by the CAT, or referred to, at a hearing which has been held in public (CAT Rule 102(5)). An application for such an order may be made by:

- by a party;
- by any person to whom the document belongs; or
- by any person who claims that the document contains confidential information relating to them.

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 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 will of course depend on the witness's credibility, as well as the other circumstances of the case. A party wishing to secure 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 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 exchange of expert reports, written questions may be put to the expert by the other party. The experts may also be ordered to meet in order to identify those 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 and Littlewoods 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 as to 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.

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) (CAT Guide) states that the expert is subject to an overriding obligation to the tribunal to assist on the matters within his or her expertise. Single joint experts may also be appointed in CAT proceedings, although as noted above it is unlikely that they would be in the context of complex follow-on damages claims (CAT Guide paragraph 7.66).

In relation to evidence, CAT Rule 55(1) provides that the CAT may give directions, among other things, as to:

- the provision by parties of statements of agreed matters;
- the issues on which it requires evidence, and the admission or exclusion from the proceedings of evidence;
- the nature of the evidence which it requires to decide those issues;
- whether the parties are permitted to provide expert evidence;
- any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally; and
- the way in which evidence is to be placed before the CAT.

Under CAT Rule 55(5), the CAT may also dispense with the need to call a witness to give oral evidence if a witness statement has been submitted in respect of that witness. 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 UK to attend as a witness before the CAT and/or answer any questions or produce any documents or other material in their possession or control which are relevant to the proceedings (CAT Rule 56).

In relation to experts, the CAT Rules provide that the CAT may give directions as to whether the parties are permitted to provide expert evidence (CAT Rule 55(1)(d)). They 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)).

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. First, 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. Second, 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 ECJ in case C-550/07 P *Akzo Nobel Chemicals Ltd v Commission*. 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. Third, the communication must be made for the purpose of giving or receiving legal advice. 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.

Litigation privilege

Litigation privilege covers confidential communications between client and lawyer or between one of them and a third party, which 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 which may lead to the obtaining of evidence. These must be the sole or dominant purposes of the communications if they are to attract litigation privilege. This would cover, for example, correspondence with witnesses of fact, experts, reports and drafts etc made in the context of bringing or defending a follow-on damages action. Litigation would probably be considered to be 'in prospect or pending' at the stage of the Commission or 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 OFT (as it then was) for disclosure of information about Tesco's contacts with potential witnesses and records of discussions with those individuals. In so doing, the CAT stated that the question with regard to litigation privilege was whether the OFT's investigation could properly be classified as adversarial, as opposed to merely investigative or inquisitorial, at the time that Tesco contacted potential witnesses prior to the OFT's *Dairy* retail price initiatives decision. 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.

Privileged status of leniency applications and settlement agreements?

In relation to follow-on damages arising from a decision of the Commission or the CMA, any document submitted by the parties to the investigation to the regulator has arguably lost its 'confidential' status and may therefore not be privileged. Such documents would form part of the case file and therefore be disclosed to other parties as part of access to file. The position taken by the Commission is that, as a matter of public policy, leniency applications must not be disclosed (paragraph 40 of the Leniency Notice (OJ 2006 C298/22)) as to do so risks jeopardising the attractiveness of making an application, and thereby threatens the leniency regime; this is also the position it has adopted in relation to settlement agreements (paragraph 40 of the Settlement Notice (OJ 2008 C167/6)). In *National Grid Electricity Transmission plc v ABB Ltd* (see above), the Commission submitted an amicus curiae observation in which it stated that:

> *The willingness of companies to provide comprehensive and candid information is crucial to the success of the leniency programme, which is the most effective tool at the Commission's disposal for the detection of secret cartels. To this end, the Commission's policy has been that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members which refuse any cooperation. In practical terms, this means the Commission's long-established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection both during and after its investigation.*

Furthermore, the European Competition Network (representing EU national competition authorities and the Commission) passed a resolution on the 'Protection of leniency material in the context of civil damages actions' (23 May 2012) in which it stated that the protection of leniency applications was 'fundamental for the effectiveness of anti-cartel enforcement'.

The Damages Directive makes it clear that leniency statements and settlement submissions must be protected from disclosure in damages claims at any time (before or after the file is closed) (article 6).

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

Under section 188 of the EA02 only an individual can be found guilty of the criminal cartel offence. Private damages actions, on the other hand, would tend to be 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 US, in June 2008 three Dunlop executives pleaded guilty and were convicted in the UK 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 P*assenger 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.

The CMA (formerly the OFT) charged three of individuals (one of whom pleaded guilty) in relation to a suspected cartel relating to the supply of galvanised steel tanks for water storage. In June 2015, a jury unanimously acquitted the two executives who pleaded not guilty. In March 2016, a UK businessman pleaded guilty to criminal charges (under section 188 EA02) for his alleged role in fixing prices for precast drainage products.

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 claimant in a private action is required to prove all the elements of his or her claim, subject to the fact that a relevant decision of the Commission or the CMA 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). As such, the claimant will be required to show evidence of loss and causation in a follow-on

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

The EA02 has specific rules governing the admissibility of evidence discovered in criminal proceedings. The CMA and the Serious Fraud Office (SFO), the bodies in the UK responsible for investigating the criminal cartel offence, 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 damages unless the information has already legitimately been disclosed to the public. The CMA and the SFO have entered into a memorandum of understanding which outlines the basis on which the CMA and SFO will cooperate when investigating or prosecuting individuals under the criminal cartel offence in circumstances where serious or complex fraud is suspected.

There are no provisions protecting leniency applicants from follow-on damages claims brought in England and Wales. The Damages Directive will also require member states to ensure that an infringement of EU competition law found by a final decision of a national competition authority or review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under national or EU competition law. However, under the Damages Directive member states shall ensure that an immunity recipient is jointly and severally liable to its direct or indirect purchasers 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 11(4)). In addition, the amount of contribution from an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of harm it caused to its own direct or indirect purchasers or providers (article 11(5)). Furthermore, to the extent that the infringement caused harm to parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm (article 11(6)).

The CMA and the Commission do not routinely disclose documents obtained in their investigations directly to private claimants.

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

National courts are under a duty not to take decisions running counter to those of the European Commission or courts (article 16 of Regulation 1/2003). Furthermore, a relevant decision of the Commission or the CMA 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 UK in circumstances where the underlying Commission decision is being appealed to the European courts, defendants may therefore apply for an action to be stayed pending the outcome of the appeal.

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 *WM Morrison Supermarkets plc v MasterCard Incorporated* [2013] EWHC 1071 (Comm), the claimants claimed damages against MasterCard in respect of alleged losses suffered as a result of intra-EEA and UK arrangements for the setting of multilateral interchange fees on MasterCard transactions. The European Commission had adopted an infringement decision in relation to MasterCard's intra-EEA arrangements that was being appealed to the ECJ. No infringement decision had been made in relation to the UK arrangements (an earlier OFT decision had been overturned on appeal). The claim therefore comprised both a follow-on claim (in relation to the intra-EEA arrangements) and a stand-alone claim (in relation to the UK arrangements).

Certain of the *MasterCard* defendants made an application for an immediate stay of proceedings until the ECJ appeal had been determined. The court dismissed the application, finding that although a stay would be necessary at some time before trial, the defendants ought to be required to file their defences and then a case management conference held regarding the future progress of the case. This was on the basis that:

- in the overall scheme of the litigation, the expense to which the defendants would be put in terms of time and money in pleading defences and preparing for a case management conference was relatively modest;
- the anticompetitive behaviour complained of began in 1992 and there was a 'pressing need' to proceed with the litigation;
- even if the appeal to the ECJ resulted in the annulment of the decision, there was an appreciable chance that the UK claim would continue and so the risk that the defendants might incur wasted costs and expend wasted time for which they were not fully compensated was not compellingly high; and
- if there was an immediate stay and the appeal to the ECJ was dismissed, the claimants would suffer the prejudice of a considerable delay in having their claims determined for which they might not be fully compensated by an award of interest.

The court refused the application for an immediate stay and ordered that the action should continue to a case management conference (CMC). This was in line with the approach taken by the High Court in *National Grid v ABB* [2009] EWHC 1326 (Ch). A further application for a stay of proceedings in the *MasterCard* litigation was rejected by the court, which conducted a similar analysis (*WM Morrison Supermarkets plc v MasterCard Incorporated* [2013] EWHC 3082 (Comm)).

In *Secretary of State for Health v Servier Laboratories Ltd* [2012] EWHC 2761 (Ch), the defendants applied for a stay of proceedings on the basis that there was a substantial overlap between the claim and an ongoing investigation by the European Commission: both the claims and the Commission's investigation concerned alleged infringements of articles 101 and 102 TFEU in relation to the same product, Perindopril, and the same conduct in relation to that product, namely the enforcement of Perindopril patents and the conclusion of patent settlement agreements with generic companies. The court partially granted the stay until the conclusion of Servier's oral hearing in the Commission investigation. However, it held that it would not be appropriate to order the stay to continue for more than a short period after the end of the oral hearing, after which disclosure could commence (although the court recognised that a trial could only take place after all European proceedings had been exhausted). In a further hearing (unreported), Servier successfully applied to amend the case management directions to postpone the commencement of its disclosure obligations until the conclusion of an appeal in relation to the impact of the French blocking statute (to which see further question 9) on its disclosure obligations in the case.

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 certain 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 which 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:

- 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.

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 CA98 claims see also Rule 85(1)(k) for collective proceedings under section 47B CA98. In addition, section 58A CA98 (as amended by the CRA15) states that in respect of claims brought on the basis of an infringement decision of the Commission 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). Under the old rules, follow-on claims could not be brought until a decision became final unless the CAT granted permission. There were a number of important cases on this issue which may still be relevant to the CAT's consideration of whether to stay a follow-on claim or part of such a claim in circumstances where a decision has not yet become 'final'. The outcome of the Court of Appeal's judgment in *BCL Old Co Ltd v BASF SE* [2009] EWCA Civ 434 was that permission to bring a follow-on claim is limited to circumstances where the substance of the infringement finding is being contested, and is not required where an appeal relates only to the fine. In *Emerson I*, the claimant sought to bring a follow-on action in the CAT against Morgan Crucible, the leniency applicant in the Commission's infringement case. Other addressees of the decision were appealing the decision, but Morgan Crucible, as the leniency applicant, was not. The CAT held that permission was required to commence proceedings where the underlying infringement decision was being appealed by any of the addressees (*Emerson Electric Co v Morgan Crucible* [2007] CAT 28). However, in *Emerson II*, the CAT granted permission for the action to be brought against Morgan Crucible – although it indicated that proceedings may be stayed prior to the case coming to trial, and proceedings were in any event stayed against Morgan Crucible by agreement (*Emerson Electric v Morgan Crucible* [2007] CAT 30). In *Emerson III*, the claimants went back to the CAT to ask for permission to bring proceedings against the other parties to the Commission's infringement decision who were appealing to the European courts, but permission was refused (*Emerson v Morgan Crucible* [2008] CAT 8).

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 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). The High Court in *Attheraces v British Horseracing Board* [2005] EWHC 3015 (Ch) held that while the standard of proof is the civil standard of balance of probabilities, the seriousness of an infringement of the competition rules required the proof of evidence to be 'commensurately cogent and convincing'. This is sometimes referred to as a 'heightened civil standard'.

The Damages Directive, once introduced through national legislation, will require a presumption that the infringement caused harm and that the infringing undertaking should have the right to rebut this presumption (article 17(2)).

In relation to passing-on defences, see question 35.

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; how extensive disclosure is; the number of witnesses; 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, which 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 (see, for example, the Admiralty and Commercial Courts Guide, section J1), but this will be rare for a damages claim.

Cases in the High Court can be subject to strike-out 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 3 and 24). For example, a margin squeeze allegation made under article 101 TFEU was summarily dismissed by the High Court in *Unipart v O2* [2002] EWHC 2549 (Ch) within three months of the claim being issued. On the other hand, in *Adidas v ITF* [2006] EWHC 1318 (Ch) the court held that the complexity of the competition law issues meant that striking out the claim or defence would be inappropriate.

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)(l)), 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 (see question 36) to be tried as a preliminary issue. The 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 in order to hear the preliminary issue as being potentially substantial. In *Streetmap.Eu Limited v Google Inc & 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 of the matter, whereas if they succeeded, the question of dominance could be determined at a subsequent trial.

Recently, in *Emerald Supplies v British Airways plc* [2014] EWHC 3514, the court considered two applications for summary judgment and strike-out (one by the defendant, one by the claimant). The defendants' application was for strike-out and summary dismissal of the claimant's claims in the torts of unlawful means conspiracy and unlawful interference. The claimants' application was for two contentions of law in British Airways' defence to be declared incorrect, struck out or summarily dismissed. In relation to the defendant's application, the court noted that the arguments for and against were heavily fact-based and did not believe that the factual platform for these legal arguments was clearly established at this stage in the proceedings. For that reason the court ordered that the application be adjourned until at the earliest after disclosure had taken place. With regard to the claimants' application, the court did not think it was appropriate to decide this important point of principle at a summary judgment stage and adjourned the application. Certain of the defendants appealed to the Court of Appeal to seek to overturn the High Court's decision (*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 which 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 *Tesco Stores Ltd and Others v Mastercard Incorporated and Others* [2015] EWHC 1145, the defendants brought an application for summary judgment/strike-out on the basis that the claims brought by Tesco Stores Ltd had no real prospect of success and that there were no reasonable grounds for bringing the claim as a result of the principle of ex turpi causa. The case related to a claim for damages arising out of infringements in relation to multilateral interchange fees in the court of operating the Mastercard credit card system. In particular, the defendant argued that the claimants and Tesco Bank were part of a single economic entity which through Tesco Bank was a participant in the infringement.

The court refused the application on the basis that complex questions of law arose in relation to the application of the single economic entity principle to vertical and horizontal relationships which should be decided at trial with the benefit of full disclosure. Once the context for the single economic entity could be determined, the question of which activities, and therefore which legal persons fall within it, is fact and context-specific. It was not possible to determine that question at this stage because the

definition of the single economic entity itself had yet to be determined, and it was not clear that all of the relevant facts were available. Furthermore, the court held that even if the claimants and Tesco Bank were found to be a single economic entity, it could not be said that the claimants did not have a realistic as opposed to a fanciful prospect of success in showing that the infringement by Tesco Bank should not be imputed to them. It was more than merely arguable that responsibility for an infringement within a single economic entity is not based upon strict liability (or mere membership of the entity) but requires something more which may be decisive influence.

CAT

The duration of proceedings in the CAT will again depend on the circumstances and complexity of the case. To date, only three follow-on actions have reached judgment in the CAT, namely *Enron Coal Services Limited v English Welsh & Scottish Railway Limited* (Case 1106/5/7/08), *2 Travel Group plc (In Liquidation) v Cardiff City Transport Services Limited* (Case 1178/5/7/11) and *Albion Water Limited v Dŵr Cymru Cyfyngedig* (Case 1166/5/7/10). In *Enron*, the claim form was filed in November 2008 and judgment was handed down in December 2009 ([2009] CAT 36). In *2 Travel*, the claim form was filed in January 2011 and judgment was handed down in July 2012 ([2012] CAT 19), while in *Albion*, the claim form was filed in June 2010 and judgment was handed down in March 2013 ([2013] CAT 6).

The CAT has the power to give directions for the hearing of any issues as preliminary issues (CAT Rule 53(2)(o)). The CAT also has the power to strike out claims. Under CAT Rule 41, the CAT may strike out in whole or part a claim, at any stage of the proceedings if it:

- considers that the CAT has no jurisdiction;
- considers that there are no reasonable grounds for making the claim;
- is satisfied that the claimant has habitually and persistently and without any reasonable ground, instituted vexatious proceedings, or made vexatious applications; or
- the claimant fails to comply with any rule, direction, practice direction or order of the CAT.

Under CAT Rule 43, the CAT may give summary judgment against a claimant or defendant on the whole claim or a particular issue if it considers that:

- the claimant or defendant has no real prospect of succeeding on or defending the claim or issue; and
- there is no other compelling reason why the case or issue should be disposed of at a substantive hearing.

Under CAT Rule 42, the CAT may of its own initiative or on the application of a party give default judgment without a hearing of the claim where:

- the defendant fails to file an acknowledgement of service or defence to the claim, or a counterclaim has been made and a defence to a counterclaim has not been filed; and
- the relevant time for doing so has expired.

An order for default judgment cannot be made by the CAT if the defendant has made an application:

- disputing the jurisdiction of the CAT;
- to have the claim struck out under CAT Rule 41 described above; or
- for summary judgment under CAT Rule 43 described above.

The CRA15 has introduced a fast-track procedure for simpler competition claims in the CAT. The CAT may, at any time, either of its own initiative or on the application of a party, make an order that particular proceedings be subject to the fast-track procedure (CAT Rule 58(1)). Under CAT Rule 58(2), 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 determined by the CAT.

In deciding whether to make proceedings subject to the fast-track procedure, the CAT will be able to take into account all matters it thinks fit, including:

- whether one or more of the parties is an individual or a micro, 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; at the time of writing none has reached trial. Two property developers launched a fast-track claim for infringement of the Chapter I and/or Chapter II CA98 prohibitions and common-law restraint of trade against Tesco Stores over an allegedly anticompetitive restriction in the use of land they had purchased. In March 2016 the dispute settled before trial. In April 2016, purchasers of flexible polyurethane foam brought a follow-on damages claim pursuant to a decision of the European Commission dated 29 January 2014. The claimants applied for the claim to be designated as a fast-track claim in particular because they were considered to be SMEs (*Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and Others* [2016] CAT 8. In his judgment, Roth J (President of the CAT) stated that the claimants' status as SMEs was only one factor and it did not follow that because a case was brought by one or more SMEs it falls within the fast-track procedure. In finding that fast-track was inappropriate Roth J considered that although a hearing of three days was not an absolute limit, a case of such longer duration (two weeks) was not the kind suitable for the fast-track procedure; 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 April 2016, a fast-track claim was issued by Socrates Trading Limited (a provider of online training) against the Law Society of England & Wales (the professional body for solicitors in England & Wales) alleging that the defendant abused its dominant position in the market for the provision of quality certification/accreditation services to conveyancing firms. The case is due to go to trial in November 2016. In June 2016, the CAT decided to exercise its powers under Rule 58(2)(b) to cap the level of recoverable costs in the case. In his judgment, Roth J (President of the CAT) 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.

17 What are the relevant limitation periods?

High Court

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 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 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 claimants, all well-known high street retailers, alleged that by setting (in effect) a minimum price that merchants had to pay banks to process payments by Visa card, the defendants had restricted competition and had inflated the price which the claimants had to pay. The defendants applied for summary judgment to strike out those aspects of the claims which alleged infringement of competition law six years prior to the issue of proceedings. The High Court rejected the claimants' argument (under section 32 Limitation Act 1980) that the limitation period had not started to run due to the deliberate concealment of

facts by the defendants. The High Court found that there were facts which were known, or discoverable by the exercise of reasonable due diligence, by the claimants before the limitation period which were sufficient to establish a prima facie case. Simon J considered that this was not a 'secret cartel', instead the existence and operation of the Visa payment system and interchange fees were matters of public knowledge, which 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 of the High Court to strike out those aspects of the claims which were time-barred. The appellants argued that the limitation period under section 9 of the Limitation Act 1980 had not begun to run and that the High Court had wrongly applied the 'statement of claim' test as set out in *Johnson v Chief Constable of Surrey Times*. The Court of Appeal held that as regards the approach to section 32(1)(b) Limitation Act 1980 competition claims should not in principle be treated any differently from other claims. Among other issues, the policy considerations of finality and certainty in the law of limitation are as important to competition claims as to those under consideration in other cases discussed. The Court of Appeal concluded that the statement of claim test applied in the present case because all the necessary ingredients for 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.

CAT

For claims issued before 1 October 2015, the old 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)). As such, an infringement decision of the Commission or CMA that is not appealed within the required time limit will become final; where an appeal is lodged the limitation period will not start to run until the appeal has been determined and no further appeals are possible. As noted above, 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 the CA98. 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.

In *Deutsche Bahn AG v Morgan Crucible Company plc* [2011] CAT 6, 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 CRA15 amended the CA98, to insert a new section 47E, which harmonised the limitation periods of the CAT with those of the High Court of England and Wales. This means that from 1 October 2015 a six-year limitation period will apply to all private action cases in the CAT brought in England and Wales and Northern Ireland, whether stand-alone or follow-on (in Scotland the limitation period will remain five years, in line with the Scottish Court of Session (section 47E(2) CA 98)).

For claims arising before 1 October 2015, the transitional limitation rules apply. Rule 119(2) of the CAT Rules states that Rules 31(1) to (3) of the 2003 CAT Rules will apply for claims arising before 1 October 2015. It is unclear how these rules will be interpreted for stand-alone claims or the new section 47B collective proceedings brought in the CAT as neither type of claim was envisaged under the 2003 CAT Rules. In *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2015] EWHC 3472 (Ch) the High Court considered whether a stand-alone action was appropriate for transfer to the CAT. Barling J stated that whatever the precise ambit of Rule 119 it could have no application to proceedings if they were transferred in whole or in part to the CAT. A case transferred to the CAT would be all or part of an existing claim, whereas Rule 119 only deals with claims originating in the CAT. Therefore the relevant limitation period in the High Court would remain in place after transfer to the CAT. On this basis claimants who are uncertain of the application of the transitional limitation rules to stand-alone claims may consider bringing their claims in the High Court and applying for transfer to the CAT. This is not a route which can be used for collective proceedings under section 47B as these can only be brought in the CAT.

The Damages Directive will require member states to ensure that the limitation period for bringing an antitrust damages claim must be at least five years (article 10(3)). It will not begin to run before the infringement has ceased and an injured party knows, or can reasonably be expected to know:

- the behaviour constituting the infringement;
- the qualification of such behaviour as an infringement of EU or national competition law;
- the fact that the infringement caused harm to the party; and
- the identity of the infringer who caused such harm (article 10(2)).

The limitation period is suspended if a competition authority takes action in respect of the infringement. The suspension shall end at the earliest one year after the infringement decision has become final or proceedings are otherwise terminated (article 10(4)). The limitation period should not begin to run before the day on which a continuous or repeated infringement ceases.

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

Judgments of the CAT (section 49 of the CA98) 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. 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, again provided permission is granted either by the Court of Appeal or the Supreme Court.

In addition to appeals, the High Court or the CAT can stay proceedings and refer a question to the ECJ under the preliminary ruling procedure set out in article 267 TFEU. The CAT Rules outline the procedure for references to the European Court by the CAT (CAT Rule 109).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Following the introduction of the antitrust provisions of the CRA15 on 1 October 2015, collective actions are now available in the CAT, with safeguards against vexatious claims. The regime applies to both follow-on and stand-alone cases and will not be restricted to actions brought on behalf of consumers (as under the old rules). Collective actions can be brought on an opt-in or an opt-out basis in the CAT under section 47B CA98. It is possible to bring representative actions in the High Court, but this is difficult to do in the context of private antitrust litigation.

High Court

In the High Court, CPR 19.6(1) allows a representative action to be brought by a claimant representing himself 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 BA's airfreight services. They alleged that they had paid inflated air freight prices as a result of a price-fixing cartel to which BA 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 in order for the latter to benefit from damages awarded. The Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 confirmed the High Court's decision, rejecting the move to engineer such a class-action mechanism. 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.

In *Bao Xiang International Garment Centre and Others v British Airways plc and Others* [2015] EWHC 3071 (Ch) the claimants brought a claim on their own behalf and that of 64,696 other claimants (enterprises based in China that conducted international trade and were members of the China Chamber of International Commerce) in relation to alleged damages arising from an unlawful price-fixing cartel in relation to air freight services. However, it was subsequently conceded that only about 5,000 of the claimants could show that they had shipped cargo by air during this period and that none of the claimants had authorised the claimants' solicitors to bring proceedings. The claimants solicitors argued that 362 claimants had ratified the commencement of proceedings. In this context, the defendants applied to strike out the claim on the grounds that the claim had been issued without the claimants' solicitors having the necessary authority of any of the claimants to bring the proceedings and, in the alternative, that the claim constituted an abuse of process of the court. The court concluded that none of the 64,697 claimants on whose behalf the claim was brought had either authorised the bringing of the claim or ratified their solicitor's actions in starting the claim on its behalf. The claims were struck out on the basis of a lack of authority.

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.

CAT

Previously in the CAT, representative claims could only be made by a specified body on behalf of consumers on an opt-in basis. Only one representative action (brought on behalf of consumers who had purchased overprice football shirts) was brought under the old rules.

Under the new section 47B of the CA98 (as amended by the CRA15) 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 UK unless they opt in). The collective proceedings must be commenced by a person who proposes to be the representative in the proceedings. The CAT may authorise a representative, whether or not 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 whether that person:

- would fairly and adequately act in the interests of class members;
- does not have, in relation to the common issues for class members, a material interest that is in conflict with the interests of the class members;
- would be the most suitable person to act (if there is more than one person seeking approval);
- will be able to pay the defendant's recoverable costs if ordered to do so; and
- where an interim injunction is sought, will be able to satisfy any undertaking as to damages.

In addition, the CAT Rules explain that in determining whether the representative would act fairly and reasonably the CAT will take into account all the circumstances, including whether the proposed representative is a member of the class and, if so, their suitability to manage the proceedings; if the proposed representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body; and whether the proposed representative has prepared a plan for collective proceedings that satisfactorily includes a method for bringing the proceedings, a procedure for governance and consultation and estimates of and details with regards to costs, fees and disbursements (CAT Rule 78(3)). In addition, the CAT may approve a representative to act as the class representative for a sub-class (CAT Rule 78(4)). The representative must also establish a register on which it will record the names of those class members who opt-in or opt-out (CAT Rule 83(1)). If the representative is a member of the class and settles the whole or part of his or her personal claim included within the proceedings, he or she must promptly give notice of that fact to all represented persons and the CAT (CAT Rule 86(1)). In addition, a class representative may only withdraw from acting in that capacity in the collective proceedings if the CAT gives permission for withdrawal (CAT Rule 87(1)). The draft CAT Rules had included a presumption that organisations that offer legal services, special purpose vehicles and third-party funders should not be able to bring cases. However, this presumption was not included in the CAT Rules as introduced on 1 October 2015.

In June 2016, an application to commence collective proceedings under section 47B CA98 was made by Ms Dorothy Gibson (who proposes to act as the class representative) against Pride Mobility Products Limited in a follow-on action for damages arising from a decision of the OFT (as it then was) dated 27 March 2014 in relation to mobility scooters. Ms Gibson is the General Secretary of the National Pensioners Convention, an umbrella organisation for around 1,000 pensioners' groups in the UK. The application proposes that the claim should be on an opt-out basis.

It is not a requirement that all of the claims should be against all of the defendants in those proceedings. Furthermore, the proceedings may combine claims brought under section 47A CA98 and those which have not. If a claim has been made under section 47A then it may only be continued in collective proceedings with the consent of the person who made that claim.

Collective proceedings will 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)). In order 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(2) states that when deciding whether claims are suitable to be brought in collective proceedings, the CAT will take into account all matters it thinks fit including:

- whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- the costs and benefits of continuing the proceedings;
- whether separate proceedings making claims of the same or similar nature have already been commenced by members of the class;
- the size and nature of the class;
- whether it is possible to determine for any person whether he or she is or is not a member of the class;
- whether claims are suitable for an aggregate award of damages; and
- the availability of alternative dispute resolution or other means of resolving the dispute, including the availability of voluntary redress schemes.

The collective proceedings order must authorise the person who brought the proceedings to act as the representative, and shall:

- state the name and address for service of the class representative (or representatives if there are sub-classes);
- state the name of each defendant;
- describe or otherwise identify the class and any sub-classes;
- describe or otherwise identify the claims certified for inclusion in the collective proceedings;
- state the remedy sought;
- state whether the collective proceedings are opt-in or opt-out;
- specify the domicile date;
- specify the time and manner by which a class member may opt in or opt out;
- order the publication of a notice to class members; and
- specify the part of the United Kingdom in which the collective proceedings are to be treated as taking place (CAT Rule 80(1)).

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), described above (CAT Rule 79(3)).

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 sub-class 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(11)).

Section 47C of the CA98 contains 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 (DBAs), 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 tribunal thinks fit (section 47C(3)).

20 Are collective proceedings mandated by legislation?

In the High Court the applicable rules for collective actions are set out in the CPR, which are set out above.

As noted above, collective proceedings in the CAT are governed by section 47B CA98, as amended by the CRA15. Two or more claims can be combined to form a collective action.

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 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 which is wider than the requirement that the persons have the 'same interest' for representative proceedings.

CAT

Under section 47B of the CA98 (as amended by the CRA15), any collective proceedings will only be continued if the CAT makes a collective proceedings order (section 47B(4)). 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. In order 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 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 (section 47B(7) CA98).

See question 20.

22 Have courts certified collective proceedings in antitrust matters?

See above. As noted above, it is now possible for the CAT to hear both opt-in and opt-out collective actions under section 47B CA98.

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. See questions 19 and 20.

23 Can plaintiffs opt out or opt in?

Under section 47B CA98, 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 UK 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 sub-class 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(11)). See questions 19 and 20.

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 CAT. In normal circumstances, the claimant can then withdraw (discontinue) the claim unilaterally. Note, however, that 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 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 tribunal may make any consequential order it thinks fit (CAT Rule 44(2)).

The CRA15 introduced a new opt-out collective settlement regime for competition law in the CAT. Any opt-out settlement must be judicially approved. Section 49A CA98 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. Where a collective proceedings order has been made and the tribunal has specified that the proceedings are opt-out proceedings, the claims which are subject to the proceedings may not be settled other than by a collective settlement approval order issued in accordance with the CAT Rules (CAT Rule 94(1)). 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 application shall include the following information:

- details of the claims to be settled;
- terms of the proposed collective settlement;
- a statement that the applicants believe that the terms of the proposed settlement are just and reasonable, supported by evidence which may include a report of:
  - an independent expert or an opinion from the applicants' legal representatives as to the merits of the settlement;
  - specify how any sums received under the collective settlement are to be paid and distributed;
  - have annexed to it a draft collective settlement approval order; and
  - set out the form and manner by which the class representative proposes to give notice of the application to the represented persons or class members.

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;
- 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 UK and did not opt-out, or who opted into the collective proceedings.

Section 49B CA98 applies to cases where a collective proceedings order has not been made but, if collective proceedings were brought, the claims could be made at the commencement of the proceedings. The application for the order must be made to the CAT by a person who proposes to be the settlement representative, and the person who, if collective proceedings were brought, would be a defendant (or, where there is more than one, those defendants who wish to be bound by the proposed collective settlement) (CAT Rule 96(1)). CAT Rule 96 provides further detailed application requirements. The CAT may make an order approving a proposed collective settlement, only if it first makes a collective settlement order (CAT Rule 97(1)). The CAT can only make that collective settlement order if it considers that the proposed settlement representative is a person whom it could authorise to act, and in respect of claims which are eligible for inclusion in the proceedings. The collective settlement order must authorise the settlement representative (the representative need not fall within the class of claimants although the CAT must consider it just and reasonable for the settlement representative to act), and describe the class of persons whose claims are eligible for inclusion. Where the CAT has made a collective settlement order, it may approve the settlement only if it is satisfied that the terms are just and reasonable. In determining whether the terms are just and reasonable, the CAT will take into account CAT Rule 97(7), which contains a similar list of factors to those in Rule 94(9) discussed above. Any such CAT-approved collective settlement order will be binding on all persons within the class except those who:

- opt out by notifying the settlement representative; or
- are not domiciled in the UK and do not opt in (CAT Rule 97(9)).

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 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. This applies not just within the UK but also across Europe, to the extent that it is likely to be more cost-effective and efficient for a claim to be heard in one European jurisdiction in relation to losses the claimant suffers as a result of a pan-European infringement of the competition rules. Claimants are wise to these efficiencies: see, for example, the efforts to which the claimant in *Provimi v Aventis* went in order for all its European claims to be heard in the English courts (see question 5).

Under the CAT Rules, 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 CA98 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).

26 Has a plaintiffs' collective-proceeding bar developed?

There are an increasing number of claimant firms in England and Wales, which is seen as one of the most active jurisdictions in Europe for EU-wide antitrust damages claims. The plaintiffs' collective-proceeding bar may develop further as a result of the new collective proceedings that have been introduced by the new section 47B of the CA98.

Remedies

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 (see question 2) and damages are awarded on the tortious basis (ie, the amount of the loss, plus interest). This is in line with 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. Only two follow-on claims in the CAT have resulted in a final award of damages (*2 Travel Group* and *Albion Water*, discussed further below), although a number of cases in the English courts have addressed the issue. This is not surprising in circumstances where the vast majority of commercial disputes settle before judgment. An increasing number of damages claims are settling shortly before trial.

How damages might be calculated in a competition law claim will depend on the facts of the case. In *Crehan v Inntrepreneur Pub Company* [2003] EWHC 1510 (Ch), the High Court considered that if there had been a breach of the competition rules the damages awarded would have been for losses actually suffered, profits and interest up to the date of the judgment; the Court of Appeal ([2004] EWCA Civ 895) considered this approach to be too speculative and held that damages should be assessed as at the date of loss. In any event, the decision to award damages was overturned by the House of Lords, which did not therefore need to rule on which would have been the correct measure of damages ([2006] UKHL 38).

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 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 tribunal concluded that there was no loss at all because on the counterfactual the claimant would have been no better off.

The measure of damages awarded will depend on the nature of the infringement. In relation to a cartel, the damages should be the cartel overcharge, adjusted as necessary for pass-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. In December 2009 Oxera published a paper for the European Commission in relation to the calculation of quantum in competition law claims. The paper may be useful to judges awarding damages in such claims, but it is not anticipated that it will provide a shortcut to the detailed damages assessment necessary in the event damages are awarded. The Commission has also published a Communication and a Practical Guide on quantifying harm in antitrust damages claims (both of which are non-binding). The Practical Guide explains various methods available to quantify antitrust harm and, according to the Commission, is intended to assist national courts and parties involved in actions for damages by making information on quantifying harm caused by infringements of the EU competition rules more widely available. The Damages Directive outlines that it shall be presumed that cartel infringements cause harm, although the infringer will have the right to rebut that presumption. In addition, member states will have to ensure that in damages proceedings a national competition authority may, upon the request of a national court, assist that national court with respect to the determination of the quantum of damages.

In relation to stand-alone claims, compensation may be sought for infringements that must be proved de novo and would be awarded on the

same basis as follow-on damages actions noted above. In addition, other 'compensation' may be sought, as to which see question 29.

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, if the claimant could demonstrate the effects of the infringement had continued past the period of infringement found, damages could extend for that longer period. The CAT accepted that 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 *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. The CAT approached the compensatory damages assessment on the basis of what the market conditions would have been without the infringement. The CAT awarded damages to 2 Travel for loss of profits from the date the infringement commenced up to the date of 2 Travel's liquidation (the infringement ended shortly thereafter), finding that, 'but for' the infringement, 2 Travel would have made a further profit from its operations. However, the CAT declined to award damages in relation to loss of a capital asset, loss of a commercial opportunity and the costs of 2 Travel's liquidation as these would have been incurred in any event absent the infringement due to pre-existing and ongoing financial and management difficulties. Further, the CAT declined to award damages in relation to wasted management time in dealing with the abuse, as on the facts there was no abnormal waste of time.

In relation to exemplary damages, 2 Travel sought exemplary damages on two counts: 'oppressive, arbitrary or unconstitutional conduct by servants of the government' and 'conduct calculated to make a profit that may well exceed the compensation payable to the claimant'. While the CAT rejected a claim under the first ground on the basis that Cardiff City Transport Services did not exercise government functions, it did award damages under the second ground, finding that Cardiff City Transport Services had acted in knowing disregard of an appreciated and unacceptable risk that the Chapter II prohibition of the CA98 was either probably or clearly being breached or it had deliberately closed its mind to that risk. The CAT distinguished this case from *Devenish* on the grounds that while there had been a previous OFT (as it then was) decision, like in *Devenish*, Cardiff City Transport Services had been granted immunity from fines by the OFT on the basis of it being conduct of minor significance, rather than pursuant to a leniency regime. As such, the CAT held that there was no policy reason why exemplary damages should not be imposed. Given this distinguishing feature, it appears that exemplary damages will still be unavailable in most follow-on damages cases where a fine has been imposed by the regulator (one which may of course have been reduced or waived in the case of leniency and immunity applicants). The CAT's approach to awarding exemplary damages was to take into account the following factors: that the exemplary damages should bear some relation to the compensatory damages awarded; the economic size of Cardiff City Transport Services; and the fact that Cardiff City Transport Services would no doubt take very full account of the CAT's judgment even if the exemplary damages were quite low given its association with a local authority.

In *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6, Albion brought an action for damages against Dŵr Cymru for losses resulting from Dŵr Cymru's abuse of its dominant position. The CAT had previously determined that the access price at which Dŵr 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 Dŵr 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 Dŵr 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. Dŵr 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 Dŵr Cymru would have offered a reasonable access price. There was a range of lawful access prices that Dŵr 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.

In relation to the claim for exemplary damages, the CAT stated that evidence was required that Dŵr Cymru knew that the way the price was calculated was unlawfully excessive or that it did not care whether it was excessive or not. Despite criticising Dŵr 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 Dŵr 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 Dŵr Cymru was reckless as to 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 Dŵr Cymru had weighed the risks of going ahead with the access price against the likely downside in terms of future compensation payments to Albion.

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 (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, and that damages would be inadequate to remedy its losses (*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 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) in certain circumstances where the claimant is outside the jurisdiction.

CAT

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 tribunal 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 OFT (as it then was) finding that Genzyme had operated an unlawful margin squeeze in breach of Chapter II of the CA98.

The CAT can also order security for costs in the context of follow-on damages actions (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: in *BCL Old Co v Aventis* [2005] CAT 2 the tribunal 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.

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 CAT Rules or another enactment applies (CAT Rule 59(4)). These conditions include:

- that the claimant is resident out of the jurisdiction, but not resident in a Brussels contracting state, a state bound by the Lugano Convention or a regulation state;
- the claimant is a company or other body and there is reason to believe it will be unable to pay the defendant's costs if ordered to do so;
- the claimant has changed address since the claim was commenced with a view to evading the consequences of the litigation;
- the claimant failed to give its address or gave an incorrect address in the claim form;
- the claimant is acting as a nominal claimant, other than under section 47B of the CA98, and there is reason to believe it will be unable to pay the defendant's costs;
- the claimant has been authorised to act as a class representative and there is reason to believe it will be unable to pay the defendant's costs if ordered to do so; and
- the claimant has taken steps in relation to its assets that would make it difficult to enforce an order for costs against it (CAT Rule 59(5)).

If the defendant seeks an order for security for costs against someone other than the claimant then the CAT must be satisfied that:

- the person against whom the order is sought has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against that person; or
- the person against whom the order is sought has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings (CAT Rule 59(6)).

The CRA15 has inserted a new 47D into the CA98 which gives the CAT the power to grant injunctions under section 47A of the CA98 or in collective proceedings. 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) CA98). In deciding whether to grant an injunction, the CAT must apply the principles that the High Court would apply. The CRA15 also introduced section 1A to the EA02 in relation to the enforcement of injunctions. Where a person fails to comply with an injunction, the CAT may certify the matter to the High Court. The High Court may enquire into the matter and if the High Court is satisfied that the person would have been in contempt of court if the injunction had been granted by the High Court, the High Court may deal with that person as if he or she were in contempt. 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 which must be stated as part of the evidence in support of the application (CAT Rule 69).

29 Are punitive or exemplary damages available?

Punitive and exemplary damages are available in certain limited circumstances in England and Wales. The ECJ in *Manfredi v Lloyd Adriatico* (Case C-295/04 [2006] ECR I-6619) required that, in accordance with the principle of equivalence, punitive damages must be available in the national courts for breaches of European competition law where they would be so available for breaches of national law.

In the context of follow-on damages claims, the High Court in *Devenish* [2007] EWHC 2394 refused to award punitive or exemplary damages, where the defendant had already been fined (or granted immunity from or a reduction in fines) by a regulatory authority in respect of the same behaviour. Note, however, the CAT's award of 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 (see question 27). In *Albion Water* [2013] CAT 6 the CAT refused to grant exemplary damages. Although Dŵr Cymru had not been subject to a fine for its infringement of the Chapter II prohibition, the CAT held that it could not conclude on the evidence that Dŵr Cymru had intended to issue an unlawfully excessive price or that it was reckless to that fact. See question 27.

Section 47C of the CA98 provides that the CAT may not award exemplary damages in collective proceedings.

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

As noted above, 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).

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.

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 as regards restitution or account of profits ([2008] EWCA Civ 10). Note, however, the CAT's award of 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. As noted above, section 47C CA98 provides that the CAT may not award exemplary damages in collective proceedings.

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.

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 43 to 48 and the accompanying Practice Directions. The general rule is that costs follow the

Update and trends

Brexit
Shortly before the time of writing, the UK voted via a referendum to leave the European Union. The consequences of this for private antitrust litigation in England and Wales are not year clear and will depend on the nature of the UK's negotiated withdrawal and any deal struck between the EU and the UK government. For the time being EU law will continue to apply. We understand that the government may still press ahead with the implementation the Damages Directive into UK law. On this basis, any changes that are required as a result of the UK's negotiated withdrawal could be implemented subsequently. In any event, the current private antitrust litigation regime will not be significantly altered by the implementation of the directive, which is in large part based on existing UK court procedure.

Consumer Rights Act 2015
The Consumer Rights Act 2015 (CRA15) introduced a number of changes to antitrust litigation in England and Wales, in particular to the powers of the Competition Appeal Tribunal (CAT), which were designed to make it easier for consumers and businesses to gain access to redress where there has been an infringement of antitrust law. The changes, which amended (among others) the Competition Act 1998 (the CA98) and Enterprise Act 2002 (EA02), came into force on 1 October 2015. These were supplemented by new CAT Rules issued on the same date. The key changes are as follows:

Stand-alone claims
The Act amended section 47A of the CA98 to allow the CAT to hear stand-alone cases, including claims for damages or an injunction. Previously the CAT could hear only follow-on claims.

Collective proceedings
Collective proceedings can now be brought before the CAT under the new section 47B of the CA98. Under the new section 47B, collective proceedings may be opt-in or opt-out (ie, 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). Opt-out proceedings do not include any class member not domiciled in the UK at a specified time, unless they opt in to the proceedings.

Injunctions
Previously, the CAT could not grant injunctions. However, the new section 47D of the CA98 gives the CAT the power to grant injunctions in section 47A and collective proceedings. They will have the same effect as if granted by the High Court, and will be enforceable as if they were such injunctions.

Limitation
On its face, section 47E of the CA98 (as amended by the CRA15) made the limitation period in the CAT in relation to follow-on and stand-alone cases the same as for those before the High Court, six years from the date on which the cause of action accrued. However, the transitional limitation rules (inserted at the last minute into the CAT Rules) add significant complexity to this position, particularly in relation to collective proceedings.

For claims issued before 1 October 2015, 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; and the date on which the action accrued. However, for claims arising before 1 October 2015, the transitional limitation rules apply (ie, the old 2003 CAT Rules on limitation). It is unclear how these rules will be interpreted for stand-alone claims or the new section 47B collective proceedings brought in the CAT, as neither type of claim was envisaged under the 2003 CAT Rules. Cases that are started in the High Court after 1 October 2015, but which are subsequently transferred to the CAT, will not be subject to these transitional rules. This may provide a way forward for stand-alone claims that seek to benefit from the new limitation period. However, this is not a route that can be used for collective proceedings under section 47B, as these can only be brought in the CAT.

Collective settlement
The act also provides for collective settlements. Where the CAT has already made a collective proceedings order and the proceedings are opt-out, an application may be made by the representative and the defendant in collective proceedings. The CAT can approve the settlement only if it believes the terms to be just and reasonable. The settlement will then bind those domiciled in the UK who did not opt out, or those who opted in.

If a collective proceedings order has not been made, the application must be made by the person who proposes to be the settlement representative and the person who, if collective proceedings were brought, would be a defendant. The CAT must make a collective settlement order before approving a proposed collective settlement. The approved settlement will then bind all class members unless they opt out or are not domiciled in the UK and do not opt in.

Voluntary redress schemes
The act also inserts section 49C into the CA98, which allows the CMA to approve proposals by infringers to compensate those harmed by those infringements. A proposal can be considered at any time, but only approved after the infringement decision to which the scheme relates has been made or, in the case of a decision of the CMA, at the same time as that decision is made. The CMA may consider discounting any infringement penalty in exchange for participating in the scheme. The guidance issued in August 2015 states that a discount of up to 20 per cent may be applied to any fine imposed.

Fast-track procedure for SMEs
The act also amended the EA02 to introduce a fast-track procedure for simpler competition claims in the CAT. A number of fast-track claims have been brought since the introduction of the procedure on 1 October 2015, some of which have settled before trial.

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 court or settlement offer that is drawn to the court's attention. Note that 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 tribunal 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 which the CAT may take account of when determining the amount of costs. These factors are set out in CAT Rule 104(4) and include:

- the conduct of all parties in relation to the proceedings;
- any schedule of incurred or estimated costs filed by the parties;
- whether a party has succeeded on part of its cases, even if that party has not been wholly successful;
- any admissible offer to settle which is drawn to the CAT's attention, and which is not a settlement offer to which cost consequences apply;
- whether costs were proportionately and reasonably incurred; and
- whether costs are proportionate and reasonable in amount.

The CAT Rules also include specific cost consequences relating to the acceptance or rejection of a settlement offer which 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.

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.

The Damages Directive provides that member states are required to ensure that undertakings that infringed competition law through joint behaviour are jointly and severally liable for the damage caused by the infringement (article 11(1)). An undertaking which has been granted immunity will only have to pay damages to injured parties other than its direct or indirect purchasers when compensation cannot be obtained from other undertakings that were parties to the infringement. An undertaking may recover a contribution from other undertakings which were parties to the infringement, to be determined by their relative responsibility for the harm caused. However, an undertaking which has been granted immunity will not have to contribute an amount more than the amount of the harm it caused to its own direct or indirect purchasers (article 11(4) and (5)). Small or medium-sized enterprises are liable only to their direct or indirect purchasers if their share in the relevant market was below 5 per cent at any time during 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 small or medium-sized enterprise:

- led the infringement;
- coerced others to participate; or
- has been found to previously infringe competition law (articles 11(2) and (3)).

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

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 relation to the Emerald Supplies case (*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.

In *WH Newson Holding Ltd v IMI plc* [2013] EWHC 3788 (Ch), a case related to *WH Newson v IMI* (see question 3), the court was required to consider a case management decision regarding disclosure in a contribution claim. The defendants were addressees of the Commission decision in the *Copper* plumbing tubes cartel and had made a contribution claim against Mueller, another addressee of the decision. The claim against Mueller was that two third parties (together, AGA), who were not addressees of the Commission decision, had participated in the cartel through a subsidiary which was subsequently sold to Mueller. At the case management conference the defendants had been ordered to give disclosure to AGA. Mueller objected to this on the grounds that AGA had no liability under section 47A to the claimants and could not therefore be liable for a contribution in respect of the defendants' liability. The High Court found that while proceedings under section 47A in the CAT could only be brought against addressees, this limited jurisdiction of the CAT did not apply to proceedings in the High Court. Rose J held that section 47A does not create 'any new cause of action' instead it provides that the cause of action 'arising from the infringement at the suit of a person who has suffered loss may be brought in the CAT if the conditions set out in section 47A are met'.

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, though there has been no definitive judgment on this point to date.

The judgment of the ECJ in *Manfredi v Lloyd Adriatico* (Case C-295/04 [2006] ECR I-6619) holding that indirect claims should be permitted indicates that, logically, the passing-on defence should be permitted. In the CAT, the passing-on defence was considered in an interlocutory decision regarding security for costs in the *BCL* cases (Case No. 1028/5/7/04), but the matter was not decided in the CAT's judgment.

The Damages Directive confirms that a defendant can invoke as a defence the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proof in this respect rests with the defendant who may reasonably require disclosure from the claimant and from third parties (article 13). In relation to claims by indirect purchasers, the directive requires member states to ensure that, where the existence of a claim for damages or the amount of compensation to be awarded depends on the question whether or to what degree an overcharge was passed on to the claimant, the claimant will have to prove the existence and scope of the pass-on (article 14).

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

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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) 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 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 own 'illegality' to obtain damages, in circumstances where the parties are not in positions of equivalent bargaining power.

In relation to the *Safeway* litigation, in which Safeway issued proceedings against its former directors and employees alleging breach of contract and negligence, seeking to recover the full amount of the fine from its directors and employees, the defendants applied for the claim to be struck out on the basis of ex turpi causa on the basis that Safeway had to rely on its own illegality (ie, the infringing conduct) in order to bring the claim. Although the application was refused at first instance (*Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm)), the Court of Appeal was unanimous in holding that Safeway's claim should be struck out (*Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472). The court concluded that the ex turpi causa maxim applied to preclude Safeway from seeking to recover from the defendants either the amount of the penalty imposed by the OFT (as it then was) or the costs incurred as a result of the OFT's investigation. An undertaking that infringes provisions of the CA98 relating to anticompetitive activity and is fined by the CMA therefore cannot recover the amount of such penalties from its directors or employees whose actions allegedly caused the infringement.

37 Is alternative dispute resolution available?

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.

The CAT appears to be less willing to embrace arbitration. In *Claymore Dairies v OFT* ([2006] CAT 3) the tribunal emphasised the public law nature of the CA98 (ie, that proceedings before the tribunal 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)).

The Damages Directive seeks to encourage consensual dispute resolution.

The UK government's proposals 'Private Actions in Competition Law: A consultation on options for reform – government response' (January 2013) also strongly encouraged ADR in competition cases, but stopped short of making it mandatory.

France

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Legislation and jurisdiction

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

In France, private antitrust litigation and damages actions have been possible since competition law provisions were adopted in the European Union and in France, based on the French general rules of civil liability.

To summarise, to date there have been a very limited number of private enforcement cases and most decisions in the field of private antitrust litigation in France derive from individual actions. The main reason for this is the French legal principle of *nul ne plaide par procureur* ('no one shall plead by proxy'), which renders opt-out class actions inadmissible in France. At present, however, consumer associations can bring group actions, although in limited situations (see question 19).

Most judgments involving private antitrust litigation have been rendered by civil courts, but other courts may have jurisdiction (see question 3).

The first important cases laying out the conditions for bringing private actions were *Mors v Labinal* (ruling rendered by the Commercial Court of Paris in 1992; initial ruling by the Court of Appeal of Paris rendered in 1993; ruling rendered by the Court of Cassation, which is the French Supreme Court for judicial matters, in 1995; and followed by a ruling of the Court of Appeal of Paris in 1998) and *CAMIF v UGAP* (ruling rendered by the Court of Appeal of Paris in 1998). In these cases, the French courts awarded damages to the claimants (respectively, in the amount of €5 million and €1.5 million) and held that the claimants were the victims of an abuse of a dominant position in both cases, and also of an illegal cartel in the first case.

A subsequent second wave of rulings occurred in 2004 and further entrenched private enforcement in France: *Vérimédia v Médiamétrie* (ruling of the Court of Appeal of Versailles), *Marbreries Lescarcelle and others v OGF* (ruling of the Court of Appeal of Paris) and *Téléz v France Télécom* (ruling of the Commercial Court of Paris). Whereas in the two first cases the claimants were respectively granted €100,000 and €1.5 million in damages, in the third case the court awarded the claimants the significant amount of €15 million (for 'win-back' practices implemented by France Télécom, which is the historically incumbent French telecommunications operator).

Most of these cases relate to individual exclusionary practices implemented by an undertaking in a dominant position.

Since then, there have not been many rulings by French courts in the context of private actions and only in a few cases have damages actually been awarded to the plaintiff. There are several reasons for this. First, in many cases the parties settle before the court makes a final ruling. Second, group action claims were only introduced very recently. Third, French courts are not at ease when it comes to damage assessment in antitrust cases. Despite this, courts have rendered some interesting rulings in this area, including, for example, rulings establishing conditions for the application and admissibility of the passing-on defence (rulings by the Commercial Court of Nanterre in 2006, by the Commercial Court of Paris in 2007, and by the Court of Cassation in 2010 and 2012 (see question 35).

In April 2011, the European Commission (the Commission) launched a public consultation relating to collective redress. In response to this consultation, the French Competition Authority (FCA), formerly the Competition Council (following the adoption of the Law on the Modernisation of the Economy, enacted on 4 August 2008) indicated that follow-on actions, meaning actions pursuant to an infringement decision rendered by the Commission or by a national competition authority, should be treated in priority before claims that are not based on an infringement decision by a competition authority.

On 18 March 2014, the French Consumer Act (the 'Loi Hamon') providing for the introduction of group actions in France was promulgated (see questions 19–26).

French law is bound to evolve again in this matter in the coming years following the adoption of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions, which has to be implemented into national law before 26 December 2016.

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?

Damages actions for competition infringements before a civil judge follow the general French rules governing civil liability. Consequently, whether in relation to tortious or contractual liability, plaintiffs must invoke both the provisions of the French Civil Code (FCC) and the relevant antitrust provisions. These relevant antitrust provisions can be found in either the French Commercial Code, if French competition law is violated; or the Treaty on the Functioning of the European Union (TFEU), if European competition law is violated. Claims can also be based on criminal liability, since specific criminal offences cover certain types of anticompetitive behaviour. In such cases, the relevant legislation can be found in both the French Commercial Code and the French Criminal Code.

Applicable procedural rules can be found in the French Civil Procedure Code (FCPC), the French Criminal Procedure Code and the French Code of Administrative Justice.

Rules governing group actions are found in the French Consumer Code.

Finally, it must be noted that indirect purchasers can bring claims if they have standing to bring an action (see questions 4 and 35).

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

Relevant legislation

With regard to civil liability:

- tort liability is covered by article 1382 et seq of the FCC;
- contractual liability is covered by article 1134 et seq of the FCC;
- injunctions are covered by articles 809 and 873 of the FCPC;
- court orders requesting the production or preservation of evidence are covered by articles 138 to 145 of the FCPC; and
- civil party petitions are covered by article 85 of the French Criminal Procedure Code.

A valid claim must be based on one of these provisions and on the relevant antitrust provisions, including:

- articles L. 420-1 (on anticompetitive agreements and concerted practices) and L. 420-2 (on abuses of a dominant position or of a state of economic dependency) of the French Commercial Code, for actions involving a violation of French competition law, and
- articles 101 and 102 TFEU for actions involving a violation of EU competition law. Claimants may invoke cumulatively French competition law and European competition law if both laws are violated.

Most private antitrust claims are based on theories of tort liability (article 1382 et seq of the FCC). However, at least in theory, parties may also base their claims on contractual liability (article 1134 et seq of the FCC), arguing that a contractual stipulation violates competition law. In this regard it is important to note that article L. 420-3 of the French Commercial Code provides that contractual stipulations that are contrary to articles L. 420-1 or L. 420-2 of the French Commercial Code are null and void.

With regard to criminal liability, several types of competition law infringements are condemned. First, according to article L. 420-6 of the French Commercial Code, it is an offence for an individual to fraudulently take a personal and decisive part in the design, organisation, and implementation of anticompetitive practices. This article has only been rarely applied, and when it was applied, it was generally applied against individuals who participated in cartels between companies in the context of a public procurement. Second, articles L. 442-2, L. 442-5, and L. 443-2 of the French Commercial Code respectively penalise selling at a loss, imposing a minimum resale price, and artificially increasing or decreasing prices of goods or services, particularly in the context of distance auctions. In addition, article 432-14 of the French Criminal Code condemns favouritism, namely, violating freedom of access and equality for candidates with regard to tenders for public service.

The conditions relating to the introduction of group actions can be found in articles L. 423-1 to L. 423-26 of the French Consumer Code.

Relevant courts

Decree No. 2005-1756 dated 30 December 2005 sets out 16 courts that are specialised in competition matters: there are eight commercial courts and eight civil courts located in Marseilles, Bordeaux, Lille, Lyon, Nancy, Paris, Rennes (all in metropolitan France), and Fort-de-France (which is in Martinique, one of the French overseas territories). The listed commercial courts have jurisdiction over litigation between commercial parties, while the listed civil courts have jurisdiction over cases between private litigants. However, both types of courts are competent to declare anticompetitive contracts null and void and to award damages resulting from a violation of competition law.

Concerning group actions, however, all civil courts are competent and not solely the eight civil courts specialised in competition matters (article L. 211-15 of the French Code of Judicial Organisation).

When a case brought before a court encompasses two different claims, only one of which is based on a violation of competition law, the case will be dealt with by two different courts. In fact, the competition-related claim will be heard by the competent specialised court, while the other claim (including claims based on unfair competition or contract law) will stay within the jurisdiction of the court before which the claim was originally brought.

With specific regard to criminal offences, the competent courts are the criminal courts, and for cases involving a public entity, the competent courts are the administrative courts.

Rulings from these courts can be appealed, as will be explained in detail in question 18.

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 for any type of antitrust infringement because claimants only have to satisfy the general conditions that are imposed to bring a civil claim (such as standing, interest in the case, urgency or imminent damage for interim measures, etc). With respect to the specific condition relating to proving interest in the case, such interest must be personal, existing, real, and legitimate.

Consequently, competitors, direct purchasers, indirect purchasers, and contracting parties can bring private antitrust actions if they satisfy the aforementioned conditions. Under very strict conditions, it is also possible for certain authorised consumer associations to bring actions and claim compensation under tort law for damage to the collective interest they represent, which is caused by the violation of French competition rules (see question 9).

Private actions are not only available for cartel infringements but also for:

- abuses of a dominant position (see, for example, the ruling of the Commercial Court of Paris of 31 January 2012);
- unilateral anticompetitive practices (such as boycotts, resale price maintenance, or tying practices);
- non-compete clauses;
- any other anticompetitive contractual provisions (see, for example, the ruling of the Court of Appeal of Paris of 1 February 1995, that declared null and void an anticompetitive contractual clause);
- bid-rigging (see, for example, the decision of the Conseil d'État, which is the French Supreme Court for administrative matters, of 19 December 2007, involving the SNCF, the French railway company, as plaintiff);
- criminal offences relating to competition law (such as selling at a loss); and
- any horizontal or vertical restraints.

Initially, the majority of private claims were brought in the context of vertical relationships (especially claims relating to the termination of distribution agreements; see, for example, the ruling of the Court of Appeal of Paris of 22 October 1997 concerning discrimination in the application of sales conditions). Today, however, it seems that parties tend to seek damages in the context of horizontal restraints (namely cartels) or abuses of a dominant position.

Parties may bring actions even without a finding of infringement by the FCA (group actions, however, are necessarily follow-on). Infringement decisions by the FCA do not strictly bind the judge except in the context of group actions (article L. 423-17 of the French Consumer Code). This will change upon implementation of Directive 2014/104/EU, which provides that an infringement of competition found by a final decision of a national competition authority is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts (article 9). In practice, a review of the existing case law pertaining to private actions shows that French courts do already consider that an FCA decision sanctioning a competitive infringement almost necessarily implies the existence of a fault. Consequently, the FCA's finding of a competition law infringement usually constitutes valid proof of a fault. Moreover, pursuant to article 16 of Regulation 1/2003, French courts are bound by decisions taken by the Commission, the General Court and the Court of Justice of the EU. This explains why claimants usually bring private actions only when an infringement decision has been rendered by a competition authority. As an example, in *Eco System* the Commercial Court of Paris ruled that it was bound by an infringement decision made by EU institutions and that their finding of a competition law infringement constituted a fault within the meaning of article 1382 of the FCC (ruling of 22 October 1996). The Court of Appeal of Paris has confirmed being bound by a prior EU infringement decision in *JCB v Central Parts* (ruling of 26 June 2013).

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 subject-matter jurisdiction, the competent courts are the 16 courts specialised in competition matters, as previously mentioned in question 3. They have exclusive jurisdiction over private antitrust litigation cases. As a reminder, all civil courts have jurisdiction concerning group actions.

With regard to territorial jurisdiction, civil actions based on antitrust claims must be brought before the specialised court of the judicial district of place of residence or place of business of the defendant. The plaintiff may choose between different courts if there are several defendants.

Depending on the type of action, however, there may be instances where other courts also have jurisdiction. Indeed:

- tort actions (such as an action brought by a victim against an undertaking that abused its dominant position) can also be brought before the court that is located where the anticompetitive practice occurred (meaning where the damage was caused) or where the damage was suffered;
- contractual actions (such as an action brought by a distributor against its supplier to invalidate a contractual clause allegedly violating competition law) can be brought before the court where the products were delivered (or the services provided) or where the main obligation of the contract was performed;
- administrative actions (meaning actions involving a public entity, which happens often in bid-rigging cases) must be brought before the administrative court located where the public contract was performed (a recent ruling of the French Tribunal des Conflits – the court in charge of determining whether a case falls within the administrative

jurisdiction or that of the ordinary courts – rendered on 16 November 2015 (*Région Ile-de-France*) confirmed that administrative courts have exclusive jurisdiction to rule on actions brought by a public entity against the participants in a bid-rigging cartel concerning a public contract); and
- criminal actions (meaning cases where the violation of competition law is a criminal offence, such as selling at a loss) can be brought before the criminal court where the infringement occurred or where the defendant lived.

Additionally, it is generally possible for parties to insert a jurisdiction or arbitration clause in their contract to agree on the competent forum (bearing in mind that, once an arbitral award is rendered, parties can no longer seek tort damages for the very same infringement before a court).

Finally, once a claim is brought before a French court that considers that it has jurisdiction to hear the case, the case cannot be brought before any other court, and the first court therefore has exclusive jurisdiction.

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

Yes, private actions can be brought against both individuals and corporations.

With respect to individuals, as discussed in question 3, they risk criminal penalties under article L. 420-6 of the French Commercial Code if they played a personal and decisive role in the design, organisation or implementation of the anticompetitive practice in question. In such a case, the plaintiff can request damages against the individuals by joining the defendant to the criminal proceedings as a civil party.

However, the vast majority of private litigation cases involve corporations.

In any case, French courts have jurisdiction over foreign individuals and corporations if the anticompetitive practice took place in France or if the damage was suffered in France.

Private action procedure

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

Although third-party funding is uncommon in France, it is possible to receive such funding, but under very strict conditions. The third party must be validly and legally empowered to provide funding to the client. A frequent example of this situation arises in France when insurance companies offer litigation insurance and thereby agree to fund their clients' litigation expenses.

Furthermore, professional bar rules applicable to lawyers in France prohibit contingency fees, except where they merely add on to general fees, meaning where the fees are only partially contingent upon the result of the decision. Additionally, contingency fees can only be requested if the lawyer had requested them in advance and in writing. According to the French National Bar Council, a contingency fee that is merely supplementary to a fixed fee and that represents 10 per cent of the damages is considered reasonable. However, this is only a recommendation so contingency fees may exceed this limit, subject to compliance with the aforementioned rules.

8 Are jury trials available?

In France, jury trials are only available in criminal matters, but the criminal judge alone will decide on civil matters within such cases, not the jury.

9 What pretrial discovery procedures are available?

In France, there are no discovery and disclosure procedures. In particular, there is no pretrial discovery procedure similar to those that exist in common law countries.

However, prior to any lawsuit on the merits, parties can request that the court order investigatory measures in view of upcoming procedures (article 145 of the FCPC). The goal of these measures is to reveal crucial facts or to preserve or establish key evidence. For instance, claimants may request access to the defendant's technical, accounting, or commercial data to rely upon in future proceedings.

According to article 9 of the FCPC, the claimant has the burden of proof, and the defendant has no disclosure obligation other than the parties' general obligation to disclose documents they rely on to assert their arguments. Therefore, it is the claimant that must provide factual evidence of the alleged anticompetitive activity. However, article 10 enables the judge to order any measure of inquiry necessary for him or her to decide the case, and article 11 enables parties to demand that the judge order the opposing party (or third party) to disclose documents that are necessary to prove the alleged facts. The parties can try to resist these orders for legitimate reasons, such as by claiming that:
- the documents in question constitute business secrets protected by confidentiality rules (this defence is rarely accepted by the French courts, although there seems to be a slight change in this respect notably before the Commercial Court of Paris);
- they are covered by the attorney–client privilege; or
- they cannot submit them because of force majeure.

The judges will assess such arguments on a case-by-case basis (see questions 11 and 13).

Furthermore, based on article 144 of the FCPC, the court may order preparatory inquiries at the parties' request if they are deemed necessary to resolve the dispute, and the court may amend, at any time, the scope, nature, and number of these inquiries (such as personal verifications, appointment of an expert, etc). Moreover, it is common practice in France for a judge to appoint an expert, in particular in competition cases where judges do not necessarily have the required skills to comprehend and decide on technical issues, such as the definition of the relevant market. In the event that the court appoints an expert, such expert can request that any party provide him or her with any document relevant to the inquiry. If a party is not cooperative, the court can impose periodic penalties.

Additionally, parties can request that the court order the disclosure of a document withheld by the opposing party (article 138 et seq of the FCPC). In this case, the requesting party must identify the document withheld by the opposing party, and the court can accept or refuse such request. In other words, this procedure does not allow for so-called 'fishing expeditions'.

Finally, parties can also request that the court order the FCA and the French Directorate General for Competition, Consumer Affairs, and Repression of Fraud, which is the administrative service dealing with antitrust matters and antitrust investigations within the Ministry of Economy, to submit investigation reports or statements. This is usually allowed, which has considerably facilitated proving the anticompetitive infringements (see question 13).

10 What evidence is admissible?

On the one hand, in commercial cases, any evidence is admissible under the principle of freedom of evidence in commercial matters (article L. 110-3 of the French Commercial Code).

On the other hand, 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 which value exceeds €1,500 (under article 1341 of the FCC). Furthermore, what is called 'perfect' evidence (such as documentary evidence, decisive oaths, and judicial admissions) is binding on the judge; whereas 'imperfect' (meaning non-decisive) evidence (such as oral evidence, presumptions, and extrajudicial admission) is not binding on the judge. Consequently, the judge will discretionarily assess the weight of 'imperfect' evidence that was submitted and may rely on it in cases where it needs to complete other types of evidence.

11 What evidence is protected by legal privilege?

All documents and information linked to the lawyer's activity (whether in relation to litigation or not) are privileged (under article 66-5 of the Law of 31 December 1971). Therefore, the scope of the privilege is very broad and covers consultations and exchanges between a lawyer registered with a French bar and his or her client, as well as between lawyers; and handwritten notes taken during client–lawyer meetings. Consequently, even documents relating to the negotiation of a deal are privileged.

Legal privilege is recognised by every French court, French police, and French administrative bodies such as the FCA (this is true in spite of the FCA's known and criticised practice seizing, during dawn raids, the entire content of mailboxes, including communications that are covered by legal privilege).

As of today, legal privilege only benefits independent lawyers registered with a bar. Consequently, in-house counsel do not benefit from the privilege since they are not registered as independent lawyers under French bar rules. However, there is an ongoing and growing debate regarding whether such privilege should extend to and cover in-house counsel in a manner similar to the protection afforded in the United States.

Finally, as explained in question 9, trade secrets may be privileged on a case-by-case basis, in which case the judge will determine whether there is a legitimate reason not to provide the piece of evidence in question.

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

Yes. The criminal judge may decide upon civil claims arising from a criminal case. Previously, courts applied the principle according to which a civil court dealing with the same matter as a criminal court must stay the proceedings until the criminal court's ruling. However, since the recent amendment to article 4 of the French Criminal Procedure Code, this principle only applies when the purpose of the civil suit is to compensate the victim of the criminal offence for the damage directly suffered. This means that in all other cases, the civil court now has full discretion to decide whether or not 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. Consequently, a party seeking to stay civil proceedings must now prove the existence of the criminal procedure, as well as its interest in suspending the civil proceedings (parties usually do this by invoking due process).

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?

First, the evidence in criminal proceedings is confidential because of the confidential nature of the procedure. Consequently, plaintiffs cannot rely on such evidence until the criminal procedure is closed. Once closed, the criminal ruling is likely to influence the civil court's ruling (bearing in mind that the civil court is not bound by the criminal court's ruling).

Second, leniency applicants are not protected from civil law consequences relating to their competitive infringement, as specified in the FCA's general guidelines on leniency, dated 3 April 2015 (section 52).

Article L. 463-6 of the French Commercial Code prohibits the FCA from disclosing information covered by the investigative secrecy. The information contained in the FCA's file (that is linked to leniency applications) remains confidential until the final decision is issued. Moreover, the FCA does not, on its own initiative, disclose documents to private claimants that are obtained in its investigations. Therefore, leniency applicants benefit from a certain level of protection.

Moreover, the adoption of a law on 20 November 2012 limits the transmission of documents pertaining to leniency applicants from the FCA to French courts. Indeed, it provides that the FCA may produce any documents to the courts as regards anticompetitive practices at stake in the proceedings before the court, with the exception of documents elaborated in the context of or obtained through the leniency programme (article L. 462-3 of the French Commercial Code). The adoption of this law seems to show that there is more willingness in France to protect leniency applicants than to help private litigants in their damages actions.

This will be confirmed in the coming years given the fact that article 6.6 of Directive 2014/104/EU provides that national courts should not be able to order the disclosure of leniency statements or settlement submissions.

However, concerning documents other than those pertaining to leniency applications, certain procedures enable civil courts to gain access to the FCA's file once the FCA issues its decision. In particular, article 138 of the FCPC provides that a judge can order the production of documents if a party wishes to rely on:

- an official document;
- an agreement to which it was not a party; or
- any document held by a third party.

On the basis of the aforementioned article 11 of the FCPC, the FCA may deny such disclosure if it has legitimate reasons for doing so (such as the need to ensure the efficiency of leniency procedures). On 8 November 2011, the Commercial Court of Paris ruled that the production of documents from the FCA's file was not considered a disclosure of information protected by the investigative secrecy when the parties to the proceedings already have knowledge of the documents (judgment confirmed by the Court of Appeal of Paris in a ruling of 24 September 2014). Moreover, recently, the Court of Appeal of Paris ruled in a similar matter that the FCA could not be ordered to divulge documents contained in its file and related to a settlement procedure, but that a party to the procedure was free to produce such documents provided that they were necessary in order for him or her to defend itself (ruling of 20 November 2013).

It remains to be seen whether the Court of Cassation will confirm such interpretations.

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

According to articles 378 to 380-1 of the FCPC, both parties can ask for a stay of proceedings but the judge has full discretion whether to grant it or not. Pursuant to general principles of French procedural law, the request must be made before any arguments on the merits of the case are made (article 74 of the FCPC).

The judge can grant a stay of proceedings based upon due process, which is typically the case when the judge seeks to avoid two incompatible or even contradictory rulings being successively rendered. In this sense, it may make sense for the judge to grant a stay of proceedings in the case of a follow-on private action when the relevant decision by the FCA is being challenged.

Furthermore, a court can stay proceedings until the FCA renders an opinion in accordance with article L. 462-3 of the French Commercial Code. However, this opinion is not binding on the court.

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 standard of proof is set forth by article 1382 of the FCC, which sets out the following conditions for proving tort liability under French law: claimants, either direct or indirect purchasers, must prove a fault, a damage, and a causal link between the fault and the damage. Generally speaking, the judge has wide discretionary powers to adjudge the evidence set forth by the parties.

Concerning the proof of a fault, the judge must be reasonably convinced of the related competitive infringement. Recently, in a follow-on damages action based on a cartel decision by the European Commission, the Court of Cassation confirmed a judgment by the Court of Appeal of Paris that held that subsidiaries of a parent company that had applied the commercial policy of the latter should be considered as having committed a fault, even though only the parent company had been fined by the European Commission (ruling of 6 October 2015, *JCB Service*).

Furthermore, the harm must be direct and certain. Indeed, damages exclusively aim at compensating for the entire injury directly suffered by the plaintiff. Under French law, plaintiffs can be compensated for pecuniary losses (loss of profit or lost earnings) and also, although more rarely, for non-pecuniary losses such as damage to the plaintiff's reputation (see question 27). It is often difficult for claimants to provide the court with a precise calculation of damages. This explains why claimants regularly use external experts to assist them in assessing damages, which also helps them to convince the courts of the accuracy of the damages calculation. It must be noted that there is no such thing as punitive damages under French law (see question 29).

The causal link between the fault and the damage must be direct. Quite often, parties are not compensated for damage allegedly suffered because courts consider that they did not sufficiently prove this causal link, namely, that the antitrust injury incurred resulted entirely from the anticompetitive conduct.

The burden of proof rests on the plaintiff, but the defendant is free to produce any evidence or document that will make it more difficult for the plaintiff to prove a fault, a damage, or a causal link. The judge has considerable discretion when appraising the evidence. The burden of proof concerning the passing-on defence is explained in detail in question 35.

The judge, therefore, has significant discretion when assessing and deciding on the nature of the evidence and, if necessary, the judge can order inquiry measures to decide on the case.

In addition to the (recurrent) appointment of an independent expert, the judge can also request the FCA's opinion concerning both the factual and the legal aspects of alleged anticompetitive practices. However, this opinion is not binding on the courts.

Moreover, prior to the court's inquiry, the competition administration (Ministry of Economy) may have already conducted an inquiry of the facts, either at its own initiative or pursuant to a request by the plaintiff or a third party. In such case, the court can request a copy of the competition administration's findings.

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

Group actions have only recently been introduced in France and, accordingly, it is not yet possible to determine a typical timetable (see question 19).

It is somewhat difficult to provide a typical timetable for civil proceedings since this depends not only on the complexity of the case and on the availability of evidence but also on which specialised court is ruling on the case. In our experience, it is common for first instance proceedings before one of the 16 aforementioned specialised courts to last two to three years. In the event of an appeal, cases before the Court of Appeal of Paris, which has exclusive jurisdiction, last approximately 12 months. Finally, appeals before the Court of Cassation generally last between 12 and 18 months (however, these appeals are quite rare because they are limited to the appeal on points of law and not of fact; see question 19). Recently, however, proceedings seem to have been expedited, and this trend should and is likely to continue.

While it is not possible to accelerate the procedure, parties can request interim measures since general rules governing such measures cover competition cases (including articles 771, 808 et seq and 873 et seq of the FCPC; see question 28). In particular, the president of the court can order the payment of interim damages if the claim is not seriously challenged (under article 771 of the FCPC).

17 What are the relevant limitation periods?

Antitrust claims based on tort liability must be brought within five years following the 'manifestation of the damage' (this is based on article 2224 of the FCC).

The date of the manifestation of the damage is the date on which the holder of the right to bring a claim becomes aware or should have become aware of the facts enabling him or her to exercise such a right. If he or she was not aware of the anticompetitive activity, a decision to fine made by the Commission or the FCA would set the starting date.

This legal limitation period can be amended by the parties (from at least one year to a maximum of 10 years), as well as the rules governing its temporary suspension or interruption. The opening of a proceeding before a competition authority (whether it is the FCA, a national competition authority of another member state or the European Commission) interrupts the limitation period until a definitive decision has been taken by this authority or, in the event of an appeal, by the jurisdiction concerned (article L. 462-7 of the French Commercial Code). EU Directive 2014/104/EU provides that once a competition authority's decision becomes final, victims will have at least one year to bring damages actions.

As regards group actions, the time limit of five years starts from a definitive decision taken by the European Commission, national competition authorities or national courts (article L. 423-18 of the French Consumer Code). A decision is 'definitive' if all appeals relating to the facts have been exhausted at the time the group action is filed (article L. 423-17 of the French Consumer Code). If an ongoing appeal is limited to the fine or the procedure, the appealed decision is still considered as definitive under this meaning.

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

Appeals against first instance decisions, meaning rulings rendered by commercial and civil courts, must be brought before the Court of Appeal of Paris (which has exclusive jurisdiction) within one month following the date on which the ruling was served on the parties. Rulings rendered by criminal courts must be appealed within 10 days of the decision being rendered, before the court of appeal which has territorial jurisdiction. Lastly, appeals against rulings made by administrative courts must be filed with the administrative court of appeal that has territorial jurisdiction, within two months following the date on which the ruling was served on the parties.

Appeal decisions can be challenged before either the Court of Cassation or the Conseil d'État, depending on the type of case, within two months following the date on which the appeal decision was served on the parties. It is worth mentioning, however, that these courts decide only on issues of law (as opposed to questions of fact).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Certain authorised associations can bring actions in the representation of a collective interest, if the collective interest is separate from the individual interests of each of their members (article L. 421-1 of the French Consumer Code). The collective interest is assessed according to the corporate purpose of the association (for example, in a ruling rendered by the Court of Appeal of Agen on 4 May 2004, a consumer association called UFC Que choisir was awarded €5,000 for injury to its collective interest). Consumer associations can also bring actions on behalf of individual interests if they obtain mandates from individual consumers to represent them (articles L. 422-1 et seq of the French Consumer Code).

Moreover, a law (ie, the French Consumer Act) introducing collective actions in French law was promulgated on 18 March 2014. Under such law, consumers may file claims through consumer groups that are represented by government-approved associations (as of today, there are 15 government-approved associations). Such associations may introduce damages actions before civil courts for the individual harm suffered by consumers placed in a similar or identical situation, the common cause of which is the breach of competition law by the same professional(s). It should be noted that consumer groups are prohibited from advertising their course of action to consumers.

Concerning the procedure, the judge issues one single decision in which he rules on the following aspects:

- in a first stage, once the judge rules that the action is admissible, he or she decides on the principle of the professional's responsibility; and
- in a second stage, he or she defines the group of consumers in relation to whom the professional is liable, defines the criteria for joining the group and determines the type of harm that may be repaired along with the amount of damages to be awarded (article L. 423-3 of the French Consumer Code).

Individual consumers may then join the group within a certain timeframe, as specified in the decision, in order for their loss to be repaired (article L. 423-5 of the French Consumer Code). The French group action is thus not an 'opt-out' procedure but rather a specific and unique 'opt-in' procedure.

The law also provides for a simplified procedure when the court is aware of the identity and the number of victims, and when victims have suffered damages of the same amount. Under such system, after having ruled on the liability of the professional, the court may impose the obligation to directly and individually compensate the victims within a specified timeframe and according to terms decided by the court. Prior to any compensation, however, victims who have been informed individually by the court must accept the compensation within the terms of the court's decision (article L. 423-10 of the French Consumer Code).

20 Are collective proceedings mandated by legislation?

Collective proceedings are regulated by articles L. 423-1 to L. 423-26 of the French Consumer Code.

Government-approved associations may introduce group actions on the basis of these provisions. Similar to other damages actions, group actions follow the general French rules governing civil liability and associations must invoke both the provisions of the FCC and the relevant antitrust provisions (see question 2).

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

There is no equivalent in France of the US-style opt-out class action procedure and, accordingly, there is no similar certification process. Moreover, in any case, only a limited number of authorised consumer associations may introduce collective actions (see question 19).

22 Have courts certified collective proceedings in antitrust matters?

Not applicable (see question 21).

23 Can plaintiffs opt out or opt in?

The French collective action provides for a classic opt-in procedure. Indeed, in its ruling, the judge defines the group of consumers in relation to whom the professional is liable and defines the criteria for joining the group (article L. 423-3 of the French Consumer Code).

24 Do collective settlements require judicial authorisation?

Government-approved associations who have introduced a group action may take part in mediation under general civil procedure principles. Any agreement negotiated on behalf of the group requires judicial authorisation. The judge verifies the impact on those whose rights are affected,

Update and trends

Further to the introduction of group actions in French law, the next main change should be the implementation into French law of Directive 2014/104/EU – the Damages Directive.

and then enforces it (articles L. 423-15 and L. 423-16 of the French Consumer Code).

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.

26 Has a plaintiffs' collective-proceeding bar developed?

The French Consumer Act was promulgated on 18 March 2014 and, as a result, no plaintiff's collective-proceeding bar has developed yet. It must also be borne in mind that group actions can only be brought to court by government-approved associations (see question 19) and not by 'stand-alone' lawyers. Therefore, it is rather unlikely that a plaintiff's collective-proceeding bar will develop widely.

Remedies

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

Parties are compensated with damages, which are assessed on a case-by-case basis taking into account the harm actually suffered by the party. Such harm may be:

- pecuniary (such as the overcharge suffered because of the difference between the price actually paid and the price that should have been paid had no anticompetitive practices been implemented, as well as the loss of opportunity to make future profits and lost earnings); and
- non-pecuniary (such as damage to the plaintiff's reputation), see question 15.

However, non-pecuniary harm is usually more difficult to prove and to quantify. Group actions, however, may only seek to obtain damages for pecuniary losses resulting from material damage suffered by consumers (article L. 423-1 of the French Consumer Code).

It is worth noting that courts do not take into account the fine imposed by the FCA to assess the compensation to be awarded (see question 31).

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

In application of articles 808 et seq and 873 et seq of the FCPC, plaintiffs can file a claim with the president of a civil court or of a commercial court to request an interim order.

Such interim measures are available to parties when two conditions are met. First, urgency must be established. Second, there must be no serious challenge to the claim or interim measures must be justified by the nature of the dispute (article 808 of the FCPC; see question 16). Alternatively, interim measures are available to parties who prove that they are necessary to avoid imminent damage (see article 809 et seq of the FCPC). For example, this could be the case where a party is requesting an injunction requiring the defendant to sell a specific product to the plaintiff, in the situation where the seller has abused its dominant position by refusing to sell the product at issue.

Plaintiffs can also request the publication of the ruling.

29 Are punitive or exemplary damages available?

No, neither exemplary nor punitive damages are granted in France. By virtue of the non bis in idem principle in France, parties cannot be condemned twice for the same conduct. The role of competition authorities is to punish the infringing party, not to award damages to victims, and the courts' sole objective is to compensate the entire injury suffered by the plaintiff by granting damages.

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

According to the FCC (article 1153-1), a legal interest rate automatically applies to damages granted by a judicial decision. This interest rate is determined each semester by decree (for example, it was 1.01 per cent until the end of June 2016; for individuals who are not bringing an action as a professional it is 4.54 per cent). Except for express provisions to the contrary in the decision, the interest is applicable starting on the date of the decision. It is subsequently increased by five points if damages are not paid within two months following the decision.

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

Fines imposed by competition authorities are not taken into account because damages awarded by courts and fines imposed by the FCA do not pursue the same goals (as previously mentioned in question 29). Nevertheless, the calculation of fines by the FCA may provide the judge with useful guidance for the calculation of damages suffered within the framework of private actions.

Article L. 464-2 of the French Commercial Code provides that the FCA shall take into account, when fixing the amount of the fine, the 'damage to the economy' caused by the anticompetitive practice. This requires an in-depth analysis and calculation.

In line with the Commission's policy, and pursuant to the FCA's notice on the method relating to the setting of financial penalties of 16 May 2011, the FCA now provides more and more detail in its decisions as regards the calculation of the fine. This is of assistance to both the plaintiff in the drafting of its claim and the courts in the issuance of their final decision.

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

The general principle is that the unsuccessful party bears the legal costs (under article 696 of the FCPC). Legal costs are listed in article 695 of the FCPC: they include, among other things, fees for translation of documents, witnesses, experts and translators, but they do not include lawyers' fees. In any case, the judge can always order another party to bear these costs (under article 696 of the FCPC). However, this only happens exceptionally and if it does, the judge's rationale needs to be specific.

Finally, concerning other fees not covered by article 695, the judge can order the unsuccessful party to pay a certain amount to cover certain supplementary fees such as lawyers' fees, on the basis of article 700 of the FCPC. In practice, this amount, which is freely determined by the judge by taking into account fairness and the financial situation of the parties, is almost always granted but is insufficient to fully cover these fees.

33 Is liability imposed on a joint and several basis?

Infringing parties that cause damage are jointly and severally liable. Consequently, a victim can claim damages from any of them. This is a general principle of French civil liability rules.

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

As explained above, because of defendants' joint and several liability, they may be obliged to pay damages in full to the victims. They can subsequently file a separate action for contribution against the other defendants who did not participate in the initial payment.

The court must determine each party's share of liability and, accordingly, the amount of damages that they must each pay to the victim.

35 Is the 'passing on' defence allowed?

As previously mentioned, antitrust actions are based on article 1382 of the FCC according to which parties must prove a fault, damage, and a causal link between the fault and the damage. Plaintiffs will receive damages depending on the harm actually suffered. Consequently, the amount of damages will be reduced if a victim passed on a part of the price increase resulting from the anticompetitive activity.

Therefore, the passing-on defence is available and its consequence will be the reduction of damages for victims. However, there are only few examples of the use of the passing-on defence in France.

French courts have had the opportunity to deal with the application of the passing-on defence and to specify whether the burden of proof lies on the plaintiff or on the defendant.

In two follow-on actions following the Commission's decision in *Vitamins*, the landmark cartel case, the burden of proof was placed on the plaintiff to prove why it could not have passed on the price increase onto consumers. First, a plaintiff requested that the Commercial Court of Nanterre award damages in the context of the *Vitamins* cartel case and with regard to the passing-on defence, the court did not require proof from the defendant. Instead, the court based its decision on the Commission's decision and on a press release that stated, in general terms, that price increases were likely to be passed on to consumers. Ultimately, the court held that the cartel was implemented worldwide and consequently, every competitor of the plaintiff was subject to the same conditions. Therefore, the plaintiff had the possibility of passing on the increase and the choice not to do so was part of the plaintiff's pricing policy. In view of this, the court concluded that the plaintiff had not established the causal link between the fault and the damage (ruling rendered on 11 May 2006). Thereafter, in a similar case in 2007, the Commercial Court of Paris ruled that the plaintiffs could have passed on their price increase and rejected the parties' argument that a price increase would have led to a loss in market share (ruling rendered on 26 January 2007).

In the context of two follow-on actions subsequent to the Commission's decision in the *Lysine* cartel case (decision rendered on 7 June 2000), the Court of Cassation ruled that the claimants had not suffered any harm because they had passed the price increase on to consumers. Consequently, in both cases, the Court of Cassation affirmed that the burden of proving the absence of passing-on lies on the claimant, as part of the proof of the damage suffered (rulings rendered on 15 June 2010 and 15 May 2012). In the first case, the Court of Appeal of Paris ruled that the claimant had suffered from higher prices because of the anticompetitive behaviour, and thus awarded it damages in the amount of €1.66 million (ruling rendered on 27 February 2014). The second case is currently pending appeal before the Court of Appeal of Paris.

It is worth mentioning, however, that article 13 of Directive 2014/104/EU states that it should be for the defendant to prove that the overcharge was indeed passed on. Therefore, the Court of Cassation and Court of Appeal case law is bound to evolve in the near future (even possibly before the implementation of the Directive into French law, given the importance of the principle of effectiveness of EU law).

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

Based on the three necessary requirements to obtain compensation for a tort (under article 1382 of the FCC), defendants can only prove the absence of a fault, a damage, or a causal link between the fault and the damage. Since these are cumulative requirements, the proof of the mere absence of one of the three is sufficient to successfully dismiss a claim.

37 Is alternative dispute resolution available?

Alternative dispute resolution (including judicial and out-of-court mediation) is available and seems to be relatively successful. In fact, it is likely that there have been many settlements in the field of private antitrust litigation, which could explain the relatively small number of decisions issued in the context of private actions in France.

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Legislation and jurisdiction

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 based on abusive behaviour of dominant companies and contractual claims being defended on competition law grounds.

Regarding claims challenging abusive behaviour by dominant companies, there is an established body of case law spanning more than 40 years that provides, for example, that dominant manufacturers are obliged to supply certain distributors. In the same way, dominant companies were also found to be obliged to purchase products from their suppliers.

Private antitrust litigation also has a long-established tradition in Germany in relation to competition law grounds as defence arguments in civil law cases.

Damages actions by victims of anticompetitive agreements against cartel members 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). Inter alia, on the basis of the European Court of Justice (ECJ) decision in *Courage v Crehan*, dated 20 June 2001 (C-453/99), the German legislature has amended the German Act against Restraints of Competition (ARC) with the specific aim of facilitating private damages actions. For this reason, the standing of indirect purchasers has been established including – under certain circumstances – the availability of the passing-on defence (see question 15). Further, it has been confirmed by the courts that a certain type of collective action is permissible. Even more importantly, under section 287 of the German Code of Civil Procedure German courts can estimate whether the claimant has suffered a loss, and if so how much (for more details, see question 15). In addition, taking into account the possibility for claimants to rely on certain prima facie evidence and presumptions, it can easily be explained why Germany has become a favourable forum for cartel damages claims in Europe.

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 sections 33(1) and 33(2) ARC and damages claims are based on section 33(3)–(5) ARC.

In addition, claims for injunctive relief and for damages may under certain circumstances be based on section 8 and section 9 respectively of the German 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 German Civil Code (CC).

The invalidity of agreements for competition law reasons is based on section 134 CC in connection with section 1 ARC.

In a judgment of 28 June 2011 (KZR 75/10), the German Federal Supreme Court held that also indirect purchasers can bring damage claims against the members of a cartel (see also question 15). Thus, if producers agreed on a price-fixing cartel and charged 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. 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?

For the relevant legislation, see question 2. In terms of jurisdiction, there are specific courts with specialised chambers dealing with antitrust cases.

According to section 87(1) 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 courts which decide exclusively on antitrust matters within the relevant federal state (section 89 ARC). Almost all of 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 German Code on Court Constitution, 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 specialised antitrust divisions. Both the regional courts and the higher regional courts are trial courts which 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 German Federal Supreme Court, 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 German Federal Supreme Court.

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 German Federal Cartel Office (FCO). Such 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, the full burden of proof that an infringement has occurred rests on the claimant. If a competition authority investigates certain conduct it is, therefore, advisable to await the finding of the authority. According to section 33(4) ARC, 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, European Commission or any competition authority of another EU member state.

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 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation No. 1215/2012) or by the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters or by German procedural law.

According to Regulation 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 defendant committed the competition law infringement (scene of the behaviour), as well as the place at which interference with the object of legal protection occurred (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 agreed and practised. The place of interference would be the place where competition was restricted, in particular where a potential claimant suffered loss as a consequence of the cartel activity (for example, the seat of the retailer outlets that sold fewer goods because of the cartel overcharge).

If one defendant of a group of joint and severally liable defendants can be sued in Germany, all of the defendants can be sued before the German courts if there is a sufficiently close relationship between the claims against all of the defendants. In cartel cases, a claim against all participants may, thus, be brought against all 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. Since the anchor defendant reached a settlement with the claimant (the professional claimant company Cartels Damages Claims SA), none of the remaining defendants is based in Germany.

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 German Code of Civil Procedure (CCP), jurisdiction in matters of tort (here, illegal cartel activity) is connected to the place where the harmful event occurred. In this regard, the same principles apply as under Regulation 1215/2012. Other important provisions are sections 13, 17 and 21 CCP, which state that the court at the place where the defendant is domiciled or where a defendant has its seat or a branch is the locally competent court.

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 conditions as set out in question 5, private actions can be brought against both corporations and individuals (including those from other jurisdictions).

Private action procedure

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

In Germany, litigation may be funded by third parties. There are several litigation financing companies 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 company 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 enforcing 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.

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 German Federal Constitutional Court. The German Federal Constitutional Court had 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. Thus, contingency fees are now permitted if the claimant would be prevented from asserting his rights without contingency fees due to his economic situation. In addition, the agreement on contingency fees has to meet certain formal requirements in accordance with section 4(2) and (3) of the German 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.

8 Are jury trials available?

No, there are no jury trials available in Germany. In first instance, damages cases are exclusively heard in one of the respective regional courts' civil chambers consisting of (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. For more details on courts, see questions 3 and 18.

9 What pretrial discovery procedures are available?

In Germany, there are no discovery proceedings equivalent to those in common law jurisdictions. There is no general right for the (potential) claimant to request that the defendant produces documents or other relevant information, as the German civil procedure is governed by the principle of 'party control'. The principle of party control means, inter alia, that the parties are responsible for presenting the facts and the relevant evidence in court. However, the potential claimant has certain possibilities through which to gain access to relevant evidence that might be in the possession of the defendants or third parties.

Access to the records of the FCO

The claimant can request access to the records of the FCO according to section 406(e) of the German Code of Criminal Procedure. The aim is to enable victims of antitrust infringements to assess their chances of success of damages claims and the amount of loss suffered by a competition law infringement. The review of the FCO's file has to be conducted by a qualified lawyer. While potential claimants do not get access to leniency documents they can obtain copies of the infringement decisions issued by the FCO and a list of evidence available to the FCO.

Access to documents referred to in civil proceedings

According to section 142 CCP the judge can order the defendant or a third party to produce a certain specified document that it possesses which 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.

Claim for documents to be produced

Pursuant to section 421 et seq CCP, the claimant has a right to request that the defendant should produce individual specified documents in court proceedings. In particular, this right can be enforced if the claimant can demonstrate a legal interest in exploring the content of a particular document which has been established in the interest of the claimant (section 422 CCP in conjunction with section 810 CC). If the defendant denies possessing the relevant document, section 426 CCP provides the claimant with a far-reaching right to question the defendant.

Claim for disclosure in accordance with section 242 CC

In addition, a claimant has a claim for disclosure in accordance with section 242 CC. Section 242 CC provides the claimant with a claim for disclosure regarding the amount of a damages claim, if the claimant can prove that it has a damages claim and that through no fault of its own it is unable to prove the amount of loss suffered and the defendant can easily provide this information. In the event of antitrust damages claims, the claimant can combine its claim for disclosure with the actual claim for performance (action by stages). The claimant can first assert its claim for disclosure, then, after the information is provided by the defendant, specify the amount of its damages claim.

10 What evidence is admissible?

The claimant may base its claim on any available evidence, including:

- documentary evidence (contracts, website printouts, emails, letters, attendance notes, telephone notes, etc);
- evidence by witness;
- expert evidence;
- evidence by interrogation of the parties; or
- evidence by inspection.

Of the above, the first three 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 competition authority instead of providing evidence for the competition law infringement (section 33(4) ARC and article 16(1) of Regulation 1/2003).

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, as there are no discovery proceedings equivalent to those in common law jurisdictions (see question 9 for more detail). The claimant is not entitled to request that the defendant produces evidence that relates to communications between the defendant and its in-house counsel or external lawyers (except for the narrow exemptions described above under question 9).

The only way for a claimant to obtain access to evidence that relates to communications between the defendant and its in-house counsel or external lawyers is through access to the FCO's file. Such communications can be found in the FCO's file, as 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 privilege and cannot be seized. The same applies if an in-house lawyer is also admitted to the Bar and has acted in the particular case in his capacity as an independent lawyer.

Trade secrets are generally not privileged under German civil procedural law. However, if access to the infringement decision of the FCO is granted the trade or business secrets will be redacted.

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 as to whether there has been a criminal conviction or not.

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 33(4) ARC, the claimant can rely on the findings of competition authorities.

In the case of a fining decision of the FCO or 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 decision (section 33(4) ARC). In addition, the claimant has the right to access the respective authority's records in accordance with section 406(e) of the German Code of Criminal Procedure (see question 9 in this regard).

Leniency applicants are not protected from follow-on litigation. However, third parties who want to commence an action for damages against the leniency applicant will not be granted access to the leniency application and the evidence provided by the leniency applicant if they inspect the records of the FCO (see question 9). The FCO will generally refuse applications by private parties (eg, persons who plan to commence an action for damages) for access to leniency applications and the evidence provided by the applicant. The Local Court of Bonn affirmed the FCO's view in a decision published at the end of January 2012. By applying the criteria outlined by the ECJ in the *Pfleiderer* decision (C-360/09), the court denied Pfleiderer access to the leniency applications and evidence voluntarily supplied by the leniency applicants. The court held that such disclosure would undermine the effectiveness of the FCO's leniency programme. Cartel members could be deterred from making leniency applications with self-incriminating information if private plaintiffs were later entitled to receive access to these documents. This was confirmed by the Higher Regional Court of Düsseldorf on 22 August 2012 in *Coffee Roaster*. Therefore, the FCO usually only discloses its fining decision (with business secrets redacted) and a list of proof.

However, in a decision dated 26 November 2013, the Higher Regional Court of Hamm, according to section 474 of the German Code of Criminal Procedure, granted the Regional Court of Berlin access to the files containing the leniency applications in a pending cartel damages case. Whether this will indirectly lead to the parties of the damages case getting access to the leniency applications themselves remains to be seen.

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 CCP if its findings are dependent on circumstances that are already the subject of either another dispute before a court or an investigation by an 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.

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 considerably reduced. According to section 287 CCP, the court responsible for the case can estimate whether the claimant has suffered a loss, and if so how much. It is only necessary that the claimant provides a reliable factual basis for such an estimate. In cartel cases, the court can, as an additional option, base its estimate of the amount of loss incurred on the profits earned by the defendants through illegal cartel activities (section 33(3) ARC).

Where the claimant asserts lost profits, the burden of proof is further alleviated by section 252 CC. According to section 252 CC, 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 has to 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 presumptions in certain situations. 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 provide evidence that the discrimination of the claimant is justified. A further assumption is provided for in section 20(5) ARC, according to which it is presumed in certain cases 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.

Passing-on defence

The German Federal Court of Justice, in a landmark ruling handed down on 28 June 2011 (KZR 75/10), has 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 damage caused by higher prices to a downstream market (the 'passing-on' defence). However, the passing-on defence is only available under the narrow 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 down to the next level of costumers. That means, the defendant has to prove, first, that the overcharge has been passed on, and secondly, the extent to which

the overcharge has been passed on. Applying the criteria outlined by the German Federal Supreme Court the passing-on defence is, however, not available if it leads to an unjust benefit for the defendant. This is particularly the case if the indirect purchasers consist of a large fragmented group which makes it unlikely that the indirect purchasers will seek damages. In cases where an indirect purchaser wants to benefit from the passing-on of the overcharge by the direct purchaser and aims to seek damages, the indirect purchaser has to prove the passing-on and the causal link between the antitrust law infringement and the passing-on of the overcharge.

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 German Federal Ministry of Justice and the German Federal Supreme Court, civil court proceedings at first and second instance last almost eight months each and, in the event of an appeal on questions of law to the German Federal Supreme Court, a further 12 to 24 months. The total length of proceedings including all instances is therefore two-and-a-half to three years, approximately.

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.

17 What are the relevant limitation periods?

In Germany, the question of whether a claim is time-barred or not is governed by substantive law. The standard limitation period, which is also relevant in antitrust proceedings, is three years (section 33(5) ARC in connection with sections 195 and 199(1) CC). The time limit starts running after the end of the year in which the claim arose (when the damage occurred) and the claimant became aware of the circumstances giving rise to the claim and the identity of the (potential) defendant, or should have become aware without gross negligence.

The limitation is suspended for the time of investigations of the FCO or the European Commission in accordance with section 33(5) ARC. The claims will expire no earlier than six months after the final decision of the respective authority.

According to general tort law, even if a claim was time-barred the claimant might still base a claim on section 852 CC. The limitation period for this residual damages claim is 10 years after it arises, or, notwithstanding the date on which it arises, 30 years after the date on which the act causing the injury was committed or after the other event that triggered the loss. However, section 852 CC has not gained major importance in German antitrust proceedings so far. Whether or not this will change in future remains to be seen.

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 German Federal Supreme Court. 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 German Federal Supreme Court (see question 3).

Collective actions

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 via third parties. This possibility is of particular interest for end users and smaller companies that do not have the financial resources to assert their legal rights otherwise.

In relation to a cement cartel in which the FCO imposed fines of approximately €660 million in April 2003, the German Federal Supreme Court confirmed in 2009 (judgment dated 7 April 2009, KZR 42/08) the Regional Court of Düsseldorf's decision of 21 February 2007 admitting a damages claim that was submitted by CDC. CDC has bought the claims of various companies, relying on the argument that the price for cement as purchased from the members of the cement cartel was anticompetitive and therefore too high. 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 for payment of €100 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 first instance judgment of 17 December 2013, the Regional Court of Düsseldorf has now 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) CC 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.

Update and trends

The EU Directive on Antitrust Damages (2014/104/EU) will be implemented by the end of 2016. The need for adjustments is limited in Germany. Major changes will include:

- the limitation period will be extended from three years to five years;
- it will be clarified that for the limitation period to start it is necessary to know that the relevant facts constitute an infringement of competition law; in practice this will generally be the case with the publication of a press release/announcement of the FCO that an infringement decision was adopted;
- the FCO will announce on its website when it adopts an infringement decision so that parties to the infringement and affected markets become public; and
- cost coverage for interveners on the side of defendants (either because of third-party notices of the defendants or as a result of the intervener's own initiative) will be limited to avoid prohibitive cost risks for claimants.

20 Are collective proceedings mandated by legislation?

No.

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?

See question 19.

23 Can plaintiffs opt out or opt in?

Not applicable.

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.

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 another German court, section 261(1) CCP.

26 Has a plaintiffs' collective-proceeding bar developed?

See question 19.

Remedies

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

As a starting point, the amount of damages follows the compensatory principle. German damages law does not provide for punitive damages such as triple damages (see question 29).

The calculation of damages suffered by the claimant is primarily based on section 249 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 has to be considered as a whole; therefore, not only its losses in income and wasted investment have to be taken into account, but also any benefits received as a consequence of the anticompetitive behaviour (for details see question 36). Losses incurred include, in particular, lost profits (section 253 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.

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) ARC. This means that the claimant can either request that the defendant ends a certain behaviour or that the defendant has to perform a certain activity, such as supply the claimant in the future. 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 CCP. 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. 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 such claim is impossible or severely jeopardised without the interim remedy (urgency). As a general rule, an interim remedy shall not result in the fulfilment of the final remedy.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available. However, the court can estimate whether a claimant has suffered loss and, if so, how much (see question 15).

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 is obliged to pay interest on pecuniary damages (section 33(3), sentence 4 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 8 per cent above the European Central Bank's base rate, unless private customers are involved, in which case the interest rate is 5 per cent above the European Central Bank's base rate (section 288 of the CC).

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 settling damages. Even in the event of a significant fine the claimant is entitled to seek full compensation.

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

The legal costs include the costs of the court proceedings as well as the attorneys' fees. According to section 89a ARC, in antitrust cases the value of the matter may be adjusted if certain conditions are met. The court allocates the legal costs between the parties on a pro rata basis according to the outcome of the case. As a general rule, the legal costs are borne by the unsuccessful party.

The winning party can recover its legal costs on the basis of a separate decision fixing the substantive amount of the recoverable costs. In this regard attorneys' fees are calculated on the basis of statutory fees.

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.

With a judgment of 18 November 2014, the German 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) CC, that is, according to the extent of their respective participation in the cartel.

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

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third-party notices on the other participants in the infringement since 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. As such, claims for internal contribution do usually not occur in settlement cases.

35 Is the 'passing on' defence allowed?

See question 15.

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.

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 has been agreed between the parties, which requires an agreement between the parties.

Hong Kong

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Legislation and jurisdiction

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

The Competition Ordinance (Cap 619) (CO) came into force on 14 December 2015, becoming the first cross-sector competition law in Hong Kong. Pursuant to the CO, agreements that have the object or effect or restricting competition (the First Conduct Rule) and abuses of substantial market power (the Second Conduct Rule) are prohibited. The CO created two new institutions: the Hong Kong Competition Commission (HKCC) and the Hong Kong Competition Tribunal (the Competition Tribunal), which were set up in 2013. The Competition Tribunal Rules, which govern how the Competition Tribunal operates, were finalised in July 2015.

The cross-sector competition regime under the CO does not provide plaintiffs with a stand-alone right of action. Prior to the CO being enacted, when the legislation was still at the bill stage, the Competition Bill did contain a stand-alone right of action but it was removed shortly before the Bill was passed into law. However, the CO does provide for a right to follow-on action (see question 2).

Prior to the CO coming into force, antitrust cases in Hong Kong were restricted to the telecoms and broadcasting sectors, under the Telecommunications Ordinance (Cap 106) (TO) and the Broadcasting Ordinance (Cap 562) (BO) respectively. In these sectors, a follow-on right of action was available to plaintiffs, and a stand-alone right of action might have also been available (although the position in relation to this was uncertain). As a result, private litigation in antitrust cases has, to date, only involved a handful of judicial review cases in the telecoms and broadcasting sectors and, to our knowledge, there has been no private action and no follow-on action in the telecoms and broadcasting sectors. It remains to be seen how follow-on actions will be determined now the CO is in force.

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?

Under the general cross-sector competition law regime, the CO provides a right to follow-on action for persons who can demonstrate that they have suffered loss or damage as a result of an act that has been determined to amount to a contravention of the CO (section 110 CO).

Follow-on actions for antitrust damages may only be made in proceedings brought in the Tribunal, whether or not the cause of action is solely the defendant's contravention, or involvement in a contravention, of a conduct rule (section 110(2) CO).

It remains to be seen whether a person who has potentially suffered loss or damage indirectly as a result of a contravention of the CO can bring a private action under the CO. The CO appears to allow this as long as the loss or damage can be proven but the position remains unclear in practice.

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

Part 7 of the CO contains the provisions relating to follow-on actions, and the relevant procedural rules are detailed in Part 5 of the Competition Tribunal Rules.

The Hong Kong Competition Tribunal is constituted under the CO as a superior court of record, with the same powers as the Court of First Instance. It sits in the High Court and its members are drawn from the judiciary, with assistance from assessors with relevant expertise, such as economy and industry experts.

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?

Follow-on actions are available when a person has suffered loss or damage as a result of a contravention of the First Conduct Rule (anticompetitive agreements) or the Second Conduct Rule (abuses of substantial market power), as determined by the Competition Tribunal or in a broader case by the Court of First Instance, or on appeal by the Court of Appeal or the Court of Final Appeal, or as a result of an admission in a commitment that has been accepted by the HKCC that the person has contravened a conduct rule (section 110(3) CO).

There is no right of follow-on action available for contravention of the merger rule.

Under the Hong Kong model of enforcement, contraventions of the competition rules are determined by one of the four courts mentioned above. The one exception to this is the situation where a party has admitted a contravention in a commitment that has been accepted by the HKCC. Under section 110(3) CO, a contravention determined by one of the four courts mentioned above, or a contravention admitted in a commitment accepted by the HKCC, is binding on the Competition Tribunal in relation to applications for follow-on actions. In relation to the matters recorded in a commitment given to the HKCC, the Competition Tribunal Rules provide that a copy of the register certified by the CEO of the HKCC or a person duly authorised by that officer is, on its production without further proof, to be admitted in the proceedings as prima facie evidence of the matters recorded in it (rule 52 of the Competition Tribunal Rules).

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 First Conduct Rule and the Second Conduct Rule apply to the prevention, restriction or distortion of competition in Hong Kong, even if any of the parties involved are located outside Hong Kong and the conduct in question occurs outside Hong Kong.

Any persons who have suffered loss or damage as a result of a contravention of the First or Second Conduct Rule of the CO may bring a follow-on action.

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

Pursuant to section 110(1) CO, a follow-on action can be brought against both individuals and companies. The criterion for the standing of the plaintiff is that he or she must have suffered loss or damage as a result of contravention of the CO. The criteria for the defendant is that the person must have contravened, or must have been involved in a contravention of the CO (section 110(1)(a) and (b) CO).

The CO applies to agreements and conduct which have the object or effect of harming competition in Hong Kong. This can apply to undertakings based outside Hong Kong if their conduct has an effect in Hong Kong. Therefore, private action can be brought before the Competition Tribunal

against corporations and individuals based outside Hong Kong if their conduct has an anticompetitive effect within Hong Kong. In this situation, we consider that the judgment would likely need to be enforced according to international law in the jurisdiction in which the defendant has assets (for an order to pay damages) or in the jurisdiction in which the defendant is acting (for an order to cease).

Private action procedure

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

Third party-funded litigation and contingency fees are not generally available in Hong Kong. The common law offences of champerty and maintenance are still in force, and have been confirmed by the Court of Final Appeal (*Unruh v Seeberger* [2007] and *Winnie Lo v HKSAR* [2011]).

8 Are jury trials available?

Jury trials are generally only available in criminal cases in Hong Kong and not in civil cases (save for defamation).

The Competition Tribunal is a specialised civil superior court of record operating without a jury. It is likely that, for the most part, the Tribunal will operate with one judge hearing cases but additional judges may be appointed if deemed necessary.

Appeals from the Competition Tribunal to the Court of Appeal (and from the Court of Appeal to the Court of Final Appeal) will be heard without a jury, as is the case in Hong Kong for civil matters.

9 What pretrial discovery procedures are available?

The rules of discovery, which have been detailed in the Competition Tribunal Rules, are modelled on the general rules of disclosure under the Rules of the Hong Kong High Court. The Competition Tribunal has the power to order pre-action discovery, or discovery from third parties based on the relevant Rules of the High Court.

In proceedings before the Competition Tribunal, there is generally no automatic discovery process, in contrast with the position in relation to High Court proceedings.

Instead, requests for discovery and production orders will need to be made to the Competition Tribunal. The Competition Tribunal will apply certain of the rules of discovery which apply in the High Court. The Competition Tribunal, in general terms, will make orders for discovery based on the principles of specific discovery applications under the rules of the High Court, such that the applicant for a discovery order must show that the document is or was in the possession, custody or power of the other party; that it relates to one or more of the matters in question; and that discovery of the particular document is necessary for disposing fairly of the cause or matter, or for saving costs.

In addition to these general criteria, some specific additional criteria will be applied by the Competition Tribunal, which will also consider all the circumstances of the case, including the need to further the CO as a whole; whether information sought is confidential; the balance of interests between the parties and other persons; and whether the document is necessary for the fair disposal of the proceedings.

10 What evidence is admissible?

The CO makes it clear that the Competition Tribunal is not bound by the existing rules of evidence applicable in Hong Kong and that it may take account of any relevant evidence or information, whether or not admissible in a court of law, save for cases where the HKCC applies for a pecuniary or financial penalty. In this regard, evidence that is not normally admissible in other courts may be deemed admissible at the Competition Tribunal. This means that, in principle, hearsay and economic evidence may be admissible at the Competition Tribunal but it remains to be seen what will happen in practice in this regard.

11 What evidence is protected by legal privilege?

There are no special legal privilege rules applying to competition proceedings in Hong Kong but section 58 CO recognises that the general concepts of legal privilege in Hong Kong apply.

Under the general law of privilege in Hong Kong, documents and information prepared in the context of providing legal advice or for litigation advice are protected by legal privilege. In this regard, advice prepared by an in-house legal counsel is privileged if the in-house lawyer is acting in his or her capacity as a legal adviser and not providing commercial, administrative or other advice.

Practice Direction 2 to the Competition Tribunal Rules sets out procedures for the treatment of confidential information in Competition Tribunal proceedings, including redaction of confidential material from documents deployed in the Tribunal. There is no specific privilege for trade secrets aside from the law relating to confidentiality and these procedures for the treatment of confidential information.

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

Since criminal proceedings cannot be brought in the Competition Tribunal, the right of follow-on action under the CO is not available in relation to criminal acts.

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?

As explained above, criminal proceedings cannot be brought under the competition regime. The Competition Tribunal Rules are silent on the admissibility of findings in parallel or previous criminal proceedings, but the Competition Tribunal is likely to apply the existing rules of admissibility to consider whether such findings can be relied upon by plaintiffs in a follow-on action.

A condition for leniency is that the applicant must sign a statement of agreed facts admitting its participation in the cartel on the basis of which the Competition Tribunal may make an order declaring that the undertaking has contravened the CO. Therefore, persons having entered into a leniency agreement with the HKCC will only be protected from proceedings for a pecuniary penalty, but they may still be exposed to follow-on litigation.

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

Private follow-on actions can only be brought after the expiry of the relevant period for appeal of an order of the Competition Tribunal. Under the Competition Tribunal Rules, the Competition Tribunal has a discretion to stay or dismiss proceedings, and any party may apply for a stay or dismissal of the proceedings if the other party does not disclose a reasonable cause of action, or if the claim, response, defence or reply filed in respect of the proceedings is frivolous or vexatious (rule 40 of the Competition Tribunal Rules).

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?

In a recent judicial review case against a decision by the Communications Authority to impose a fine on TVB for breach of the competition provisions of the BO (*TVB v Communications Authority and the Chief Executive in Council*, HCAL 176/2013), the Hong Kong Court of First Instance provided some insight as to what the nature of the sanctions may be under the CO. In the *TVB* case, the Hon Justice Godfrey Lam, who is also the President of the Competition Tribunal, ruled that the fine imposed by the Communications Authority on TVB did not amount to a determination of a criminal charge. However, a careful reading of the reasoning indicates that this may have been fact-specific, restricted to the BO, and that this may have been ruled differently under the new competition regime, potentially paving the way for a fine under the CO to amount to a determination of a criminal charge.

In any event, whether a fine under the CO amounts to a determination of a criminal charge or not does not affect the burden of proof needed for imposing sanctions. The standard of proof is the civil balance of probabilities standard, with the additional requirement, as explained in the *TVB* case, that the evidence must be 'cogent and compelling'.

In the absence of enforcement to date, there is no indication regarding potential presumptions or whether passing on will be a matter for the plaintiff or the defendant to prove.

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

At the time of writing, no cases have been brought before the Competition Tribunal and it therefore remains to be seen what the typical case timetables

will be. Practice Direction 1 to the Competition Tribunal Rules provides that the Competition Tribunal will indicate target hearing dates as early as practicable, and actively manage its cases.

17 What are the relevant limitation periods?

Private follow-on actions may not be brought more than three years after the earliest date on which they could have been commenced (section 111 CO). Follow-on actions can be brought based upon contraventions found by the Competition Tribunal or the courts, or as a result of an admission of breach of the CO that has been accepted by the HKCC. As such, there is no element of requisite knowledge of a breach in order to trigger the limitation period.

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

Parties may appeal decisions of the Competition Tribunal to the Court of Appeal. Court of Appeal decisions can in turn be appealed to the Court of Final Appeal, the highest court in Hong Kong.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings are not available under the CO, or under Hong Kong law in general, save for representation proceedings under Order 15, rule 12 of the Rules of the High Court where parties have the same interest in proceedings. In practice, representation proceedings are rare.

20 Are collective proceedings mandated by legislation?

Not applicable.

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.

23 Can plaintiffs opt out or opt in?

Representation proceedings (noted above) are effectively opt-in proceedings.

24 Do collective settlements require judicial authorisation?

Not applicable.

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.

26 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Remedies

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

In follow-on actions, the Competition Tribunal can order the payment of damages and can order the contravening party to restore the innocent party to the position in which it was before the transaction was entered into. In addition, the Competition Tribunal can order restitution.

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

Under the CO, the Competition Tribunal has far-reaching powers in relation to making orders with respect to a contravention of the CO. Pursuant to section 112 CO, all orders available to the Competition Tribunal under Schedule 3 to the CO in relation to contraventions of competition rules can also be made by the Competition Tribunal in follow-on actions. This includes, but is not limited to, orders restraining or prohibiting a person from engaging in any conduct that contravenes competition rules; orders to prohibit conditions to the supply of goods or services; orders to void an agreement; orders restricting the exercise of property rights or voting rights; orders requiring a payment to the government or other person for the disgorgement of illegal profits; and orders to dispose of assets or shares in any undertaking.

Further, if, while the Competition Tribunal is in the process of considering an application to apply sanctions for breach of the CO pursuant to sections 92 and 94 CO, the Tribunal is satisfied that a person is engaged in, or is proposing to engage in, a contravention of the CO, the Tribunal may impose interim orders, pending its determination of the application (section 95 CO).

Interim orders remain in force for a period of up to 180 days, extendable by up to a further 180 days by the Competition Tribunal on any one occasion.

29 Are punitive or exemplary damages available?

The CO only mentions that the Competition Tribunal may make 'an order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention' (Order 1(k) of Schedule 3 CO). Whilst this seems to require a causal link between the measure of damages and the loss suffered, there remains some uncertainty as to whether the Competition Tribunal will be bound by the amount of harm done or loss suffered when ordering damages to be paid. Punitive or exemplary damages are not generally a feature of Hong Kong law.

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

The Competition Tribunal may award interest in proceedings for the recovery of a debt or damages. Interest accrues from the date when the cause of action arises to the date of the judgment (or to the date of payment if payment is made before the judgment). Pursuant to section 153A CO, the Competition Tribunal may freely determine the interest rate.

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

There is presently no indication that damages in follow-on actions will take into account the fines imposed by the HKCC. It is also unclear whether damages will be evaluated as a direct function of the loss or damages suffered by the plaintiff.

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

Pursuant to section 143 CO, the Tribunal has the same jurisdiction, powers and duties as the Court of First Instance, including in respect of costs. Hence, costs would follow the event, such that a successful party could recover some of its legal costs from its opponent in accordance with the Rules of the High Court.

33 Is liability imposed on a joint and several basis?

The CO provides that the Tribunal has the same jurisdiction, powers and duties as the Court of First Instance, and therefore it is likely that the Competition Tribunal would impose liability on a joint and several basis if it deems it appropriate under the circumstances.

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

Yes, an indemnity in private litigation is possible. Although it is not possible under the CO to indemnify officers, employees or agents against liability for paying a pecuniary penalty imposed by the Tribunal for a contravention of the CO, nor for the cost incurred in defending an action in which that person is convicted of a criminal offence in relation to an investigation (which may apply in the event of a failure to comply with powers conferred by warrants, destroying or falsifying evidence, etc), this limitation does not appear to apply to damages in follow-on action.

The Competition Tribunal is authorised to decide its own proceedings and may follow the practice and procedure of the Hong Kong courts in the exercise of their civil jurisdiction. The Competition Tribunal Rules generally provide that the Rules of the High Court apply except where inconsistent with or excluded by the Competition Tribunal Rules, although the Competition Tribunal has a case management discretion to dispense with the application of the Rules of the High Court. The Rules of the High Court

provide procedures for contribution and indemnity that could be applied, subject to satisfying the jurisdiction criteria under the CO.

Generally speaking, in the context of private litigation, indemnities usually arise to cover loss, damages, claims, liability, expenses, payments or outgoings incurred as a result of the litigation. So a party will normally only claim indemnity against the indemnifier when he or she has a final determination, ie, after a final judgment or after commitments have been accepted by the HKCC. However, there are no rules in Hong Kong that prohibit an indemnity claim from being joined to the main proceedings to be resolved in tandem with the main issues.

35 Is the 'passing on' defence allowed?

A defence of 'passing on' might generally be used when damages suffered by a purchaser of a product sold by an undertaking engaged in a cartel are reduced or mitigated if some of the overcharge is 'passed on' to the purchaser's own customers.

On the face of it, it does not appear that the availability of a 'passing on' defence has been excluded. However, it remains to be seen in practice how much weight the Competition Tribunal will give to this defence once the CO is in operation. The Competition Tribunal is likely, as is the case in the Hong Kong courts, to have regard to English case law as being persuasive. Under English law, whilst the 'passing on' defence can be argued by the defendant, its status remains uncertain, partly because of the close factual analysis required.

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

Apart from the defences available to defendants at the HKCC stage or in public enforcement proceedings, no additional or specific defence is available to defendants in a follow-on action.

37 Is alternative dispute resolution available?

Alternative dispute resolution methods, such as mediation, are encouraged in enforcement actions and private follow-on actions in Practice Direction 1. Indeed, the Competition Tribunal adopted the High Court's Practice Direction 31 on Mediation in this regard, which requires, among other things, parties to indicate their willingness to mediate and solicitors to declare that they have advised their clients about the availability of mediation. The Competition Tribunal also encourages active case management and flexibility in proceedings.

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Legislation and jurisdiction

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

In recent years, following the social unrest of 2011, there has been a sharp increase in private antitrust litigation, especially class actions. This increase is particularly noticeable with respect to international cartels and excessive pricing class actions.

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 based on the Restrictive Trade Practices Law, 5748-1988 (the Antitrust Law or the Law), can be filed under the Class Actions Law, 5766-2006, in the framework of contractual suits or as certain tort claims, as well as under other legislation. See question 3.

The Antitrust Law is silent with regards to the ability of indirect purchasers to bring private lawsuits against antitrust violations. The Supreme Court has thus far not been required to decide on this matter and there is no precedent that affirms or denies the applicability of the indirect purchaser doctrine under Israeli law.

However, in recent cases where litigants have attempted to use the doctrine, courts have generally held that indirect purchasers are not precluded from bringing tort claims, such as private antitrust suits, under Israeli law. In *Naor v Tnuva*, a class action against Israel's largest dairy producer, which was certified in April 2016, Tnuva argued that the indirect purchaser doctrine barred the group from bringing a claim against Tnuva and referenced US federal case law in order to substantiate this argument. The Central District Court ruled that under Israeli law indirect purchasers are permitted to bring tort claims and that, specifically in the antitrust context, this view is supported by a textual and purposive interpretation of the Antitrust Law and its explanatory notes.

This view is also supported by an amicus curiae brief submitted by the Attorney General of Israel in *Hatzlacha v El Al Airways et al*, a class action against four major commercial airlines. The Attorney General stated that at least in regards to price-fixing violations – the offence under discussion in that case – the cause of action of indirect purchasers should be recognised. The case is still pending.

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

Section 50(a) of the Antitrust Law provides that an act or omission contrary to the provisions of the Law shall constitute a tort in accordance with the Tort Ordinance [New Version]. The same applies to any breach of directives issued by the Commissioner of the Israel Antitrust Authority (the IAA and the Commissioner respectively) and conditions imposed by the Commissioner as part of a merger or restrictive arrangement approval. Such violations can serve as the basis for claims for damages or other injunctive relief by private parties.

The Class Actions Law provides that a person, public entity or consumers' organisation may, under certain conditions, file a class action on behalf of a class of plaintiffs and seek damages for breach of the Antitrust Law.

Private antitrust claims are commonly made in the context of contract litigation. A party who seeks to defend against enforcement of a contract will often argue that the contract violates the Law (illegal contracts are normally not enforced under section 30 of the Contracts Law). Israeli courts are reluctant to brand contracts that lack obvious anticompetitive characteristics with a mark of illegality. However, if a court comes to the conclusion that a provision in a contract violates the Law, this provision will normally be unenforceable.

While less common, private claims alleging unfair competition by competitors may also rely, in certain circumstances, on the Unjust Enrichment Law, 5739-1979. Under such claims, the plaintiff may be entitled to receive profits unjustly obtained by the defendant through anticompetitive behaviour, without having to prove actual damages. This was determined in *Unipharm v Sanofi*, which is subject to appeal before the Supreme Court. Claims based on this law may be especially important in cases where the plaintiff lacks the ability to substantiate the damages caused.

As with other civil claims, private antitrust actions are deliberated before civil courts.

The Antitrust Tribunal acts as an appeals court over decisions of the Antitrust Commissioner. Additionally, the tribunal serves as a first-instance forum in applications for approval of restrictive arrangements. The tribunal does not have jurisdiction over private antitrust claims.

Private parties can also agree to turn to alternative dispute resolution mechanisms such as arbitration and mediation (see question 37).

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?

As mentioned above, private actions are available where the defendant has engaged in conduct that is in violation of the Antitrust Law. Such violations may include the engagement in a restrictive arrangement that is not permitted under a statutory or block exemption or that has not been properly approved or exempted (this includes horizontal restrictive arrangements such as cartel offences – ie, price-fixing, bid-rigging, market allocation, etc and certain vertical restrictive arrangements). Monopoly violations such as refusal to deal and abuse of dominant position (eg, unfair pricing, price discrimination, tying, predatory pricing, etc), as well as violations of monopoly directives or other conditions imposed by the Commissioner (eg, merger conditions) and the breach of merger control provisions are also actionable violations.

A finding of infringement by the IAA is not required to initiate a private antitrust action. However, a 'declaration of breach' made by the Commissioner pursuant to section 43 of the Antitrust Law serves as prima facie evidence for what was determined in the declaration in any legal proceeding, thus facilitating private actions. In practice, declarations are indeed usually followed up by private enforcement, in particular class actions. Declarations of breach include a declaration that a certain arrangement constitutes an illegal restrictive arrangement; a merger was unlawfully consummated; a course of action determined or recommended by a trade association constitutes a restrictive arrangement; and a monopoly has abused its dominant position. The Commissioner may also issue a 'monopoly proclamation' stating that a certain firm is a monopoly, which also serves as prima facie evidence to such monopoly position in any legal proceeding.

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?

As regards subject-matter jurisdiction, the general rule is that private claims in the sum of less than 2.5 million shekels are deliberated in magistrate courts and claims above that sum are deliberated in district courts. Parties cannot agree to deviate from such rules. Most antitrust-related tort claims are above the sum of 2.5 million shekels and thus are usually deliberated in district courts.

As regards territorial jurisdiction in antitrust-related matters, the plaintiff is entitled to submit its claim to a court located in the jurisdiction where the defendant resides or conducts its business, where the obligation was created or intended to be fulfilled or where the illegitimate act was committed. If there are several defendants, the plaintiff is entitled to submit its claim to any court in which the claim could be submitted against one of the defendants. Parties can agree to deviate from these rules.

Courts are authorised to assume jurisdiction with regards to a foreign defendant only after the statement of claim is duly served to such defendant. If the defendant is found within Israeli jurisdiction (eg, is registered or operates directly in Israel or has a local office, branch or representative in Israel), the statement of claim may be served directly to the defendant or its representative. However if the defendant is not found within Israel's jurisdiction, the plaintiff is required to seek the court's approval to serve the claim outside of Israel's borders. The court is authorised to approve such request if at least one of the conditions detailed in section 500 of the Civil Procedure Regulations, 5774-1984, is met (eg, the claim is based upon an act or omission committed in Israel).

Once the court has assumed jurisdiction, the defendant can argue that the courts of the state of Israel are not the 'natural forum' to try the claim (forum non conveniens).

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, provided that the subject matter and personal jurisdiction are appropriate.

As regards subject-matter jurisdiction, the Antitrust Law does not include an express provision that applies its provisions to legal relations outside of Israel. The issue of its application to arrangements concluded between foreign entities outside of Israel has yet to be decided by the Supreme Court. Lower courts have rendered somewhat inconsistent decisions, with a tendency in recent years to adopt the effects doctrine as the prevailing test for the extraterritorial application of the Antitrust Law (see, for example, *ACUM Ltd v The Antitrust Commissioner* and the Antitrust Commissioner's determination regarding the alleged *Gas Insulated Switchgear Cartel*). The effects doctrine requires, among others, that the conduct in question had a significant impact on competition in Israel.

Private action procedure

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

Third parties may fund private antitrust litigation.

Generally in civil proceedings, contingency fees are available, as well as other fees structures, such as a fixed amount or an hourly rate. In class actions, the plaintiff and representing counsel are prohibited from receiving fees. At the end of the proceeding, the court determines the compensation that is to be paid to the plaintiff and the attorney's fee.

If certain conditions are met, certification requests and class actions may also be funded by a foundation established under the Class Actions Law. The foundation is authorised to fund certification requests and class actions in which there is a public or social importance in having them brought before the court. The foundation, which began operating in 2010, is funded by the state. In 2015, 41 requests for funding were accepted, one of which was an antitrust claim, representing approximately 53 per cent of all requests submitted to the foundation's deciding committee.

8 Are jury trials available?

No.

9 What pretrial discovery procedures are available?

The underlying principle in pretrial discovery is to allow the most extensive discovery possible of the information relevant to the dispute in order to aid in uncovering the truth. At the request of a litigant the court may order that the parties to a dispute disclose in an affidavit the documents relevant to the dispute that are or were in their possession, including the existence of documents that are protected by privilege. At a litigant's request, documents in the opposing party's possession must then be made available for inspection and copying (and any party can request additional relevant documents not mentioned in such affidavit). While this process may require petitioning the court, litigants usually deliver the relevant disclosed documents to one another without a court order.

The definition of 'documents' is interpreted widely and includes all relevant information and data, including in electronic format. Courts are also careful not to allow parties to embark on fishing expeditions.

Third-party discovery is available on a very narrow basis and is founded upon court precedents, not legislation. A party may petition the court to instruct a corporation that is not party to the proceeding to comply with a discovery request if the corporation belongs to or is under the full control of the opposing party.

Third-party discovery regarding an entity that is not party to the dispute is very limited. In protection of third parties' right to privacy on personal information, the Supreme Court has ruled that such discovery will occur only in rare and exceptional cases and will require a high degree of persuasion regarding the necessity and essentiality of the requested information, among other stringent conditions. Information relevant to a dispute which is in the possession of an administrative agency can also be obtained through the Freedom of Information Law, 5758-1998, in addition to a request for third-party discovery.

Litigants may submit questionnaires to an opposing party. The questionnaire and the responses to it are not part of the court pleadings. They are not part of the evidentiary materials upon which findings may be based unless they are formally submitted as such to the court. The party that requested to have the questionnaire completed is granted the discretion to decide if and to what extent to use the responses to the questionnaire and submit them as evidence before the court.

Pretrial discovery procedures in class actions are more limited than those in standard civil proceedings. Under the Class Actions Regulations, 5770-2010, the court is authorised to grant discovery only if the documents the discovery of which is being requested are related to issues relevant to the certification request (as opposed to relevant to issues concerning the claim itself) and the claimant has presented prima facie evidence establishing the fulfilment of the requirements for the certification of a class action. These rules have been further developed by Supreme Court rulings (see *Tnuva v Prof Yaron Zelekha* and *Boaz Yifat et al v Delek Motors et al*).

10 What evidence is admissible?

Generally, the following evidence is not admissible in civil proceedings: hearsay; evidence regarding which a minister issued a certificate of confidentiality (eg, when there is a public interest in the confidentiality of certain information); evidence that was obtained through harm to privacy, as defined in the Protection of Privacy Law, 5741-1981; and statements recorded through illegal eavesdropping, as defined in the Eavesdropping Law, 5739-1979.

Witnesses are permitted to testify only on facts, as opposed to theories and conclusions. A notable exception to that rule is expert testimony, which may include the presentation of theories and conclusions with respect to the expert's field of expertise. Naturally, in private antitrust claims, opposing parties usually retain economic experts to prove competitive harm and quantify damages.

Litigants can usually agree to stray from evidence law and determine that they may submit evidence that would otherwise not be admissible. Furthermore, if a party to a civil proceeding does not object to the submission of inadmissible evidence immediately following its submission, such party is precluded from claiming otherwise later and such evidence will be regarded as admissible.

11 What evidence is protected by legal privilege?

There are two central legal privileges relevant to private antitrust claims: the attorney–client privilege and the legal documents privilege. Additionally, trade secrets are often protected under confidentiality granted by the court.

Under attorney–client privilege, an attorney (including in-house counsel) is barred from disclosing information provided to him or her by his or her client (or by a person on the client's behalf), if the information is substantially linked to the professional services provided by the attorney. The same prohibition applies to the attorney's employees. According to case law, the client is also entitled to enjoy the attorney–client privilege, in the sense that the client will not be forced to disclose information concerning professional consultation with his or her lawyer. The attorney–client privilege is absolute, thus the court is not authorised to remove it. The legal sources for attorney client privilege are section 48 of the Evidence Ordinance [New Version], 5731-1971, as well as section 90 of the Bar Association Law, 5721-1961. Attorney–client privilege does not extend to communications provided in relation to the commission of future or ongoing crimes or fraud.

The legal documents privilege provides that documents prepared either by an attorney, his or her client or someone on their behalf in connection with pending or anticipated legal proceedings are privileged. The normative source for this privilege is a Supreme Court ruling. It has yet to be determined whether the privilege can be waived by the court. The legal documents privilege also applies to documents created in the framework of pending or anticipated alternative dispute resolution proceedings (eg, mediation, arbitration). However, only documents prepared predominantly in order to serve such potential legal proceedings may enjoy the privilege.

A party to a civil proceeding is entitled to file a petition to the court for non-disclosure of evidence constituting trade secrets, pursuant to section 23(c) of the Commercial Torts Law, 5759-1999. The court will accept the petition if the interest in non-disclosure of the evidence is greater than the need to disclose it, and if other measures cannot be taken to protect the trade secrets (eg, partial discovery, discovery only to outside counsel, etc).

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

Follow-on litigation may arise when an investigation ends with a criminal conviction and sentencing. Civil claims can be submitted to the same judicial panel that convicted the defendant within 90 days of the date on which the verdict becoming final (section 77 of the Courts Law [Combined Version], 5744-1984; section 17 of Civil Procedure Regulations, 5774-1984). Findings and conclusions determined in the criminal proceeding are deemed as if they were established in the civil proceeding (section 42D of the Evidence Ordinance).

Plaintiffs can also submit a 'regular' claim in which the findings and conclusions of the criminal court can be used, subject to conditions, in the civil proceeding (see question 13).

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?

Generally, evidence or findings in criminal proceedings are admissible as prima facie evidence in private actions, subject to the following conditions:

- the evidence and the findings are part of a convicting judgement and provided the basis for conviction (ie, were not obiter dictum);
- the convicting judgement is final (either the time frame for submitting an appeal has passed or the appeal proceedings have been exhausted); and
- at the very least, one of the parties in the civil proceeding is the convicted person, its substitute (ie, one who legally assumes the convicted person's place such as the buyer of a convicted company) or a person whose responsibility arises out of the responsibility of the convicted person (eg, an insurance company, an employer, etc).

An opposing party may be permitted to attempt to meet the burden of proof and refute such prima facie evidence and findings, subject to receiving the court's approval and other stringent criteria.

It should be noted that, notwithstanding the above, evidence and findings introduced in sentencing proceedings are not admissible in court and thus cannot be relied on by plaintiffs in parallel private actions.

The leniency programme applies only to criminal liability regarding certain violations of the Antitrust Law. Therefore leniency applicants are not protected from follow-on private litigation or administrative enforcement measures. The first case in which the leniency programme was used in Israel was in the *GIS* cartel case. In this case, one of the parties to the alleged cartel (ABB) provided the IAA with evidence in exchange for leniency. In 2013, the IAA issued a declaration of breach (an administrative measure) according to which the parties to the arrangement in question (including ABB) were parties to an illegal restrictive arrangement. Following the determination, several class actions and a civil claim were brought against the alleged cartel members, including ABB.

The IAA does not normally disclose documents obtained in its investigations under its own initiative. A private claimant can file a petition to the IAA for the review of such documents pursuant to the Freedom of Information Law. While the Freedom of Information Law does not apply to materials obtained in the course of investigations conducted by the IAA, the IAA applies similar principles when reviewing petitions for disclosure. Additionally, if the documents were submitted to the court either in criminal or administrative proceedings, a private plaintiff can also file a petition to review the court's case file. Generally, under both disclosure alternatives, third parties that the documents refer to will be given the opportunity to object to the disclosure of the documents. A common ground for objection is that the documents refer to sensitive commercial information such as trade secrets.

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

A stay of proceedings in private antitrust actions may be granted on the same grounds as in any other civil proceeding. Defendants commonly petition the court for a stay of the proceedings when an action dealing with substantially the same cause of action is pending elsewhere, whether administrative or criminal (the lis alibi pendens principle). When weighing the petition, the court takes into account potential cost and time savings to the state and the parties, the prevention of contradicting court decisions and the balance of convenience between the parties, among other factors.

Plaintiffs are also permitted to petition the courts for a stay of proceedings. This is commonly done when criminal or administrative enforcement proceedings are pending and the findings in such proceedings may support the plaintiff's claim.

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, the burden of proof in civil cases lies with the plaintiff who is required to prove his claim on the balance of probabilities. The IAA Commissioner can publish a declaration of breach, which provides the plaintiff with prima facie evidence that the Antitrust Law was breached by the defendant. Additionally, cartels, bid-rigging arrangements and some other forms of horizontal arrangements are held as inherently harmful to competition and thus the plaintiff does not need to prove their actual competitive effect in order to establish liability. This is seemingly different, however, in the case of international cartels, where one must prove the fulfilment of the requirements of the effects doctrine as a precondition for the application of the Antitrust Law.

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

The timetable for private proceedings varies significantly between cases, primarily depending on the scope of the case, the strength of the claim and the willingness of the parties to settle. As in other private claims, an antitrust claim can be dismissed in limine or it can last for several years. Parties can file a petition to expedite specific court proceedings (eg, court hearings).

17 What are the relevant limitation periods?

Civil claims not related to real estate prescribe within seven years from the day that the cause of action arose (sections 5 and 6 of the Prescription Law, 5718-1958). In civil antitrust claims, the cause of action arises on the day on which the damage occurred; in case of an ongoing infringement, the cause of action may arise on the day on which the infringement ceased (section 89 of the Tort Ordinance). However, if the facts constituting the cause of action were unknown to the plaintiff for reasons out of the plaintiff's control and which it could not have prevented with reasonable care, the period of limitation begins on the day on which the facts became known to the plaintiff (section 8 of the Prescription Law). According to case law, the degree of knowledge required to trigger the commencement of the

limitation period is suspicion of the facts that constitute the cause of action (including cases in which the plaintiff should have had such suspicions).

If damage caused by the defendant is not discovered on the day of its occurrence, a civil tort claim shall prescribe within 10 years from the day on which the damage occurred (section 89(2) of the Tort Ordinance; *Merom Golan Kibbutz Cooperative Society of Agriculture settlements Ltd v Yoram Fradkin*). This rule, however, does not apply in cases where other elements of the offence were discovered after the time in which the damage occurred. For example, if a plaintiff discovers that it was harmed at the time in which the damage occurred but only learns at a later date that this harm was due to the operations of a cartel, the limitation period will not be limited to 10 years as of the time in which the damage occurred.

In addition, there are a few specific limitation rules which apply only to class actions. For example, if the court certifies a class action, the relevant group members will be deemed, for the purposes of limitation, as if they submitted a claim on the day on which the request for approval of the class action was submitted. If the court rejects a request for certification of a class action or dismisses such request, personal claims of the relevant group members will generally not prescribe for one year as of the day upon which the court's decision became final, thereby extending the limitation period as necessary.

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

In civil proceedings, a trial court's judgment is subject to appeal by right to the appeals court. Interim decisions are subject to appeal by permission. Some interim decisions, most of which deal with technical matters (eg, decisions regarding deadlines), are not subject to appeal during the trial court proceeding.

Administrative decisions of the Antitrust Commissioner (eg, a determination according to which a party committed a violation of antitrust law) are subject to appeal by right to the Antitrust Tribunal. Judgments of the Antitrust Tribunal are subject to appeal by right to the Supreme Court. Interim decisions of the Antitrust Tribunal, in contrast, are not subject to appeal during the proceeding.

Appeals can be based both on legal or factual grounds. However, the appellate court will rarely intervene in factual determinations of the trial court and is much more likely to intervene in matters of law.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Class actions may be filed only regarding matters listed in the Class Actions Law or where other legislation explicitly grants a right to file a class action. As described in question 3, collective proceedings in respect of antitrust claims under the Antitrust Law are available under the Class Actions Law.

20 Are collective proceedings mandated by legislation?

No. Parties can choose whether to file a claim as a private civil suit or a class action (provided that there is a right to file a class action in the relevant matter). Once a class action has been certified, all parties that belong to the group as it was defined by the court are automatically included in the action unless they affirmatively opt out of the class within the allotted time frame.

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

Under section 8 of the Class Actions Law, a court is authorised to certify a class action if the following cumulative requirements are satisfied: the action must raise substantive questions of law or fact that are common to all members of the group and there is a reasonable possibility that the answer to these questions will be found in favour of the group; a class action is the most efficient and equitable method to resolve the dispute under the circumstances of the case; and it must be reasonable to presume that the interests of all members of the group will be represented and managed in an appropriate manner and in good faith.

Plaintiffs are required to demonstrate that the above conditions are satisfied based on prima facie arguments and evidence in support of their claim.

22 Have courts certified collective proceedings in antitrust matters?

In recent years there has been an increase in the number of antitrust-related class actions. In particular, class actions based on excessive pricing claims against monopolies have become increasingly common since the social justice protests of the summer 2011. There has also been in increase in class actions against alleged international cartels (see 'Update and trends'). Many of the antitrust class actions do not reach the certification stage as they are withdrawn (usually with a reward granted in exchange for the withdrawal) or settlements are reached.

The Central District Court recently certified a class action against Tnuva, in which it was argued that Tnuva charged excessive prices (*Naor v Tnuva*, see question 2).

23 Can plaintiffs opt out or opt in?

Once a class action has been certified by the court, plaintiffs may opt out of the class by informing the court of their desire to do so within 45 days of the publishing of the class action's certification, or within a longer time frame if so determined by the court.

24 Do collective settlements require judicial authorisation?

Once a class action has been filed or certified by the court, a settlement of the claim requires judicial authorisation. If a proposed settlement is not dismissed in limine by the court, the court will order that the submission of the settlement be made public and that the class members, the Attorney General as well as several other entities be sent copies of the proposed settlement. Certain parties, such as a member of the class, a government agency related to the subject matter of the settlement or class action and the Attorney General, may file a reasoned objection to the proposed settlement.

A member of the class who is not interested in being party to the proposed settlement may request to be removed from the class that the settlement shall apply to.

The court is authorised to approve a settlement only if it found that the settlement is appropriate, fair and reasonable. However, if the proposed settlement is submitted prior to the certification of a class action, the court must also analyse conditions which are essentially the conditions required for certifying a class action – that prima facie questions of law or fact which are common to the members of the class are raised and that ending the action by way of a settlement is an efficient and equitable method of resolving the dispute. The Class Actions Law also sets other requirements and procedures that may apply in approving a settlement, such as appointing an expert in the relevant subject matter to provide its opinion on the proposed settlement.

Class action practice has also led to the development of another form of settlement, which involves the withdrawal of class action suits. The Class Actions Law sets out the procedure for the withdrawal of a class action. A class action can only be withdrawn if it has not yet been certified and once a withdrawal is approved, it does not create a res judicata. In some cases, however, defendants have taken up the practice of granting an award despite the action's being withdrawn. This is often done when the defendant is of the opinion that the action indeed raised an issue of importance and led to a beneficial outcome such as a positive change in behaviour. This practice has been met with scepticism by courts. This has brought the courts to set certain conditions for the approval of withdrawal requests that involve the provision of some form of reward or benefit in exchange for the withdrawal of the class action certification request.

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?

Israel is not divided into multiple jurisdictions. For administrative purposes, Israel is divided into six districts. Private actions dealing with the same matter can be brought simultaneously to courts in different jurisdictions. However, the Supreme Court is authorised to order that such private actions will be deliberated in the same court.

26 Has a plaintiffs' collective-proceeding bar developed?

No.

Update and trends

The social unrest of the summer of 2011 marked a turning point in the Israeli public's attitude towards dominant corporations and government regulation of the economy and competition. In response to the public call for reform, Israel's parliament, the Knesset, enacted new legislative measures aimed at lowering the cost of living. Many of these efforts focused on promoting competition. The centrality of competition-based considerations and the IAA's role in the Israeli economy have since been on the rise.

In addition to increased regulatory activity of the IAA, private parties have also begun to take a more prominent role in the antitrust landscape. In April 2014, the IAA published guidelines on the IAA's enforcement policy regarding excessive pricing. The guidelines established that the IAA views the charging of excessive prices by monopolies, under certain conditions, as illegal unfair pricing.

In the past two years alone, about a dozen class actions have been filed on excessive pricing grounds. The Central District Court recently certified a class action against Tnuva, Israel's largest dairy producer and a proclaimed monopoly in the dairy sector, relying in part on the guidelines.

However, the current Commissioner, who began her post in August 2015, recently announced a public hearing and formal re-evaluation of the policy on excessive pricing. Meanwhile, in private actions that lean heavily on the guidelines, courts have expressed a degree of support for the excessive pricing policy which is now undergoing re-evaluation. This may lead to the emergence of significantly different interpretations by civil courts and the IAA with regards to monopoly excessive pricing.

In recent years there has also been an increase in the number of civil claims submitted by indirect purchasers against international cartels. In 2013 several civil proceedings (including class actions) were filed against members of the alleged international Gas Insulated Switchgear cartel (an important component in electric power systems). Class actions have also been filed against member of the alleged international LCD cartel and cathode ray tubes (CRT) cartel, among others.

Remedies

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

An antitrust-related cause of action enables the plaintiff to seek compensatory damages, which are limited to the actual loss suffered by the plaintiff. This is often proved by the use of an expert economic opinion.

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

The interim remedies and injunctions available in private antitrust actions are the same as those available in other civil actions and are generally aimed at preserving the status quo. A plaintiff who seeks an interim remedy must convince the court of the existence of a prima facie cause of action; that the balance of harm weighs in its direction; that the motion is made in good faith; and that granting the remedy is just and warranted under the relevant circumstances and does not cause harm beyond what is necessary.

In antitrust-related cases, however, the Supreme Court has held that courts should rarely grant motions for interim remedies due to antitrust claims requiring 'a profound examination', which should be conducted in the course of the main proceeding. A notable exception to this rule concerns determinations issued by the Commissioner stating that the defendant breached antitrust law. In these cases, the determination serves as prima facie evidence that the antitrust laws were in breach, and thus civil courts should be more inclined to grant motions for interim remedies.

29 Are punitive or exemplary damages available?

In civil antitrust cases, damages are limited to compensatory damages and thus punitive or exemplary damages are generally not awarded. Recently, the IAA began advocating for an amendment to the Antitrust Law that would allow for treble damages for antitrust offences.

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

Damages will normally include interest and will be linked to the consumer price index according to the Interest and Linkage Adjudication Law, 5721-1961. Damages accrue from the action's day of submission or from another date as determined by the court, starting from the day the cause of action arose. Interest on repayment of legal expenses, if awarded, accrue from the time the expenses were made until the later of the date in which the judgment is rendered or payment of the award as determined by the court. Interest on repayment of attorney fees accrue from the time in which the judgment is rendered until the date of repayment as determined by the court.

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

This question has yet to be examined by the courts. The IAA was granted legislative authority to impose 'fines' (monetary payments) only in 2012. Nevertheless, it is expected that fines imposed by the IAA (or foreign competition authorities) will normally not be taken into account when setting damages. Fines, which go to the national treasury, do not mitigate the actual damages suffered by the plaintiff and their purpose (punitive) is different from the purpose of civil damages (compensation).

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

At the discretion of the court, legal costs are often imposed on the losing party. The amount of the awarded costs is dependent on, inter alia, actual legal costs (eg, court fees, witnesses' salary, costs relating to the registration of a court protocol, etc), attorney fees, the value of the claimed remedy or relief, the value of the awarded remedy, the complexity of the case in question and the manner in which the parties handled themselves during the proceedings.

33 Is liability imposed on a joint and several basis?

In antitrust-related cases, liability is mostly imposed on a joint and several basis. However, courts are authorised to distribute liability among the defendants. In *Tower Air v Aviation Services Ltd* the plaintiffs argued that the coordinated activity of the defendants, in the framework of a jointly owned company, constituted an illegal restrictive arrangement. The plaintiffs also argued that the said company abused its monopoly position in the market. The court ruled in favour of the plaintiffs and determined that the defendants are equally responsible towards the plaintiffs. Nonetheless, the court divided the liability among the defendants according to their shares in the jointly owned company.

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

Indemnity agreements and insurance policies among defendants are invalid regarding monetary payment proceedings undertaken by the IAA (an administrative enforcement measure) and criminal antitrust proceedings. However, as with civil proceedings in general, insurance policies and indemnity between defendants in civil antitrust matters is permitted subject to certain prohibitions and limitations. Such claims can be asserted in the framework of the principal proceeding or in a separate claim.

35 Is the 'passing on' defence allowed?

Only a limited number of cases have addressed this subject. Thus far courts have yet to positively rule whether the passing on defence is a valid defence argument in civil antitrust cases. In *Isracard Ltd v Reis* the Supreme Court implicitly acknowledged the passing on defence in the context of a claim alleging that a monopoly charged excessive prices.

Some courts have recognised the right of indirect purchasers to bring antitrust lawsuits, which logically should lead these courts to acknowledge the passing on defence – in order to avoid double compensation (eg, *Hatzlacha The Consumers' Movement for the Promotion of a Fair Society and Economy v AU Optronic Corporation* and *Naor v Tnuva* (see question 2)).

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

Any defence claim that can be brought in civil proceedings is also valid in the context of civil antitrust proceedings. This is in addition to substantive

antitrust defence arguments (such as the applicability of a block exemption, statutory exemption etc).

37 Is alternative dispute resolution available?

Antitrust claims, particularly in the context of contract dispute, may be brought not only before a court, but also in the course of arbitration, which is becoming increasingly common in Israel. The Arbitration Law, 5728-1968, provides contracting parties broad discretion to agree on the substantive law and procedural rules that shall apply to arbitration proceedings. The Arbitration Law, however, may not be used as a mechanism for enforcing illegal contracts such as those that are in violation of antitrust law. Nonetheless, in an attempt to encourage the use of arbitration as a dispute resolution mechanism, courts have not categorically disqualified arbitrations in which one party argued that the disputed agreement was, in whole or in part, an illegal restrictive arrangement.

In one case, the Supreme Court validated an arbitration clause, even though the agreement in which it was included was argued to be a restrictive arrangement. The members of the panel expressed different opinions as to whether the agreement indeed violated the Antitrust Law; this question remained unanswered. In another case the court rejected a claim of invalidity regarding an arbitration agreement, owing to the fact that it was signed after the contractual relations between the parties, which were claimed to constitute a restrictive arrangement, had terminated.

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Legislation and jurisdiction

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

Private antitrust litigation in Italy is significant and increasing, possibly because of:

- more general awareness of the advantages of judicial remedies, as a result of, inter alia, the initiatives taken in this field by the European Commission (the Commission), starting with the 2008 white paper on damages actions for breach of EU antitrust rules and culminating in its proposal of June 2013 for a directive on certain rules governing actions for damages under national law for infringements of competition law provisions of the member states and of the EU. This directive was adopted by the European Parliament and the Council in November 2014 as Directive 2014/104/EU (the Damages Directive). Although it has not yet been implemented in the Italian legal system, domestic civil courts already refer in their rulings to the principles established by the Damages Directive (eg, Court of Cassation, No. 11564/2015);
- the exclusive power of civil courts to grant interim relief measures upon request by private parties; and
- a clear recognition in the case law of the Court of Cassation that consumers are entitled to bring private actions based on Law No. 287 of 1990 (the National Competition Law).

Once implemented, the Damages Directive is expected further to boost the development of private antitrust litigation in Italy, together with other factors – particularly as far as follow-on actions to cartel decisions are concerned – such as the as yet untapped potential of the 2007 leniency programme of the Italian Competition Authority (the Authority), applied in only five cases to date; the enactment of legislation on consumer class actions in 2010 and its ongoing reform (article 140-bis of the Italian Consumer Code – see questions 19 to 26); and the 2012 simplification of jurisdictional rules (see question 3), which could limit the number of private actions rejected on grounds of inadmissibility.

On the other hand, the Authority's recent policy regarding the use of the commitment procedure – by virtue of which, where the parties to an investigation offer suitable commitments to meet the concerns expressed by the Authority in its preliminary assessment, the procedure may be closed, without a finding of infringement by a final decision making those commitments binding on the companies concerned – seems to suggest that fewer follow-on damage actions may be expected in non-cartel cases. The Authority adopted commitment decisions in 10 out of 11 abuse-of-dominance investigations opened in 2010, but only in three out of seven cases in 2011, three out of 10 cases in 2012, and one out of five cases in 2013. The Authority adopted commitment decisions in eight out of nine vertical-agreement cases in 2014, in two out of three abuse-of-dominance investigations and in the only vertical-agreement case decided in 2015. More recently, the Authority has closed with commitment decisions the first abuse-of-dominance case and the first vertical-agreement case ended in 2016.

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 litigation is primarily governed by general civil law and procedure. Article 2 of Law Decree No. 1 of 2012, as converted into law by Law No. 27 of 2012 (the 2012 Decree), sets forth a special jurisdictional and venue provision, discussed in question 3.

Based on general civil liability principles, indirect claims seem to be also admissible (Rome Court of Appeals, 31 March 2008 and obiter in the Turin Court of Appeals, 6 July 2000).

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

Pursuant to article 2 of the 2012 Decree, competition law disputes mainly fall under the jurisdiction of companies courts, which are specialised sections of tribunals and courts of appeals that generally sit in the capitals of the Italian regions (Lombardy and Sicily, unlike other regions, each have two companies courts in their territory; Valle d'Aosta does not have any). In particular, companies courts have jurisdiction over:

- petitions for declaratory relief (eg, for a declaration that an agreement hindering competition is null and void), actions for damages and requests for interim relief relating to infringements of National Competition Law;
- private actions based on articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU); and
- private actions based on the National Competition Law or articles 101 and 102 TFEU and relating to the exercise of industrial property rights.

However, pursuant to general civil procedure rules, lower civil courts have jurisdiction with respect to:

- claims related to the violation of the National Competition Law other than those mentioned above, such as unjust enrichment claims or claims for the court to determine the price in a contract for services or works, where the court finds that the agreed-upon contract price is the result of anticompetitive conduct and is thus null and void (Court of Cassation, No. 25880/2010);
- actions based on alleged violations of unfair competition law, certain of which may be characterised as antitrust infringements;
- petitions for declaratory relief and actions for damages due to the creation or maintenance of dominant positions in the telecommunications and broadcasting sectors; and
- actions brought pursuant to article 9 of Law No. 192 of 1998 (abuse of economic dependence).

Moreover, in the context of civil actions not based on antitrust claims, lower civil courts may have to consider incidental questions involving the application of National Competition Law (for example, objections to the enforceability of a contract claiming nullity for violating the ban on restrictive agreements; Rome Tribunal, 8 August 2012; Milan Tribunal, 25 January 2012; Trento Court of Appeals, 1 March 2011).

Although the Court of Cassation for a long time supported the opposite solution, since 2005 it has been uncontroversial that consumers may bring actions for damages based on National Competition Law. In particular, the Court stated (No. 2207/2005 and No. 2305/2007) that, by its very nature, National Competition Law is intended to protect anyone, including consumers, whose interests may be affected by antitrust infringements. Individual consumer actions must be brought before a companies court, whereas, pursuant to article 140-bis of the Consumer Code, consumer class actions fall within the jurisdiction of the tribunals of the main Italian judicial districts, based on the place of the defendant company's registered office (see question 25).

Neither National Competition Law nor any other statute provide criteria to coordinate private actions brought before different jurisdictions. Hence, parallel proceedings might concern the same parties and the same conduct, with the ensuing risk of conflicting decisions.

Interim measures may be granted according to article 700 et seq of the Civil Procedure Code. A plaintiff may request an interim measure if it fears that its rights are likely to be irreparably damaged during the course of the ordinary civil proceedings.

As far as substantive provisions are concerned, declaratory actions may be based on article 2(3) of the National Competition Law or article 101 TFEU, pursuant to which forbidden agreements are null and void for all purposes, or on article 3 of the National Competition Law or article 102 TFEU, which prohibit abuse of market power.

In theory, negative declaratory actions should also be admissible (for example, by a dominant company seeking a declaration that certain conduct does not amount to abusive behaviour under article 3 of the National Competition Law or article 102 TFEU, with a view to pre-empting possible third-party claims for damages based on such conduct). However, in the only known case of an antitrust negative declaratory action in Italy in which a final ruling was adopted, the court rejected the plaintiffs' request to declare:

- the non-existence of a cartel infringement established by the Commission, pending actions for annulment of the Commission's decision that its addressees brought before the General Court of the EU; and
- in any event, that the cartel in question did not cause a price increase for the relevant products or any other damage to the defendants.

Although the Commission's decision had not established that the conduct had a market impact, the court took the view that the plaintiffs were in fact requesting it to rule counter to a decision adopted by the Commission, which would have been prohibited by article 16(1) of EC Regulation 1/2003. Furthermore, the court refused to grant declaratory relief on the ground that the plaintiffs failed to indicate, in respect of each defendant or group of defendants, specific facts or circumstances allowing the court to assess whether damage claims could possibly be made against them (Milan Tribunal, 8 May 2009).

Based on general civil liability principles, a plaintiff claiming antitrust damages must prove that the defendant intentionally or negligently violated National Competition Law or EU antitrust rules, the plaintiff suffered damages, and a direct causal link exists between the defendant's conduct and the alleged damages. Depending on the underlying facts, antitrust infringements may also give rise to damage actions based on contract liability (eg, being a party to a cartel may induce a company to act in bad faith towards its customers or distributors).

Consumers may also rely on consumer protection provisions, such as article 1(2)(e) of Law No. 281 of 1998 on consumers' and final users' rights, pursuant to which these categories of persons enjoy a fundamental right 'to honesty, transparency and fairness in contractual relationships'. An infringement of this right is actionable, for example, by claiming damages against a company selling goods or providing services where the sale price was raised because of an anticompetitive agreement between the company and its competitors (Magistrates' Court of Lecce, 30 January 2003).

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 antitrust actions may be filed in connection with any possible violation of National Competition Law or articles 101 and 102 TFEU. No prior finding of infringement by any competition authority is required. A final finding of infringement by the Authority is not binding on civil courts having jurisdiction over follow-on damages actions. However, according to the Court of Cassation (No. 3640/2009), the Authority's findings – if confirmed by administrative courts – may be considered a privileged means of proof of the infringing conduct (ie, they create a rebuttable presumption with respect to the existence of the infringement). The defendant may refute such a presumption by providing adequate evidence, which – according to a line of case law by the Court of Cassation – should not include evidence that was already unfavourably assessed by the Authority when adopting the decision (No. 10211/2011 – see also question 15).

The case law referred to below illustrates the most frequent kind of private antitrust enforcement actions brought before Italian courts.

Damages

Damages have been awarded in cases involving abuses of market power or cartels. For instance, in *Telsystem* and *x-DSL/x-SDH*, damages in tort were awarded to potential new entrants whose market access had been prevented by the incumbent telecom operator's refusals to supply them with services they needed to enter the market (Milan Court of Appeals, 18 July 1995 and 24 December 1996, and Rome Court of Appeals, 20 January 2003 and 11 September 2006).

In *Piccoli v Isoplus* breach of contract damages were awarded to an agent whose business proposals had been systematically turned down by Isoplus as a result of a market-sharing agreement it had entered into with certain competitors (Bari Court of Appeals, 22 November 2001).

In *Valgrana* the plaintiff, a producer of Grana Padano cheese, was awarded damages for the harm it suffered from illegitimate output-limitation decisions adopted by the Consortium for the protection of Grana Padano, the industry association of which it was a member (Turin Court of Appeals, 7 February 2002).

In *Bluvacanze* damages in tort were awarded to a travel agency that had been collectively boycotted by several tour operators in retaliation for the aggressive discounts the agency offered to its customers by renouncing part of its commissions (Milan Court of Appeals, 11 July 2003).

In *Inaz Paghe* damages in tort were awarded to a software provider that had been collectively boycotted by national and local employment consultant associations in retaliation for encroaching on activities allegedly reserved to authorised employment consultants (Milan Court of Appeals, 11 December 2004).

In numerous follow-on actions, damages in tort were awarded to consumers who paid higher premiums to insure their cars against third-party liability because their insurance companies participated in an information exchange cartel (eg, Salerno Court of Appeals, 20 December 2008, upheld by Court of Cassation No. 8091/2013; Naples Court of Appeals, 30 March 2007, upheld by Court of Cassation No. 8110/2013).

In *Gruppo Sicurezza* an airport security service provider sued the managing body of the Fiumicino airport for damages, claiming to be the victim of exclusionary abuse (unlawful interference with the plaintiff's customers, which led them to terminate their contracts with the plaintiff). Gruppo Sicurezza was awarded damages for loss of profit and harm to reputation (Rome Court of Appeals, 4 September 2006).

In *Avir v ENI* the court found that the incumbent gas operator had abused its dominant position by imposing unfair prices: the claimant was awarded restitution of the overcharge paid, in addition to damages (Milan Court of Appeals, 16 September 2006).

In *International Broker* the court awarded damages to a broker for the loss of profit suffered when the main local oil refining companies aligned prices through participation in a joint venture for the production and distribution of bitumen (Rome Court of Appeals, 31 March 2008).

In several actions brought against the Agenzia del Territorio some companies were awarded damages in tort for the loss of profit they suffered as a consequence of restrictions on the commercial utilisation of data, abusively imposed by the agency entrusted with the maintenance of the national land registry (eg, Milan Court of Appeals, 4 April 2012, Court of Cassation, No. 21481/2013 and Milan Tribunal 7 January 2016).

In *Okcom* the court awarded damages in tort for the actual loss suffered by the plaintiff (a phone service provider) when the dominant mobile phone operator on the wholesale market put a margin squeeze in place for the termination of phone calls on its own network (Milan Tribunal, 13 February 2013).

In *Teleunit* and *BT Italia* the court awarded damages in tort for the overcharge paid by the plaintiff as a result of the discriminatory termination tariffs charged by the defendant, which were less favourable than those charged to its own commercial divisions in the case of similar termination requests (Milan Tribunal, 1 October 2013 and 28 July 2015).

In *Brennercom* the court awarded damages in tort for the loss of profit suffered by the plaintiff as a result of the abusive conduct of the incumbent operator in the telecommunications sector, which charged competitors higher prices than it charged its commercial divisions for the relevant inputs in violation of article 102 TFEU (Milan Tribunal, 3 March 2014).

In several actions brought against SEA the court found that the managing body of Milan's Malpensa airport had charged the plaintiffs, which were several logistic operators, unfair and discriminatory prices for the rental of the spaces required to carry out their business, and, therefore, it awarded them restitution of the overcharge paid (Milan Tribunal, 18 April 2014, 2 December 2014, 6 March 2015, 26 March 2015 and 23 December 2015).

Interim relief

Dominant companies have been ordered to stipulate supply agreements through interim measures in only a handful of cases (see, for example, Milan Tribunal, 29 April 1995, and Rome Court of Appeals, 12 February 1995). On the other hand, a defendant may be ordered to cease and desist from continuing its allegedly unlawful behaviour (eg, from further participating in alleged cartel activities) until a final judgment is issued (Milan Court of Appeals, 13 July 1998 and 29 September 1999). Arguably, ordinary civil courts (as opposed to companies courts) have jurisdiction over requests for interim relief related to violations of National Competition Law, where the interim relief sought by the applicant is not ancillary to petitions for declaratory relief or actions for damages (Turin Court of Appeals, 18 June 2001, mutatis mutandis).

Nullity

Only agreements that directly eliminate, restrict or distort competition are null and void under article 2(3) of National Competition Law, not agreements entered into downstream by one or more of the parties to the upstream cartel (Court of Cassation, No. 9384/2003; Lazio Regional Administrative Tribunal, No. 1790/2003). However, based on a misconstrued interpretation of dicta in Court of Cassation No. 2207/2005 and No. 2305/2007, some commentators argue that downstream agreements are part of the anticompetitive agreement and, as a result, may also be found null and void. In *Avir v ENI*, the Milan Court of Appeals found that gas supply agreements through which the incumbent gas operator had abused its dominant position by imposing excessive purchase prices were null and void, in part because they were contrary to the prohibition of such abusive conduct laid down in article 3(a) of National Competition Law (Milan Court of Appeals, 16 September 2006). Similar findings were also made in rulings rendered following several actions against SEA (Milan Tribunal, 26 March 2015 and 23 December 2015).

Private antitrust actions are very unlikely to originate from violations of merger control rules. Pursuant to the National Competition Law, the Authority has the exclusive power to vet and prohibit mergers through a mechanism of prior notification by the merging parties similar to the EU merger control system. Therefore, in principle, private litigation could arguably take place only in the event that the merging parties did not comply with a prior Authority decision by implementing a prohibited merger or by violating the terms of a conditional authorisation with remedies. However, in the only precedents available: on the one hand, the Turin Court of Appeals ruled that it had jurisdiction to decide upon violations of the bans on restrictive agreements and abuse of dominance, which the defendant allegedly committed through consummation of a merger cleared by the Authority (Turin Court of Appeals, 7 August 2001); on the other hand, the Milan Court of Appeals stated that the Authority has the exclusive power to verify compliance with its own merger control decisions (Milan Court of Appeals, 24 May to 3 June 2004), thereby virtually precluding private litigation within the ambit of merger control.

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 National Competition Law applies to any antitrust infringement taking place or having effect in the Italian territory. In addition, private actions based on EU competition rules (alone or in combination with the provisions of the National Competition Law) may be brought before Italian courts.

Pursuant to the general rules on jurisdiction, a private action may be brought before the court of the defendant's place of residence or domicile, if the defendant is a natural person, or the place where the defendant company has either its registered office or a branch and an agent authorised to act for the defendant in court proceedings. In addition, an action may be brought before the court of the place where the alleged obligation arose or must be performed (ie, the place where the allegedly restrictive agreement was executed or, in actions for damages based on torts, the place where the harm occurred, which is usually the residence or registered office of the plaintiff). If the claim is to be filed against several defendants who are domiciled in different EU member states, pursuant to EC Regulation 44/2001 the action may be brought in any of these jurisdictions. Moreover, as regards damage actions based on torts, pursuant to EC Regulation 44/2001, if the harmful event occurred in more than one EU member state, the plaintiff may bring its action in any of the EU member states concerned.

Special rules apply to consumer class actions (see question 25), which must be brought before the tribunals of the main Italian judicial districts, depending on the place of the defendant company's registered office.

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

Under general procedural rules, both natural and legal persons (including those from other jurisdictions) may be sued for antitrust violations.

Private action procedure

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

There are no specific rules concerning third-party funding of litigation in Italy. Certain forms of third-party funding agreements could arguably be permissible under general contract law principles.

Outcome-based fee arrangements have been permitted by law since 2006. However, since the ethical rules of the Italian Bar oblige attorneys to charge fees that are proportionate to the amount of work performed, 'no win, no fee' arrangements would seem to be of questionable enforceability.

8 Are jury trials available?

No.

9 What pretrial discovery procedures are available?

Pretrial discovery is not available in civil litigation, including for private antitrust actions.

10 What evidence is admissible?

All evidence normally admitted in civil liability proceedings, including witness testimonies, documents and expert opinions, is admissible in private antitrust actions (see below). Courts may also order one of the parties or a third party to submit relevant documents, which must be reasonably identified by the party applying for a disclosure order, or request documents from the Authority's file. For example, in the above-mentioned International Broker litigation, upon request by the Rome Court of Appeals, the Authority produced a copy of the minutes of a hearing of the defendants' representatives as well as a copy of the documents seized in a dawn raid at the defendants' premises. Similarly, in a follow-on action brought by a new entrant in the market for ferry transport of trucks and passengers with car vehicles on the Genoa–Palermo route against the incumbent operator, which the plaintiff claimed abused its dominance by means of an aggressive exclusionary policy, the court upheld the plaintiff's request and ordered the Authority to produce a number of documents included in its case file (Palermo Tribunal, 15 July 2011; the Authority had concluded its investigation in May 2010 after accepting commitments from the dominant ferry operator). A similar order was issued, in a similar setting, in a follow-on action in the telecommunications sector (Milan Tribunal, 30 October 2013). On the other hand, in a follow-on action brought against one of the leading Italian mobile telephone operators, which in the Authority's view was suspected, like its two largest competitors, of abusing its position of single dominance on the market for phone calls termination services on its own mobile network by charging rivals higher termination rates than its own commercial division, the Milan Tribunal dismissed the plaintiff's request for a disclosure order on the grounds that, since the court-appointed expert would have had access to the defendant's relevant documents, it was not necessary to grant the plaintiff direct access to the same documents (Milan Tribunal, 10 November 2011; the Authority had concluded its investigation into the defendant's conduct in May 2007 after accepting commitments, and found in its final decision that the two other operators had infringed article 102 TFEU; see question 15).

11 What evidence is protected by legal privilege?

Italian law protects the confidentiality of communications between a lawyer who is a member of the bar of an EU member state and his or her clients. To the extent that such communications are exchanged in the exercise of the client's right of defence, they are covered by professional legal privilege (eg, they cannot be used by the Authority for the purposes of an investigation). However, pursuant to Italian law, if a lawyer has the status of employee, then he or she cannot be a member of the Bar. Accordingly, in-house lawyers, who are employees of the company for which they work, cannot be members of the Bar; thus their communications and advice are not privileged.

The Authority does not allow access to documents containing trade secrets, unless they constitute the evidence of the infringement or contain essential information for the defence of the party that requested access

to them. In these cases access is in any event limited to the relevant essential information.

In civil proceedings, if a party intends to rely on a document containing trade secrets, such a document must be included in the case-file, which is fully accessible to each of the parties to the proceedings. The court may not order an inspection or submission of documents in the possession of one of the parties, or of a third party, if this could cause serious harm to them (the possible unfavourable outcome of the proceedings not being a relevant factor in the framework of the court's assessment). Each party to the proceedings has full access to all of the documents produced by the other parties or by third parties. Confidential information contained in documents produced before the court is, therefore, fully accessible to the parties and may also be subsequently used in other proceedings. Third parties, on the other hand, do not have access to the file, and may only request a copy of the judgment.

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

Antitrust infringements cannot give rise to criminal liability under Italian law.

However, the same conduct can sometimes infringe both antitrust rules and criminal law (eg, where participation in a bid-rigging cartel results in criminal interference with public tender procedures). Private antitrust actions are not barred by a criminal conviction in respect to the same matter. Nonetheless, if the civil proceedings are instituted after delivery of the first instance criminal judgment, they must be suspended until the judgment of a criminal conviction becomes res judicata.

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?

As a matter of principle, the evidentiary value of any evidence or findings in criminal proceedings should be assessed on a case-by-case basis by the civil court in the context of a parallel private antitrust action. Moreover, principles of res judicata require that the definitive findings in criminal proceedings in which the parties involved in a parallel private antitrust suit participated (or could have participated) be given res judicata consideration in the private action.

With respect to evidence gathered by the Authority, under general rules of procedure access to the Authority's case file is granted to complainants as well as any other 'person who has a direct concern in the matter' and has requested and been granted leave to intervene in the investigation procedure (eg, consumer associations, despite the fact that the statement of objections is not addressed to them). Moreover, at the request of a party to a private litigation, the civil court may request the Authority to disclose any documents included in its case file (see question 10; Rome Court of Appeals, 31 March 2008, Palermo Tribunal, 15 July 2011, and Milan Tribunal, 30 October 2013). However, as regards documents filed by leniency applicants, third parties, including those that have requested and been granted leave to intervene in the procedure, are barred from accessing written or oral leniency statements, as well as any document annexed to such statements. Moreover, the other parties to the investigation may have access to the leniency statements only after the date of notification of the statement of objections, provided that they undertake not to make copies of the statements and to use the information contained therein only for the purposes of judicial or administrative proceedings for the application of the antitrust rules at issue in the Authority's investigation. Finally, the Authority may decide to postpone the other parties' access to the documentation supporting the leniency statements until the date of notification of the statement of objections. Other than to this extent, leniency applicants are not protected from follow-on litigation.

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

Under general rules of civil procedure, the court must stay the proceedings in cases where its decision depends on the decision of another court.

Furthermore, under article 16(1) of EC Regulation 1/2003, national courts cannot take decisions running counter to a decision adopted by the Commission (see question 3). Therefore, where a private enforcement action follows a Commission decision that is subject to judicial review, the defendant may ask the judge to stay the proceedings pending the action for annulment of that decision (Milan Tribunal, 18 April 2015).

On the other hand, civil courts are not bound by the Authority's decisions (see questions 4, 15 and 25). Accordingly, they have full discretion in deciding whether to suspend proceedings pending a possible judicial review of the Authority's decision from which the private action may have originated.

It should be noted, however, that in the case of a class action (see questions 19–26), the court may suspend the proceedings at the admissibility stage if the facts on which the action is based also form the object of either an investigation of an independent enforcement agency such as the Authority (Florence Tribunal, 17 April 2013), or judicial review proceedings pending before an administrative court.

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 far as the standard of proof is concerned, the court may weigh any evidence provided by the parties, except where the value of a given means of proof is specifically mandated by law (for example, a party's confession is by law irrefutable proof of the confessed facts, provided it concerns disposable rights of the confessing party). The court may base its findings of fact on circumstantial evidence, provided that evidence is strong, precise and conclusive.

The burden of proof lies with the claimants, who must prove the facts on which their claims are founded. The defendants, on the other hand, must offer evidence in support of their objections or counterclaims.

With respect to causation, the Court of Cassation takes the view that, based on the laws of probability, a direct link may be presumed to exist between a cartel and the damages suffered by consumers, because downstream contracts between cartel participants and consumers are normally the means by which the cartel is put into effect (No. 2305/2007). As a result, the claimant is only required to prove the existence of a cartel (possibly relying on prior findings by the Authority, if any), provide a copy of the agreement it entered into with one or more of the cartel participants and provide a reasonable estimate of the overcharge paid as a result of the cartel. In follow-on actions, even though the court expressly noted that the presumption in favour of the claimant is rebuttable, it also stated that the existence of the causal link can only be challenged on the basis of circumstances which specifically concern the relationship between the claimant and the defendant, and not simply by referring to circumstances affecting the market in general (Nos. 5327/2013, 13890/2015, 17996/2015 and 17997/2015). Moreover, the defendant may refute the existence of a causal link between the alleged antitrust infringement and the damages claimed by the plaintiff, by proving that the latter has in fact succeeded in passing on the overcharge attributable to the illegal conduct to its own customers (ie, indirect purchasers) and, thus, has not suffered any damage (see also question 35).

As regards stand-alone cases, the Court of Cassation recently maintained that, in light of the Damages Directive and even before it is transposed into national law, civil courts must guarantee the effectiveness of the right to antitrust damages also through a less strict interpretation of procedural rules, including those concerning disclosure orders and court appointed experts (Court of Cassation, Nos. 11564/2015, 5763/2016 and 6366/2016).

At its own discretion, the court may appoint an expert to assist in matters requiring specific technical expertise (for example, definition of the relevant market or liquidation of damages). In order to quantify antitrust damages in the case at hand, a court-appointed expert may gather factual elements for its assessment also outside of the parties' allegations as recorded in the proceedings (Court of Cassation, No. 21480/ 2013). The findings of a court-appointed expert cannot be characterised as evidence in strict technical terms, and therefore they cannot discharge the relevant party's burden of proof (Court of Cassation, No. 20694/2013).

As anticipated in question 4, any finding made by the Authority or by the administrative courts reviewing the case is not binding on the civil court having jurisdiction over a follow-on damage action. However, according to the Court of Cassation (No. 3640/2009), the Authority's and the administrative courts' findings have value as a preferred means of proof of the infringing conduct (ie, they create a rebuttable presumption with respect to the existence of the infringement). As a result, in order to refute such a presumption, the defendant should provide evidence that has not already been unfavourably assessed by the Authority (No. 10211/2011). Against this

background, in the *Teleunit* case a court extended the value of preferred means of proof to the Authority's commitment decisions (Milan Tribunal, 1 October 2013; see question 4). Similar conclusions were also reached in the *BT Italia* case (Milan Tribunal 28 July 2015). However, in an obiter in a more recent ruling, the same court expressed serious doubts about the use of a commitment decision as proof of the unlawful character of the defendant's conduct, given that the Authority had closed the proceedings without finding any infringement (Milan Tribunal, 3 April 2014).

Furthermore, the Milan Tribunal established, in damages actions following a decision by the Authority which accepted the commitments offered by the defendant and made them binding without finding any infringement, that even the statement of objections issued by the Authority could provide circumstantial evidence of the disputed antitrust violation, although no infringement was found by the decision closing the proceedings. In that case, however, the Authority issued the statement of objections in an investigation against three companies, two of which were subsequently fined, whereas the other company (the defendant in the private action) offered commitments which were accepted by the Authority. The Milan Tribunal thus found that, since the same infringement described in the statement of objections had been confirmed in the final decision issued against the two other companies, it was reasonable to assume that the defendant had also participated in the same infringement (Milan Tribunal, 10 November 2011, 14 October 2014 and 28 July 2015).

No presumption concerning the existence or the size of the overcharge caused by an infringement is automatically applicable.

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

Petitions for interim relief in antitrust matters are normally adjudicated within four to eight weeks from the filing of the application.

The average duration of ordinary actions before the lower and the appellate courts is two to three years at each level of jurisdiction. The time frame may be lengthened considerably in the event of an appeal to the Court of Cassation.

Pursuant to article 702-bis et seq of the Civil Procedure Code (as introduced by Law No. 69 of 2009), where a single-judge lower court has jurisdiction and the action in question may be decided on the basis of a summary investigation, the plaintiff may request accelerated proceedings. This type of proceedings is characterised by a significant simplification of formalities, as well as fewer hearings and written submissions. Nevertheless, if the judge takes the view based on the parties' pleadings that more than a summary investigation is required, the accelerated proceedings may be converted into ordinary ones.

It is not yet possible to predict the typical timetable for consumer class actions under the new legislation, which only entered into force in January 2010, since to date only two consumer class actions have come to a final ruling at first instance (Milan Tribunal, 13 March 2012, and Naples Tribunal, 18 February 2013).

17 What are the relevant limitation periods?

Declaratory actions are not subject to a statute of limitations. The limitation periods for damage actions based on tort or breach of contract are, respectively, five and ten years. As clarified by the Court of Cassation (No. 2305/2007), the limitation period for antitrust damage actions starts running when the claimant is – or, using reasonable care, should be – aware of both the damage and its unlawful nature (ie, that the damage was caused by an antitrust infringement). Pursuant to recent case law, in the context of follow-on actions, where the claimant and the defendant are both undertakings operating in the same market, the limitation period starts running no later than the date of adoption of the Authority decision to initiate the investigation into the defendant's conduct (Milan Tribunal, 1 October 2013, 3 April 2014, 15 April 2014, 18 April 2014 and 14 October 2014).

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

Companies courts' rulings may be appealed to the courts of appeals both on the facts and on questions of law. The judgments of the courts of appeals may be appealed to the Court of Cassation on questions of law only.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

As mentioned, as of 1 January 2010 consumers have been able to bring class actions, pursuant to article 140-bis of the Consumer Code, for damages allegedly suffered as a result of certain breaches of contract or torts that occurred after 15 August 2009.

In particular, class actions may be brought by any consumer or user, on his or her own, through associations mandated by him or her, or through committees of which he or she is a member. These class actions may seek damages or declaratory relief for violations of rights that are 'homogeneous' to those of other consumers or users and that arise from certain actionable breaches of contract or torts, including, inter alia, 'anticompetitive activities'.

However, since a consumer or user is defined as 'any individual who is acting for purposes falling outside his trade, business or profession' (article 3(a) of the Consumer Code), the rules on class actions do not apply to claims on behalf of individuals acting within the scope of their trade, business or profession, including their employment contract, or parties who are not individuals.

There are two stages in the class action procedure. First, following an opening hearing, the court decides on the admissibility of the action (see question 21). At this stage, the court may suspend the proceedings if the facts on which the class action is based also form the object of either an investigation of an independent enforcement authority (Florence Tribunal, 17 April 2013), or review proceedings pending before an administrative court. If the court deems the class action to be admissible, it issues an order setting out:

- the rules for the notification of the proceedings to the other members of the class;
- the characterisation of the rights that are at stake in the proceedings;
- the deadline for the exercise of other consumers' or users' right to opt in; and
- the rules governing the ensuing investigatory phase.

If the court issues a final ruling in favour of the plaintiffs, it may either award a fair estimate of damages to each of the individual consumers or users who have elected to opt into the class, or establish criteria to quantify damages and grant the parties a period not exceeding 90 days to settle the amount of damages. In the latter case, if the parties reach an agreement before the expiration of the deadline, such agreement is signed by the judge and becomes enforceable. If no agreement is timely reached, the court, following the request of at least one of the parties, shall award a precise amount of damages to each consumer or user who has opted into the class action.

20 Are collective proceedings mandated by legislation?

Consumer class actions are not mandated by legislation. Individual consumers and users have the right to bring private antitrust litigation on an individual basis, including where class action proceedings have already been commenced based on the same illegal conduct and against the same defendants.

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

Pursuant to article 140-bis(6) of the Consumer Code, for a class action to be admissible the following requirements must be satisfied:

- the action is not manifestly unfounded;
- there is no conflict of interest between class members;
- the rights claimed by the class members appear to be homogeneous; and
- the first claimant seems able adequately to protect the interests of the class.

22 Have courts certified collective proceedings in antitrust matters?

There appears to be only one consumer class action related to an antitrust infringement, but the court has not yet decided on its admissibility (action pending before the Genoa Tribunal with respect to an alleged price cartel between ferry companies operating on several routes connecting the Italian mainland to Sardinia).

23 Can plaintiffs opt out or opt in?

As noted, Italian consumer class actions are based on an opt-in system.

24 Do collective settlements require judicial authorisation?

Under general civil procedure principles, settlements do not require judicial authorisation. However, pursuant to article 140-bis(15) of the Consumer Code, any settlement reached between certain parties to the proceedings does not affect the rights of consumers or users who have opted into the class action but have not expressly agreed to the settlement.

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?

Article 140-bis(4) of the Consumer Code sets out special criteria for allocating territorial jurisdiction among Italian tribunals. In most cases, a class action may be brought only before the court sitting in the principal town of the Italian region where the defendant company has its registered office. However, in nine of the 20 regions, the territorial jurisdiction of certain other tribunals has been extended (eg, a class action in relation to a company having its registered office in the Region of Marche or Umbria would be brought before the Court of Rome). Pursuant to article 140-bis(14) of the Consumer Code, a defendant should not face more than one class action with reference to the same facts. Accordingly, if, before the expiry of the deadline to opt into a class action, further class actions are brought with reference to the same facts, these subsequent actions shall be joined to the first one. Any other class action initiated after the expiry of the said deadline shall be declared inadmissible.

Similarly, as regards non-class proceedings, simultaneous private actions concerning the same matter are not permitted. In the event of a conflict between two or more courts having territorial jurisdiction, the court where the first application was filed has jurisdiction.

Conflicts of jurisdiction may also arise between a civil court and an administrative court that exercises judicial review over a decision delivered by the Authority. In such an instance, although suspension of either proceeding is not mandatory, the most reasonable course of action appears to be for the civil judge to stay the proceedings and wait for the outcome of the other case. However, it should be noted that the civil judge is technically not bound by the terms of the administrative judgment.

26 Has a plaintiffs' collective-proceeding bar developed?

Since the legislation on consumer class actions entered into force in January 2010, only two actions to date have come to a final ruling at first instance (see question 16). As a result, no plaintiffs' collective-proceeding bar has developed yet.

Remedies

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

Both damages and restitution may be available as compensation, depending on circumstances (for example, restitution may be claimed in the event that an agreement is found to be null and void for violation of antitrust rules; Milan Court of Appeals, 16 September 2006 and Milan Tribunal, 26 March 2015 and 23 December 2015).

Damages allowed in antitrust actions are limited to the plaintiff's actual loss ('out of pocket' loss plus loss of income). Multiple damages are not available. Plaintiffs can only claim damages actually incurred. Where a precise amount cannot be proven, the court may award a fair estimate of damages. The judge may also request the assistance of an expert.

Liquidation of damages based on loss of income is especially difficult to carry out where the injured company could not enter the market due to the antitrust infringement. In the *Telsystem* case (see question 4) the court commissioned an expert's report to calculate the lost income of a potential new entrant into the leased lines market that failed to have market access because of the dominant company's refusal to supply leased-line interconnectivity. The damage calculation was based, inter alia, on the principle that in a free market economy every monopolist rent, such as that of a first mover on the market, tends to be neutralised by competition within a certain time frame, and in order to award damages it is necessary to determine such time frame in the relevant market.

In *Valgrana* (see question 4) the plaintiff was awarded damages on the basis of a fair estimate of the harm suffered. Its loss of profit was calculated by considering the extra volumes of Grana Padano cheese that the plaintiff would have otherwise produced during the term of the infringement and multiplying such volumes by the plaintiff's average profit per ton. The sum was then reduced to take into account the estimated fall in prices that would very likely have resulted from the increase of the total market supply.

In *x-DSL/x-SDH* (see question 4) several data transmission operators and internet providers (together with the Italian trade association of internet providers) claimed they had lost income due to the dominant company's refusal to supply them with x-DSL/x-SDH services. The court multiplied the plaintiffs' market shares in the data transmission or internet services market by the dominant company's turnover obtained from the provision of x-DSL/x-SDH services and awarded damages of 10 per cent of the resulting amount.

In *Bluvacanze* (see question 4) the court calculated the loss of income suffered by a travel agency that had been boycotted by several tour operators due to its aggressive discount policy. The court confronted the turnover achieved by the claimant before and after the collective boycott. In particular, the court awarded damages as a percentage of the turnover that the travel agency had achieved during the previous year, multiplied by the annual increase rate of the relevant market for travel packages in the year in which the infringement took place. Such percentage was equal to the normal profit margin that the travel agency would have earned, less the discount that it used to grant to its customers. The court also awarded additional damages to the travel agency, calculated on an equitable basis, as compensation for the harm the collective boycott had caused to its reputation.

In *Inaz Paghe* (see question 4) the court awarded damages based on loss of profit arising from contracts terminated by the clients of a software provider as a result of a collective boycott organised by national and local employment consultant associations. In order to identify these contracts the court compared the number of contracts terminated in the two-year period before and after the boycott to the number of contracts terminated during the two-year boycott. It then multiplied the average profit for each client (identified in the opinion rendered by the court-appointed expert) by the number of contracts terminated due to the boycott, assuming a potential residual contractual duration of two to three years. The court did not award any damages for potential new customers that the plaintiff had allegedly not been able to win due to the boycott, as it considered that the plaintiff's allegations were not adequately proven.

In the context of consumer follow-on actions for damages arising from a price-fixing conspiracy among insurers in the third-party auto liability market (see question 4), a number of petty claims courts and courts of appeals (eg, Salerno Court of Appeals, 20 December 2008, upheld by Court of Cassation No. 8091/2013; Naples Court of Appeals, 30 March 2007, upheld by Court of Cassation No. 8110/2013) awarded damages based on a fair estimate of the overcharge paid by the plaintiffs, amounting to 20 per cent of the total premiums (such percentage was held to correspond to the premiums' average annual price increase during the existence of the cartel, according to the Authority).

In *Gruppo Sicurezza* (see question 4) the loss of profit suffered by the plaintiff was calculated by making a fair estimate of the profits that the defendant would have obtained from the customers taken away by the defendant, on the assumption that the plaintiff would have provided them with its services for a three-year term. In addition, the court awarded damages on an equitable basis for the costs that the claimant bore to enlarge its production capacity in order to supply those prospective customers.

In *Avir v ENI* (see question 4) the court granted the plaintiff restitution of the overcharge paid to the defendant, finding that the incumbent gas operator abused its dominant position by applying price increases that did not bear a reasonable relation to the cost of gas. Upholding the court-appointed expert's arguments, the court compared the increase of ENI's gas prices to the trend of gas quotations at the London Commodity Exchange during the disputed period. The difference between the two growth rates was found to constitute an abusive overcharge and the same amount was awarded to the claimant as restitution (including pre-judgment interest). The court also decided that additional damages were to be quantified by a separate judgment.

In *International Broker* (see question 4) the court awarded the plaintiff both actual losses and loss of profit. The former was calculated as the total costs borne by the plaintiff in gathering the evidence of the infringement

Update and trends

Private antitrust litigation in Italy is significant and increasing, possibly as a result of:

- more general awareness of the advantages of judicial remedies, as a result, inter alia, of the initiatives taken in this field by the Commission, starting with the 2008 white paper on damages actions for breach of EU antitrust rules and culminating in its proposal of June 2013 for a directive on certain rules governing actions for damages under national law for infringements of competition law provisions of the member states and of the EU (Directive 2014/104/EU – the Damages Directive). Although this directive has not yet been implemented in the Italian legal system, domestic civil courts already refer in their rulings to the principles established therein;
- the exclusive power of civil courts to grant interim relief measures upon request by private parties; and
- a clear recognition in the case law of the Court of Cassation that consumers are entitled to bring private actions based on Law No. 287 of 1990.

Once implemented, the Damages Directive is expected further to boost the development of private antitrust litigation in Italy, together with other factors – particularly as far as follow-on actions to cartel decisions are concerned – such as the as yet untapped potential of the 2007 leniency programme of the Authority; the enactment of legislation on consumer class actions in 2010 and its ongoing reform; and the 2012 simplification of jurisdictional rules, which could limit the number of private actions rejected on grounds of inadmissibility.

On the other hand, the Authority's recent policy regarding the use of the commitment procedure seems to suggest that fewer follow-on damage actions may be expected to be brought in non-cartel cases.

and participating as complainant in the Authority's investigation. The court established that the loss of profit was equal to 40 per cent of the plaintiff's turnover in the 12 months prior to the implementation of the anticompetitive agreement by the defendants.

In *Agenzia del Territorio* (see question 4) the court-appointed expert calculated the loss of profit awarded to the claimants by comparing the EBITDA they derived from the services affected by the infringement with the theoretical EBITDA they could have gained in the absence of the infringement, on the assumption that they would have had the same earnings enjoyed prior to the defendant's misconduct.

In *Okcom* (see question 4) the court awarded the actual loss suffered by the plaintiff as a consequence of the abusively high termination tariffs charged by the defendant. The loss was calculated as the difference between the wholesale tariffs paid by the plaintiff and the retail tariffs that the defendant offered to its retail clients. The court refused to award loss of profit and harm to the claimant's reputation on the grounds that the claimant had not provided adequate evidence of such damages.

In *Teleunit* and *BT Italia* (see question 4) the court awarded the plaintiff actual losses for the overcharge it paid as a result of the discriminatory termination tariffs charged by the defendant. In *Teleunit*, the overcharge was calculated by a court-appointed expert as the difference between the average tariff per minute offered by the defendant to its wholesale clients compared to the average tariff offered to its own retail divisions. The court refused to award loss of profit as the claimant had not provided adequate evidence thereof. In *BT Italia* the court awarded actual losses on the basis of the report by a court-appointed expert, which calculated the margin lost by the plaintiffs.

In *Brennercom* (see question 4) the court awarded only the loss of profit suffered by the claimant, considering that the actual loss (ie, the overcharge applied by the defendant) was absorbed by the loss of profit. The loss of profit was estimated on the basis of a complex calculation provided by the court-appointed expert.

In *SEA* (see question 4) the plaintiffs were awarded restitution of the overcharge paid for the rental of certain spaces at Milan's Malpensa airport. The said overcharge was calculated as the difference between the unfair prices charged by the defendant and the fair price per square metre established by ENAC, the Italian national body for civil aviation.

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

As noted, a plaintiff may obtain interim remedies, including temporary injunctions and any other remedy deemed appropriate to preserve the plaintiff's rights until a final judgment is issued. As a matter of principle, civil courts have no power to enjoin the defendant permanently from repeating the anticompetitive conduct in their final judgments, unless the antitrust violations are also qualified as unfair competition acts pursuant to article 2598 of the Italian Civil Code. In order to obtain an interim remedy, the claimant must provide sufficient factual and legal grounds to establish a prima facie case (fumus boni iuris), as well as the risk of imminent and irreparable damage (periculum in mora).

29 Are punitive or exemplary damages available?

No. In the Italian legal system plaintiffs can only claim damages actually incurred.

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

In the case of tort liability, legal interest on damages awarded to the plaintiff accrues as of the date on which the infringement was committed. In the case of contract liability, legal interest will accrue only from the date on which the damages claim was filed with the court. The current legal interest rate in Italy is 0.2 per cent per annum.

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

No. The fines imposed by competition authorities are not taken into account when setting damages.

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

The unsuccessful party is ordered to pay all costs, including attorneys' fees. However, where each party succeeds on some and fails on other matters, or where the circumstances are exceptional, the court may order that the costs be shared or that each party bears its own costs.

Fees are set by the court and their amount depends on the seriousness and number of the issues dealt with, as well as on certain parameters applicable to members of the Bar, which the Ministry of Justice adopted in March 2014 in lieu of the tariff previously in force. These parameters are based on the monetary value of the dispute and the level of the court hearing the case. The maximum and minimum numerical thresholds resulting from the application of the parameters are expressly defined as 'non-binding' on the court setting the fees.

33 Is liability imposed on a joint and several basis?

Where an action for damages is brought against all the undertakings involved in an antitrust infringement that caused the harm suffered by the plaintiff, each co-conspirator is held jointly and severally liable for the full amount of the plaintiff's damages (Rome Court of Appeals, 4 September 2006 and 31 March 2008). In this respect, it is irrelevant that the plaintiff's suit may have been based on different types of claims against each defendant (for example, because one or more of the co-conspirators are liable in tort and one or more of the others for breach of contract).

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

Under general civil liability principles, in cases of joint and several liability, where a defendant pays more than its share of the damages, it can in turn seek a contribution from other defendants or sue other defendants for indemnification of its costs. The defendants' relative responsibilities must be determined in proportion to the seriousness of each defendant's fault and the materiality of the effects of its conduct. Where this allocation is not possible, all defendants are held liable for an equal amount of damages.

The defendant who is called to pay more than its share of the damages can seek a contribution from other defendants in the same proceedings in which it was sued, or file a new claim against the other defendants who did not participate to the initial payment.

In the first case, the defendant may assert its claim in the same private damages proceedings, either seeking contribution and indemnity from the other parties to the proceedings or calling other defendants to join

in the proceedings, in order to allow the judge to determine the share of liability of each party when quantifying the amount of damages due to the plaintiff(s).

In the second case, the defendant who has already been ordered to pay the damages suffered by the claimant may bring a new action to get contribution and indemnity from those who could be deemed to be jointly and severally liable for such damages.

35 Is the 'passing on' defence allowed?

The passing-on defence is not expressly recognised. However, pursuant to general civil liability principles, a claimant may only seek compensation for damages it actually suffered and only where it had no part in causing them. There are very few precedents. In 2000, the Turin Court of Appeals found that a travel agency could not be granted damages because it had wilfully participated in an anticompetitive agreement with the intent to pass the overcharge on to final customers (Turin Court of Appeals, 6 July 2000). More recently, the Court of Cassation found that the possibility of passing on higher prices does not exclude that damages corresponding to the sales volume lost due to the downstream price increase be awarded to the claimant (No. 29736/2011; No. 21033/2013). On the other hand, the Milan Tribunal established in an abuse of dominance case that the overcharge paid by the plaintiff could not be relied on as a basis for quantifying the antitrust damages; the court held that the plaintiff, which had failed to prove cost internalisation, was likely to have passed on the relevant overcharge to its customers (Milan Tribunal, 27 December 2013). Finally, in another recent abuse-of-dominance case, the Milan Tribunal held that the plaintiff was not entitled to a refund of the abusive airport fees charged by the defendant, because the plaintiff had passed on the fees to its customers (Milan Tribunal, 27 June 2016).

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

Defendants may avail themselves of any defence that is normally used against civil liability claims.

37 Is alternative dispute resolution available?

The parties may reach out-of-court settlements or submit to arbitration. Because of the confidential nature of these transactions no statistics or reports are available.

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Japan

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Legislation and jurisdiction

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

In 1998 a dramatic change in the development of private antitrust litigation in Japan took place. Before this, there were almost no cases in Japan in which plaintiffs seeking damages or injunctive relief from the harm caused by the anticompetitive acts of defendants had prevailed in such an action, although several such private litigations were brought each year. However, this seminal case dramatically altered the field of private antitrust litigation.

In that case, defendant manufacturers were ordered to pay approximately US$400,000 in damages, equivalent to 5 per cent of the turnover of the 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 this 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 the cartel-related products. More recently, 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 occurring during the period of 1994 to 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 who engaged in cartel conduct 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 illegal activities that violated an 'interference against a competitor' under unfair trade practices of the Antimonopoly Law. It is a recent tendency for corporations listed on a stock exchange to seek damages arising from anticompetitive acts before a court, or outside court, in order to avoid the potential risk of a shareholder making a derivative litigation. Likewise, there has recently been more derivative litigation against the directors of companies guilty of cartel behaviour alleging, in particular, that damages were caused against the company by having chosen not to apply for leniency.

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 Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Antimonopoly Law)), and are also possible under general tort law, pursuant to the Civil Code of Japan. The standing to bring a claim is not limited to those directly affected, but includes those indirectly affected under both the Antimonopoly Law and the Civil Code.

Also, pursuant to a 2001 amendment to the Antimonopoly Law, a private plaintiff may, in addition to seeking damages, seek an injunction against certain 'unfair trade practices'. The Antimonopoly Law provided for, and the Japanese Fair Trade Commission (JFTC) has designated under the authority of the Antimonopoly Law, many unfair trade practices such as exclusive dealing, price discrimination, below-cost sale, tie-in, resale prices maintenance, refusal to deal, division of territories, etc. Among these, private plaintiffs have most commonly sought injunctions for price discrimination, below-cost sales and division of territories. However, private plaintiffs have not prevailed 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 Antimonopoly Law relate to suits for damages for anticompetitive acts. Article 25 provides that parties who have monopolised or engaged in a cartel or other unfair trade practices are liable to indemnify those injured by such practices.

Article 709 of the Civil Code of Japan provides the principles for general tort law, stating that those who violate the rights of another must compensate for damage resulting from their actions. This is recognised to include anticompetitive acts, thereby authorising the bringing of private antitrust actions.

There are two possible ways to bring an action seeking monetary compensation, the distinction between the two being the burden of proof applicable to each. Article 26 of the Antimonopoly Law provides that the right to claim damages under articles 25 and 26 of the Antimonopoly 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 by the JFTC at court). However, when such an order exists, the plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant as to the relevant infringement of the Antimonopoly Law, given that such a determination will already have been made in the prior JFTC decision. However, in article 709 litigation, no such JFTC determination of guilt will exist; thus, the plaintiff must prove the existence of intention or negligence of the defendant at trial.

As stated in question 2, a private plaintiff may, in addition to seeking damages, seek an injunction against certain unfair trade practices (article 24 of the Antimonopoly Law).

The Antimonopoly Law was amended in December 2013 and the new Antimonopoly Law was put into force in April 2015. In this regard, the court of first instance for private actions brought pursuant to articles 25 and 26 of the Antimonopoly Law was changed from the Tokyo High Court to the Tokyo District Court. However, a plaintiff must still bring private actions pursuant to articles 25 and 26 of the Antimonopoly Law before the Tokyo High Court when the action is based on a JFTC order that became final and binding on or before 31 March 2015. The Tokyo District Court decisions may only be appealed to the Tokyo High Court, and the decision on appeal may be further appealed to the Supreme Court of Japan, similar to actions brought under general tort, although the court of first instance for general tort actions is not limited to the Tokyo District Court and the district decision may be appealed to the relevant high court. High courts must accept an appeal on both the factual determinations and the interpretations of law by the lower court. As above, the decision on appeal may be further appealed to the Supreme 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. Injunction litigations are initially brought in district courts. The amendment to the Antimonopoly Law does not change the timing that a plaintiff can bring an action under articles 25 and 26 of the Antimonopoly Law, which means that a relevant order by the JFTC must become final and binding for damage claims under articles 25 and 26 of the Antimonopoly Law.

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?

Redress for damages caused by all types of antitrust violations may be sought in a private litigation. However, under article 24 of the Antimonopoly Law, a private action seeking an injunction is limited solely to claims of unfair trade practices on the part of the defendant, as stated in question 2. A finding of infringement by the 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 weight in a private litigation. In addition, as explained in question 3, when such an order exists, a plaintiff can assert the right to claim damages under articles 25 and 26 of the Antimonopoly Law, under which the plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant as to the relevant infringement of the Antimonopoly Law, given that such a determination will already have been made in the prior JFTC decision. Without a final and binding JFTC order, a plaintiff claiming damages must choose article 709 of the Civil Code as its legal basis and must prove the existence of intention or negligence of the defendant as to 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.

As explained in question 12, some cases are referred by the JFTC to public prosecutors for criminal prosecution. 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 the private litigation.

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 Antimonopoly 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 Law. If a plaintiff would like to bring an action for damages to a district court other than the Tokyo District Court, the plaintiff must choose article 709 of the Civil Code as its legal basis.

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

Yes, provided that such actions have an impact on the Japanese market.

Private action procedure

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

Litigation may be funded by third parties and contingency fees are available. In fact, most cases of private antitrust litigation are on a contingency basis. The number of corporations, in particular, public corporations, that have brought such cases for damages is increasing as stated in question 1, in which a time-charge basis may be used by such public corporations.

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 for serious criminal cases only.

9 What pretrial discovery procedures are available?

During the past 10 years and more, the Japanese legal system's form of discovery has been changed in order 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. While 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 US and some other systems. There have also been amendments made to the Antimonopoly Law since January 2010, which state 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 (article 80 of the Antimonopoly Law).

10 What evidence is admissible?

In civil actions in Japan, in general, all evidence, including documentary or testimonial evidence, will be admissible. There are limited exceptions, such as if the evidence was obtained by illegal activity. The judge determines 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, as mentioned in question 9, it is possible for a party to request the court to order another party to produce information. An 'e-discovery' system is not common in Japanese court or even in JFTC procedures.

11 What evidence is protected by legal privilege?

In seeking damages there is no generally applicable rule regarding attorney–client privilege and attorney–work products in Japan. However, in civil litigation procedures relating to testimony and 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 during the course of performing their duties and that should be kept secret. In seeking an injunction trade secrets are protected to some extent under article 81 of the Antimonopoly Law.

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

Yes. The JFTC transfers criminal cases to public prosecutors for prosecution. In such cases, private litigation may still proceed, as civil cases are clearly distinguished from criminal proceedings in Japan. We further note that in most cases in which there has been a criminal prosecution followed by private litigation against the relevant defendant, plaintiffs have had a good chance of prevailing at trial.

However, it must be noted that in practice, few criminal cases are brought in Japan with regard to antimonopoly violations (perhaps only one case every two years). In contrast, administrative decisions of the JFTC regarding anticompetitive acts are common, and recently there have been 10 to 20 JFTC orders each year. As noted, orders that have become final and binding allow for article 25 and 26 private litigations to be brought, and hence are a much more common connective source of private antitrust litigation in Japan.

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 the judgment or decision rendered or evidence presented in a criminal proceeding (even including JFTC administrative proceeding). Applicants for leniency are not protected from follow-on litigation. In most private actions, leniency applicants were defendants.

The JFTC has a general policy to disclose, at its discretion, the documents obtained in its administrative investigation (except leniency procedures) to private claimants.

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 made in the court, the court may decide at its discretion whether to grant the stay.

If a plaintiff seeks damages under article 25 of the Antimonopoly Law, such suit is only allowed after the relevant order by the JFTC is finalised, and only when a defendant cannot challenge the existence of the violation

Update and trends

For the past six or seven years, individual executives in large corporations have often lost cases in derivative litigation where shareholders sought from the executives damages incurred by the corporations for participation in cartels due to the executives' misconduct, alleging that these executives failed to prevent a cartel or to use the leniency system. Executives as individuals paid ¥88 million, ¥230 million, ¥160 million, and¥140 million in 2010 and ¥520 million 2014 in settlement monies in courts to their corporations, in addition to the arrangement of more efficient compliance programmes. These examples show that pressure from shareholders in public corporations in relation to illegal cartels is significantly increasing in Japan.

The introduction of the commitment system, under which suspicion of violation of the Antimonopoly Law is voluntarily resolved by an agreement between the suspected undertaking and the JFTC, is currently considered. The contemplated commitment system is more or less same as the one under the EU competition regime. A bill including the introduction of the commitment system was presented to the national Diet in March 2016 but is still pending. Once it has been introduced, it is predicted that many unilateral conducts will be resolved through the commitment system. If so, there will be a few cases where the JFTC issues orders in which illegal conducts are determined, on which plaintiffs currently rely for their private actions, in particular articles 25 and 26 private litigation. The current bill does not provide any treatment as to articles 25 and 26, so we need to keep an observant eye on how private litigation will evolve in relation to the cases where the JFTC's investigation ends upon the commitment with the suspected infringer.

of the Antimonopoly Law any further (article 26 of the Antimonopoly Law). Accordingly, if a suit is allowed, the court will be highly likely to deny a defendant's petition for a stay.

On the other hand, if a suit is brought as a general tort under article 709 of the Civil Code, as a matter of general practice, the court is likely to grant the defendant's petition for a stay of proceedings only after the decision by the JFTC has been finalised and completed.

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, although there is no clear applicable standard of proof, the claimant – whether a direct purchaser or not – has the burden of proof to the extent of the preponderance of the evidence. As 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 a proper amount of damages on the basis of the entire import of the oral argument and the result of the examination of evidence under article 248 of the Code of Civil Procedure. In general, there are no rules of thumb or rebuttable presumptions even relating to overcharges of cartels.

As noted above, actions brought pursuant to articles 25 and 26 of the Antimonopoly Law will have the benefit of a determination by the JFTC regarding the existence of intention and negligence of the defendant. Thus, in these actions the defendants are liable for damages without negligence, provided that other requirements are fulfilled.

In actions brought pursuant to article 709 of the Civil Code, no such JFTC determination exists; thus, the plaintiff has the burden at trial of proving the existence of intention and negligence of the defendant.

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 weight in a private litigation. Since this assumption is not based on any provisions of law, there is no difference in terms of such presumption between actions pursuant to articles 25 and 26 of the Antimonopoly Law or article 709 of the Civil Code.

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 non-class 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. 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.

17 What are the relevant limitation periods?

Pursuant to article 26, paragraph 2 of the Antimonopoly Law, private actions brought pursuant to articles 25 and 26 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 the conspiracy or act that caused the damage, or within 20 years of the date of the conspiracy or damaging act, whichever is earlier.

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

As mentioned in question 3, actions pursuant to articles 25 and 26 must be brought solely in the Tokyo District Court. The Tokyo District Court decisions may only be appealed to the Tokyo High Court, and the decision on appeal may be further appealed to the Supreme Court of Japan. 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, as well as actions seeking an injunction under article 24 of the Antimonopoly Law, are brought in district courts, and the decisions of which may be appealed to the relevant high court.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

No, class proceedings are not available in Japan.

20 Are collective proceedings mandated by legislation?

Not applicable.

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.

23 Can plaintiffs opt out or opt in?

Not applicable.

24 Do collective settlements require judicial authorisation?

Not applicable.

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 or collective proceedings are not available.

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 related high courts. Private actions brought pursuant to articles 25 and 26 of the Antimonopoly Law must be brought solely in the Tokyo District Court, as the court of first instance.

Actions brought pursuant to article 709 of the Civil Code will be brought in the relevant district court. An appropriate nexus for the 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 in regard to any claim.

26 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Remedies

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

Damages are limited to actual loss 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 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 damage 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 recent trend 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.

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

Article 24 of the Antimonopoly Law permits a person, whose interests are infringed upon or likely to be infringed upon by unfair trade practices, as stated in question 2 and who is thereby suffering or is likely to suffer serious damages, to seek an injunction suspending or preventing the party from engaging in such infringements. Both provisional (interim) and permanent injunctions are available although the burden of proof is less in provisional dispositions than in permanent injunctions.

Further, restitution is rarely granted as a remedy, although 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.

29 Are punitive or exemplary damages available?

No.

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

Yes. The court must award interest at the rate of 5 per cent per year from the time of the damaging act or conspiracy until the defendant makes the payment.

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 of the violator's turnover of related product or products during the relevant period up to three years. The percentages are different in manufacturers, wholesalers, retailers and type of violations. The highest percentage is 10 per cent to manufacturers that participated in a cartel. 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 JFTC at all.

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.

33 Is liability imposed on a joint and several basis?

Yes, tortfeasors are generally liable for actual damages on a joint and several basis.

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 an entire damages award, that defendant may seek indemnification from the codefendants and demand a contribution equivalent to their respective proportion of the damages. Such contribution is commonly sought in these cases.

A defendant who paid the whole or a part of damages can seek indemnification from the codefendants in or out of court, provided that, in order for the defendant to assert such 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 codefendants is brought in separate proceedings from the principal claim and normally pursued after a judgment or settlement of the principal claim.

35 Is the 'passing on' defence allowed?

The passing-on defence may be taken into account, although not by that name. In Japanese civil litigation, an award of 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, it may still have difficulty showing the non-existence of an injury.

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

No.

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37 Is alternative dispute resolution available?

In theory, private claims for violation of the Japanese Antimonopoly 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 has been almost no such arbitration or alternative dispute resolution used in Japan for Antimonopoly Law claims. This is because the Antimonopoly 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.

Lithuania

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Legislation and jurisdiction

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

Competition litigation is showing a general tendency towards growth in Lithuania. This growth includes both litigation between the private and public sectors and purely between private-sector litigants. The growth may be attributed to the following factors: first, the increasing awareness and understanding of competition rules by the private and public sectors; and second, because of the increasing activities and competence of the relatively recently established (in 1997) Lithuanian national competition authority (NCA).

The development of private antitrust litigation in Lithuania is twofold. Cases concerning competition where the burden of proof is relatively easy have an increasing tendency to grow, whereas cases where the parties are subject to a high burden of proof are still slow to develop.

The first class of cases includes: claims in unfair competition cases, claims in breaches of non-compete obligations, claims in intellectual property cases where unfair competition is also a matter of dispute, and disputes regarding the public procurement law that correlates with competition law. These types of cases have a tendency to grow and quite few have been tried in the courts. This might be attributed to the fact that due the nature of these cases the burden of proof on the plaintiff is relatively easy to discharge.

The second class of cases includes other types of claims concerning infringements of competition law such as: prohibited agreements, abuse of a dominant position and illegal concentrations. These cases have a high burden of proof; usually expert knowledge of economics is needed to establish any infringement, many technical details must be proven and a lot of evidence has to be gathered. Therefore there is almost no observable growth in these types of cases. Only very few private litigants have claimed existence of a prohibited agreement, abuse of a dominant position or that a concentration took place without clearance from the NCA.

It is to be noted that even though the NCA finds quite a few competition law infringements every year (eg, cartels in public procurement, other prohibited agreements), follow-on damages claims tend not to be made in the courts. This has also been the trend in other member states of the European Union. However, this trend is forecast to change upwards as the EU has passed Directive 2014/104/EU on Antitrust Damages Actions (the Damages Directive).

The Ministry of Economy is responsible for implementing this directive. The draft implementing law has been already presented before the Lithuanian Parliament (the draft LoC). The directive is due to be implemented on 27 December 2016.

Private antitrust litigation is in the early stages of development in Lithuania. Even though the existing legal basis is basically sufficient for private enforcement of competition rules, there are a number of reasons why private competition enforcement is still underdeveloped. This is because of the lack of a well-established competition tradition, the reluctance of courts to award full or at least a large part of the litigation costs, complexity of the cases, lack of local economic competition advisers and no effective legislation for class action damages.

However, a slight increase in private antitrust litigation is expected in the future after the recent initiative to adopt legislation enabling collective actions to be brought in practice.

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 Lithuania. Private antitrust litigation proceedings are conducted in courts.

Claims for injunctive relief and damages is normally based on the Law on Competition (LoC) and the Civil Code. The claimant is entitled to the full recovery of damages caused by a defendant's unlawful conduct.

The invalidity of agreements for antitrust reasons has its grounds in the provisions of the Treaty on the Functioning of the European Union (TFEU), the LoC and the Civil Code.

Claims for compensation of damages are heard in civil courts in accordance with the Code of Civil Procedure. If the private competition enforcement claim is brought to a civil court under article 47 LoC, the rules set in the Code of Civil Procedure regarding who has standing to bring such claim apply. These rules provide a wide notion of 'interest'. The party bringing the claim must show that its rights and interests may have been violated by alleged breaches of the LoC.

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

The relevant antitrust legislation is both national and adopted from the EU. The national legislation relevant to private antitrust claims includes:

- the Constitution of the Republic of Lithuania;
- the LoC;
- the Civil Code;
- the Law on Prohibition of Unfair Actions by Retail Trade Companies;
- the Law on Advertising;
- the Law on Prices;
- the Law on Electronic Communication Networks;
- the Law on Electricity;
- the Law on Natural Gas; and
- various resolutions by the NCA.

In addition to the national legislation, EU legislation also applies to antitrust litigation:

- the TFEU;
- Council Regulation 1/2003 (on the implementation of the rules on competition laid down in articles 81 and 82 TFEU); and
- Council Regulation 139/2004 (on the control of concentrations between undertakings).

The core legislation regulating antitrust policy in Lithuania is the LoC and the TFEU. The purpose of this law is to protect and secure the freedom of fair competition in the country and also to harmonise Lithuanian and EU law regulating competition relations.

The case law of Lithuanian judicial institutions and article 1(3) LoC impose a duty on the national courts to construe and apply national competition law in accordance with EU competition laws. The LoC concepts have been given the same meaning as that of the same or similar ones used in EU law.

The LoC prohibits all actions of public and local authorities and private undertakings that restrict or that may restrict competition, as well as unfair competition, the establishment of rights, duties and liabilities of public

and local authorities and undertakings and the legal basis for the control of competition restriction, as well as unfair competition in Lithuania.

The LoC is applicable to the activities of undertakings registered abroad if their activities restrict competition in the domestic market. This law is not applicable to undertakings that restrict competition in foreign markets, unless international agreements to which Lithuania is a party provide otherwise.

The institutions relevant to the execution of state competition policy are the NCA and administrative and civil courts.

There are no specialised courts and no specialised divisions in courts committed to the resolution of antitrust cases, though Vilnius County Court has sole jurisdiction to hear private antitrust cases as the court of the first instance.

According to the amendments of the Law on Commercial Arbitration of the Republic of Lithuania, from 30 June 2012 claims related to the compensation of damage caused through violation of rules of the competition law became arbitrable.

Other antitrust cases (ie, not private) are resolved in the Lithuanian administrative courts (Vilnius Regional Administrative Court and the Supreme Administrative Court).

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 antitrust actions are available in four major types of cases where infringements derive from: conclusion of prohibited agreements; abuse of a dominant position; breaches in concentration regulation; or unfair competition practices.

Private actions are provided for breaches of both national and EU legislation.

A finding of infringement by a competition authority is not required to initiate a private antitrust action, though this finding is regarded as prima facie proof in the follow-on litigation. However, the final decision by the review court has a res judicata quality and can be relied upon in the follow-on litigation.

According to the draft LoC, an infringement of competition law found by a final decision of the NCA is deemed to be irrefutably established (res judicata) regarding specifically the fact and the type of infringement, the territory, the duration and the participants in the infringement.

An infringement finding by any non-Lithuanian competition authority is not yet considered res judicata or prima facie proof. However, an infringement finding by a competition authority of another EU member state was relied upon as a decisive proof in the 27 January 2015 decision by the Vilnius County Court in *flyLAL Lithuanian Airlines v Air-Baltic and Riga International Airport* (pending appeal).

The draft LoC transposes article 9 of the Damages Directive. Therefore a final decision by the NCA, if it is adopted in other EU member state, will be considered prima facie proof for infringements of articles 101 or 102 TFEU. A court decision (recognised under the EU regulations) will be considered res judicata proof.

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?

A private antitrust claim can be filed in Lithuania if one of the following conditions is fulfilled:

- the place where the damage was inflicted is in Lithuania;
- the defendant's domicile is in Lithuania; or
- the defendant's main place of business is in Lithuania.

If an affiliate or an agency of an undertaking is alleged to have breached competition law, the jurisdiction is determined by their domicile.

The parties have no influence as to the jurisdiction of the court hearing a claim. If a claim falls within the jurisdiction of Lithuanian courts, in accordance with article 47 LoC, the Vilnius Regional Court has exclusive jurisdiction to hear disputes arising from private antitrust claims.

Since the 30 June 2012 amendments to the Lithuanian Law on Arbitration, it has become legal to refer disputes related to competition law infringements to arbitration (to sign arbitration agreements before or after the dispute arose).

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

Yes. Private antitrust actions can be brought against both legal and natural persons, including subjects from other jurisdictions. The best recent example of private antitrust litigation between corporations is the claim by flyLAL Lithuanian Airlines, the Lithuanian national air carrier, against Air-Baltic Corporation and Riga's international airport.

Private action procedure

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

Third-party funding for competition law claims is not illegal and is available on the grounds of a contract between the claimant and a third party funding a claim (investor). Nevertheless, such an investor, if he or she does not participate in the case, will not be entitled to res judicata effects of the court's decision and is not entitled to recover the invested funds by itself. Though the party to the case is entitled to recover the incurred costs, very rarely do the courts award full costs. The practice of third-party funding is far from common in Lithuania.

Contingency fees are available. These fees are subject to negotiations between legal representatives and clients.

8 Are jury trials available?

Jury trials are not available in Lithuania.

9 What pretrial discovery procedures are available?

The Lithuanian legal system does not have the equivalent of discovery procedures as they are understood in common law systems. Nevertheless, evidence can be collected in the following ways. First, an attorney-at-law has a right to request information held by official institutions and to collect evidence without using any compulsory measures. These ways are ineffective in practice. Second, after initiating court proceedings, the applicant can request the court to extract any evidence from any person, necessary for the resolution of the case, except for information which is a state secret or a professional secret. Before evidence is extracted, the party requesting the extraction is obliged to prove the relevance of such evidence, the fact that it exists, and the fact that the party cannot obtain the evidence without a court order. Non-compliance with court orders is punishable with fines (which are unfortunately not deterrents) and contra spoliatorem presumption. Last, if a competition authority had found an infringement, the applicant has a right to request the case file himself or herself or through a court order from the competition authority. If done by the applicant, part of the case file, comprising commercial secrets, cannot be obtained by the applicant but can still be extracted and analysed by the court.

The procedures described above resemble the disclosure rights granted by the Damages Directive. Almost the same amount of disclosure is granted in practice prior to the implementation of the Damages Directive. However, the draft LoC foresees the possibility to obtain information containing commercial secrets from the case of the Competition Council, which is still generally unavailable prior to implementation of the Damages Directive.

10 What evidence is admissible?

There are no limitations as to the form of data that can be held as evidence, but the data submitted as evidence must have two characteristics in order to be acknowledged as evidence in court:

- it must have relevance to the case (ie, either confirm or deny the facts at issue in the case); and
- it must be acquired legally.

The most common types of evidence are: written documents (eg, contracts, written explanations, website printouts, emails, letters, attendance and other notes), witness statements, expert opinions, material evidence and other evidence that is admissible in private antitrust action proceedings.

11 What evidence is protected by legal privilege?

Information protected by professional secrecy rules is guarded by legal privilege. Professional secrecy rules safeguard attorney–client, accountant–client and notary–client communications. Specifically, the fact of reference to the attorney, terms of the client–attorney agreement, the information and data obtained from the client, the type of consultation

and the data obtained by the attorney under the request of the client are protected.

Advice from in-house counsel is not privileged.

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

Infringements of competition law are not subject to criminal investigation under Lithuanian law. Nevertheless, facts established in a criminal case can be relied on in any other case if those facts have relevance.

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?

Since no criminal liability is envisaged for antitrust-related behaviour, the question of protection from follow-on litigation is not relevant.

Leniency applicants in administrative proceedings concerning cartel activities are not exempted from follow-on private antitrust litigation. However, documents provided by a successful leniency applicant to the NCA must not be forwarded to third parties. Evidence provided by unsuccessful leniency applicants is not privileged. Unsuccessful leniency applicants have a right to withdraw information provided to the NCA unless they apply for fine reduction.

The draft LoC introduces several changes with respect to the availability of leniency applications. First, the draft LoC does not distinguish between 'successful' and 'unsuccessful' leniency applications. All leniency applications and recognitions of the infringement will be declared inadmissible as evidence in the follow-on litigation. Second, the draft LoC explicitly declares that the evidence attached to the leniency applications, in contrast to the applications themselves, would be generally allowed to disclose to third persons.

Any person has a right to access files held by the NCA, except for confidential parts. Therefore, the NCA is obliged to disclose non-confidential documents. In addition, the NCA is obliged to provide the file in full if so ordered by a court. The draft LoC foresees that the requests to disclose the NCA case file will have to be specific in relation to the categories of evidence. Requests to disclose merely the 'whole case file' will not be satisfied. The NCA will provide the case-file documents only if this evidence is not available from other sources.

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

Article 47 of the Law on Competition provides that the Vilnius Regional Court has exclusive jurisdiction to hear private antitrust claims. The same article also states that when hearing private antitrust cases, the court is obliged to draw the NCA into the proceedings. In private antitrust cases, the NCA is required to provide findings on whether an infringement of competition rules has occurred.

The Vilnius Regional Court will take into account the fact that the NCA had already begun an investigation concerning plausible infringements of competition rules before being drawn into court proceedings. Even though no compulsory legislation demands this, the Vilnius Regional Court will usually stay civil proceedings until the NCA's investigation or the administrative proceedings regarding the appeal of the decision of the NCA are over.

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 standard of proof set in the Code of Civil Proceedings is that of the balance of probabilities. The burden of proof in competition law and civil litigation (most often concerning damages) lies with the plaintiff. On the other hand, the defendant has the right to bring evidence proving the contrary.

The most important rule of thumb is probably the evidential value of the NCA's decisions in follow-on private antitrust litigation as well as the NCA's opinions in private antitrust cases that have prima facie value. The courts evaluate the NCA's decisions on infringements of competition law as incontestable proof of unlawful actions made by the defendant. Thus the claimant is required to prove the amount of damages suffered and the causal link between damages and illegal actions.

No rebuttable presumptions other than those that exist in EU competition law are found. The draft LoC, following article 17(2) of the Damages Directive, introduces a rebuttable presumption that cartel infringements cause harm.

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

There is no set timetable. Antitrust litigation may last for three or more years; the only way proceedings may be accelerated is if there is an applicable NCA decision concerning antitrust actions initiated by the plaintiffs.

17 What are the relevant limitation periods?

The general period for limitation of action in Lithuania is 10 years. Claims for damages have a three-year limitation period. The limitation period begins on the day the interested party learns or ought to have learned of the infringement of his or her interests arising from antitrust behaviour.

The draft LoC, following article 10 of the Damages Directive, foresees a five-year limitation period since the interested party learned or ought to have learned of the infringement of his or her interests arising from antitrust behaviour. The running of the limitation period will be suspended until one year passes after the NCA infringement finding becomes final. In addition, the draft LoC foresees a limitation period for the out-of-court settlement procedure.

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

Civil proceedings based on infringement of the LoC and articles 101 and 102 TFEU are handled exclusively by the Vilnius County Court (the court of first instance). The decision of the latter may be appealed on grounds of fact and law to the Lithuanian Court of Appeals (the appellate court). The decisions of the appellate court come into force on the date of issue. Further cassation appeals on matters of law are heard by the Supreme Court of Lithuania.

NCA decisions regarding infringement of competition rules that are reached after carrying out administrative procedures may be appealed to the Vilnius Regional Administrative Court (the administrative court of first instance), whose decision on grounds of fact and law may be overruled by the Supreme Administrative Court (the appellate court).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Amendments to the Code of Civil Procedure, which permit the institution of class actions, will take effect from 1 January 2015. Therefore, from that date, individuals are able to bring a class action lawsuit. Class actions are available with regard to antitrust claims.

In addition, joint actions of certain persons ('procedural complicity' – each accomplice represents himself or herself in the proceedings, unless one of the accomplices was commissioned to conduct proceedings on behalf of the accomplices by agreement of all accomplices), actions brought by a prosecutor in defence of the public interest and actions by either the State Consumer Rights Protection Authority or public consumer organisations are possible.

20 Are collective proceedings mandated by legislation?

Procedural rules concerning class action and joint proceedings are enacted in the Code of Civil Procedure.

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

A class action can be brought if the following conditions are fulfilled:

- the class action is based on identical or similar facts and aims at the same remedies to enforce the group of natural or legal persons which are identical or similar substantive rights or legitimate interests;
- the class action is more economical, more effective and more appropriate way to resolve a particular dispute than individual actions;
- a pre-court dispute resolution procedure took place;
- the group is represented by an attorney-at-law;
- the group also has another representative; and
- the class action in writing expresses the requirement of at least 20 natural or legal persons, expressing their will to be members of the group and to bring legal action.

22 Have courts certified collective proceedings in antitrust matters?

Owing to the fact that class actions have only permissible from 1 January 2015, the courts have not yet certified collective proceedings in antitrust matters.

23 Can plaintiffs opt out or opt in?

The Code of Civil Procedure provides an opt-in option.

24 Do collective settlements require judicial authorisation?

Private antitrust claims in civil proceedings can be resolved by settling. Collective settlements are required to be judicially authorised on the grounds that they are not in breach of imperative legislation, the interests of third parties or the public interest.

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, as Lithuania is a unitary state.

26 Has a plaintiffs' collective-proceeding bar developed?

Owing to the fact that class actions have only been available from 1 January 2015, a plaintiffs' collective-proceeding bar has not developed yet.

Remedies

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

According to the Civil Code, damages include the amount of direct expenses related to the injury (direct losses) and the income not received due to the infringement (indirect losses). The claimant has to prove the size of the damages claimed.

Interest for damages is also awarded. The minimum interest rates are set in the Civil Code, which states a 5 or 6 per cent annual interest rate. The draft LoC does not introduce any changes in this respect.

The claimant may also seek compensation for extra reasonable expenses such as expenses suffered to prevent greater damages, or expenses to evaluate damages or collect them without litigation. Lithuanian courts are not limited to awarding damages that have already been incurred – future damages may also be awarded, if sufficient evidence is provided that such damages shall occur in the future.

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

There are several types of remedies in private antitrust cases that are provided by the law:

- article 47 LoC provides the following remedies:
  - damages claim; and
  - injunction to terminate anti-competitive actions;
- article 1.80 Civil Code provides that contracts that are counter to mandatory law norms are null and void. Competition law norms that prohibit anti-competitive practices are mandatory. Therefore, a claimant can seek annulment of contracts, or parts of them, that are illegal from the competition law point of view. For example: a claimant may seek annulment of contracts or parts of them are:
  - vertical or horizontal agreements prohibited by competition law; or
  - entered into with a dominant undertaking that abused its dominant position by concluding contested contracts; and
  - article 16 LoC provides additional remedies for unfair business practices:
- termination of illegal actions;
- imposition of the obligation to make one or several statements of a certain content or form, denying previously submitted incorrect information or giving explanations as to the identity of the undertaking or its goods; and
- seizure and destruction of the goods, their packaging or attributes, directly related to unfair competition, unless the infringement can be eliminated otherwise.

Interim remedies are applied on the grounds in article 144(1) Code of Civil Procedure that require the applicant to:

- establish a prima facie claim;
- prove that in the absence of interim measures the implementation of the final decision of the court would be impossible or hindered; and
- prove that interim measures are in line with the standard tests of proportionality, economy and fairness.

According to article 145 Code of Civil Procedure, the following types of interim remedies are explicitly made available. Nevertheless, courts can apply individually tailored interim remedies that are necessary for the final decision of the court to be actually implementable. Therefore, even though the following list is provided by the Code of Civil Procedure, it is not exhaustive:

- seizure of immoveable property;
- notice in a public register prohibiting the sale or transfer of property;
- seizure of moveables, funds or property rights owned by the defendant and possessed by the defendant or third persons;
- detention of the property owned by the defendant;
- designation of property administrator;
- prohibition of the defendant from performing certain transactions or undertaking certain activities;
- prohibition of third persons from transferring property to the defendant or performing other obligations to him or her;
- suspension of the realisation of property if filing a claim for annulment of the arrest on such property;
- suspension of realisation during the enforcement procedure;
- order to compel a party to perform certain actions necessary to avoid damage; and
- other interim measures provided by laws or applied by court in the absence of which the enforcement of the court decision could be hindered or rendered impossible.

29 Are punitive or exemplary damages available?

Under Lithuanian law the sole purpose of damages is compensation to the injured party; thus, punitive or exemplary damages are forbidden.

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

Minimum interest rates are provided for in the Civil Code (6 per cent yearly rate in commercial disputes). Interest is not only available regarding awarded damages; procedural interest is also available for the period lasting from the initiation of proceedings until the court's decision is fully executed. The general rule is that interest on damage is available from the moment the damage has actually been suffered.

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

Since the purpose of damages is complete compensation to the injured party, fines imposed on the defendant by authorities (such as the NCA) are not taken into account when appointing damages to be awarded.

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

In general, the legal costs are borne by the unsuccessful party to the litigation. The legal costs include the state costs as well as attorneys' fees.

The winning party can recover the legal costs, but in most cases a full recovery is not available. The legal costs are allocated between the parties on a pro-rata basis according to the outcome of the case; the size is determined on the complexity of the case and the time spent preparing for the case. Also, there are statutory limitations as to the recommended maximum size of legal costs. The courts do not tend to depart from those recommendations and seldom do the courts grant that the successful party can recover all (or most) of the legal costs.

33 Is liability imposed on a joint and several basis?

Where damages were caused by several subjects (legal or natural persons), each defendant is liable for the damages incurred to the claimant. The defendants are liable jointly and the court can impose several liability on each defendant.

The draft LoC almost literally transposes articles 11(1)–11(4) of the Damages Directive. In the legal context to date, the draft law introduces

partial exemptions from civil liability for immunity receivers and small or medium-sized enterprises, subject to conditions set out in articles 11(1)–11(4) of the Damages Directive. The draft LoC makes it clear that the partial exemption from civil liability is also applied to companies that have received immunity from the European Commission or a competition authority in another EU member state.

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

In cases where several defendants have caused damages, one defendant is entitled to sue another in recourse pursuant to the scope of their participation. Exemptions from fines and leniency provisions do not cover civil liability.

The draft LoC almost literally transposes articles 11(5)–11(6) of the Damages Directive.

35 Is the 'passing on' defence allowed?

To date, there is no statutory background or case law to deny the existence of a passing-on defence in Lithuanian civil law.

The draft LoC faithfully transposes articles 12–16 of the Damages Directive. The burden of proof lies upon the defendant. The draft LoC introduces a rebuttable presumption that an indirect purchaser has suffered harm if cartelised goods have been purchased.

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

There are two types of other defences that can be used by the defendant.

First, the LoC provides the exemptions from liability having made some types of agreements prohibited agreements. These are:

- agreements, which, due to their non-appreciable influence, cannot substantially restrict competition (article 5 LoC); and
- agreements that promote investment, technical or economic progress or improve the distribution of goods between undertakings (article 6(1) LoC).

A party to these agreements is not held to have acted in an unlawful manner.

Second, the LoC provides exemption from or reduction of fines to undertakings that produce information or documents to the NCA (leniency). Basic leniency provisions are set out in article 38 LoC. Provisions of the leniency programme are elaborated on in the Rules on Setting Fines and the 28 February 2008 Resolution of the Competition Council No. 1S-132 on the rules of exemption from and reduction of fines for the participants of prohibited agreements. If specific requirements are met, undertakings may be exempted from fines or may have the fines imposed upon them reduced by up to 75 per cent.

37 Is alternative dispute resolution available?

According to the amendments of the Law on Commercial Arbitration of the Republic of Lithuania, from 30 June 2012 claims related to compensation for damage caused through violation of rules of the competition law became arbitrable.

Another form of ADR available in private antitrust claims is court mediation. Distinct from arbitration, private antitrust claims concerning infringements of competition rules can be resolved by court mediation, since the only limitation applicable to cases that might be referred to mediation is that mediation is not possible in cases that cannot be settled (ie, where the settlement agreement would contradict imperative norms). Therefore, in theory private antitrust claims can be mediated, although the issue of NCA participation in such proceedings would be open.

Court mediation is a voluntary procedure: a pilot project was launched on 1 January 2008, and may be commenced upon the agreement of the parties. It is free of charge and is conducted on court premises by special mediators, who are judges, assistant judges or other persons having the necessary qualifications. Any party can quit the procedure at any time without specifying a reason. If a settlement agreement cannot be drawn up during the generally accepted four-hour period and this period is not extended, the mediation procedure is terminated and the dispute goes back to the court.

Although such ADR procedures are available, most disputes in Lithuania, including private antitrust claims, are carried out in civil courts in accordance with the Code of Civil Procedure.

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Legislation and jurisdiction

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

The Netherlands is widely regarded as a favoured forum for follow-on cartel damages litigation in the European Union. It is in the area of follow-on actions concerning a decision by the European Commission, that the most notable developments are found. The number of follow-on cartel damages that are brought before the Dutch courts, mostly through claim vehicles, is steadily increasing.

Private enforcement of competition law also plays an important role in the development of private antitrust litigation in the Netherlands. A substantive body of case law has already been developed, primarily through contract disputes.

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?

At the time of writing, the Netherlands is still in the process of transposing into national law Directive 2014/104/EU on antitrust damages actions (the Damages Directive). It is expected that transposition will take place on 26 December 2016 at the latest. The Damages Directive will be implemented into separate, newly created sections of the Dutch Civil Code (BW) and the Dutch Code of Civil Procedure (RV), which will provide additional, specific rules for private competition damages actions (collectively the Damages Directive Implementation Act). However, there are already several civil law actions through which private competition actions are possible (see question 3). Any party that has suffered damage has standing to bring a claim, including indirect purchasers.

We note that the Damages Directive Implementation Act will initially apply exclusively to damages actions following cross-border infringements of competition law and infringements of national competition laws insofar as they affect the trade between EU member states. However, the Netherlands state will adopt a separate measure pursuant to which the Damages Directive Implementation Act will also be applicable to damages actions following purely domestic infringements of competition law.

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

In addition to the new sections implementing the Damages Directive, there are several civil law actions through which private competition actions are possible. Section 6:162 BW sets out the criteria for tort and provides the conditions for establishing liability and the right to compensation for damages. In addition to section 6:162 BW damages may also be claimed on the basis of section 6:166 BW, which provides the rules for group liability for damages caused by a tortious act (see question 33). Furthermore, damages may be claimed on the basis of unjust enrichment, as set out in section 6:212 BW. Undue payment (section 6:203 BW) may create a ground for restitution of the amount unduly paid (see question 27). Finally, individual claims may follow from collective settlement agreements, as set out in sections 7:907-7:910 BW and sections 1013-1018 RV (see question 19).

After the establishment of liability by the court, damages are usually calculated in a separate procedure, in accordance with sections 612–615b RV.

All district courts in the Netherlands are competent to hear civil law claims (see question 5). Judgments at first instance may be appealed before the courts of appeal. Judgments from a court of appeal may be appealed before the Supreme Court of the Netherlands (see question 18). We note that procedures at first instance with respect to collective settlement agreements must be submitted to the Amsterdam Court of Appeal (section 1013(2) RV).

Interim relief measures are sought from the president of the district court that has jurisdiction over the main course of action.

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 for all types of competition matters. Both contractual disputes and cartel and abuse-of-dominance cases may be brought before a court. A decision by a competition authority establishing an infringement is not required. However, with regard to cartel or abuse-of-dominance cases, such a decision will in most instances be the starting point for follow-on damages litigation.

As regards the effect of a finding of infringement by competition authorities on national courts, see question 15 on the applicable standard of proof.

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 rules regarding jurisdiction are set out in the RV and in EU Regulation 1215/2012. Pursuant to section 2 RV a Dutch court has jurisdiction when one of the defendants is domiciled in the Netherlands or has its statutory seat in the Netherlands. For defendants that have their domicile or statutory seat outside of the European Union, section 6 RV provides several grounds on the basis of which jurisdiction in the Netherlands can be established, for instance when the underlying cause of damages suffered as a result of a tortious act took place in the Netherlands. Jurisdiction over defendants having their statutory seat or domicile within the European Union, but outside of the Netherlands, will be determined on the basis of EU Regulation 1215/2012.

Claimants in cartel damages procedures can influence the jurisdiction in which their claim will be heard by using an 'anchor defendant'. EU Regulation 1215/2012 stipulates that in the case of multiple defendants that are domiciled in a member state, each defendant can be sued before the courts of the place where any one of the defendants is domiciled, provided that there is a close connection between the claims of the claimant on the defendants. Therefore, a claimant can choose between the various member states in which the defendants are domiciled and then bring a claim against all defendants in its member state of choice. Pursuant to section 7 RV, which contains the same 'close connection' criterion as EU Regulation 1215/2012, claimants that have brought a claim against a Dutch 'anchor defendant' can also bring claims before a Dutch court against defendants that have their domicile or statutory seat outside of the European Union.

Potential defendants can also influence the jurisdiction in which a damage claim will be heard by using a 'torpedo'. The defendant will bring a case in its member state of choice, seeking a declaration of non-liability. Pursuant to article 29 of EU Regulation 1215/2012, which contains a lis pendens rule, any court other than the court first seized by the defendant has to stay proceedings until the court first seized by the defendant has established whether it has jurisdiction. Moreover, should the court first seized accept

jurisdiction, other courts must decline jurisdiction with regard to the dispute. In a follow-on case relating to the *Airfreight* cartel, KLM, Martinair and Air France successfully launched a 'Dutch torpedo' by bringing a case before the District Court of Amsterdam, seeking a declaration that they were not liable to pay any damages to Deutsche Bahn in relation to any infringement of competition law. In its judgment of 22 July 2015 the district court accepted jurisdiction, thereby dismissing a claim by Deutsche Bahn that KLM's action constituted abuse of procedural law and was therefore inadmissible.

Forum-selection and arbitration clauses between claimants and defendants do not necessarily affect the jurisdiction of the Dutch courts. In a follow-on case relating to the *Elevator* cartel the District Court of Rotterdam dismissed a motion by the defendants (elevator manufacturers) contesting the district court's jurisdiction. The defendants argued that the district court lacked jurisdiction to hear the claim, due to arbitration clauses in the general terms and conditions that apply to the agreements between the defendants and the housing associations that have assigned their claims to the claimant. The district court referred to relevant case law of the European Court of Justice and held that the arbitration clauses only cover disputes that arise directly from the legal relationship in the context of which they had been agreed on (ie, the purchase agreements between the elevator manufacturers and the housing associations). Since the housing associations could not foresee the competition law infringements on the part of the elevator manufacturers when they agreed on the arbitration clauses, the arbitration clauses do not cover claims following such infringements. Therefore, the district court held that the arbitration clauses do not affect its jurisdiction and dismissed the motion by the defendants (District Court of Rotterdam, 25 May 2016).

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

Yes, private actions against both corporations and individuals can be brought before the Dutch courts. Actions against corporations and individuals from other jurisdictions can be brought before a Dutch court if the applicable rules on jurisdiction provide sufficient ground to do so (for instance, section 6 RV or articles 7 or 8 of EU Regulation 1215/2012; see question 5).

Private action procedure

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

Yes, third parties are allowed to fund litigation. In practice most follow-on damages litigation is initiated by third parties, ie, claim vehicles.

A five-year-pilot regarding contingency fees has been initiated by the Dutch Bar Association. The pilot scheme is, however, limited to cases regarding bodily injuries or death and was initiated on 1 January 2014. With the exception of the scheme, no contingency fee arrangements are available in the Netherlands.

8 Are jury trials available?

Jury trials are not available in the Dutch legal system.

9 What pretrial discovery procedures are available?

Dutch legislation provides for the following three pretrial discovery procedures: provisional examination of a witness, provisional expert opinion and request for documents.

The preliminary hearing of witnesses (sections 186-193 RV) or experts (sections 202-207 RV) share the same two objectives. The first objective is the preservation of evidence. The second objective is to provide the claimant with the opportunity to clarify certain facts, especially with respect to the defendant's identity. The procedures aim at clarifying the facts and circumstances. The party can, on the basis of these facts and circumstances, assess whether or not to start proceedings. Claimants must be able to identify the scope and nature of their request for a preliminary hearing. Moreover they must have a legitimate interest. However, the courts do not tend to apply very high thresholds.

If a claimant has knowledge of a certain document that is not in his or her possession, section 843a RV allows for a request for that document. Section 843a does not, however, allow for discovery of all documents relating to a certain case. The claimant must demonstrate a legitimate interest in specific documents. The judgment of 16 May 2012 of the District Court of Arnhem in a follow-on case relating to the *Gas Insulated Switchgear* cartel confirms the restrictive approach taken by Dutch courts with respect to section 843a RV.

The Damages Directive Implementation Act contains more detailed rules on requests for documents pursuant to section 843a RV in competition damages actions. For instance, pursuant to the proposed section 845 RV a person that has in his or her possession documents relating to a follow-on damages claim may refuse disclosure of such documents (only) if he or she can demonstrate compelling reason to do so.

10 What evidence is admissible?

Section 152 (1) RV states that there are no limitations regarding the form of evidence that can be brought before the court. Section 152 (2) RV does, however, state that the determination of the value of the presented evidence is left to the discretion of the court.

11 What evidence is protected by legal privilege?

Correspondence between a lawyer and a client and legal advice are covered by the legal privilege enjoyed by lawyers, as members of the Dutch bar. It is important to note that the European Court of Justice and the Supreme Court of the Netherlands have ruled differently about extending legal privilege to in-house lawyers. According to the European Court of Justice, correspondence between in-house lawyers and their employers is not covered by legal privilege (*AkzoNobel*, 14 September 2010). The Supreme Court of the Netherlands, on the other hand, has acknowledged the existence of legal privilege for in-house lawyers that are admitted to the bar. In-house lawyers who are not admitted to the bar therefore do not possess legal privilege (Supreme Court of the Netherlands, 15 March 2013).

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

We note that the enforcement of competition law in the Netherlands is based on administrative law and procedure. In its judgment in the *Window Cleaners* cartel the Hague Court of Appeal ruled that infringements of the Dutch Competition Act are exclusively sanctioned through administrative law. The Dutch Competition Act is therefore a lex specialis to the Penal Code (The Hague Court of Appeal, 21 May 2008). A criminal conviction in competition law cases is, while theoretically possible, therefore very unlikely to happen in practice.

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?

Since infringements of the Dutch Competition Act are exclusively sanctioned through administrative law, criminal proceedings in competition law matters are only a theoretical possibility (see question 12).

Leniency applicants under the Leniency Rule enjoy a certain degree of protection because their leniency files will not be disclosed by the Netherlands Authority for Consumers and Markets (ACM). The applicant is therefore protected from disclosure. The applicant is not, however, shielded from follow-on litigation. On 2 December 2015, the Trade and Industry Appeals Tribunal (CBb) issued a judgment in which it decided that the ACM had to grant access to oral leniency submissions to the defendants in the *Dutch Flour* cartel appeal proceedings. The CBb held that, in this particular case, the protection of the ACM's leniency programme was not as important as safeguarding the defendants' right of defence. The CBb considered it relevant that the defendants already had knowledge of the contents of the oral statements. Therefore, the interest in withholding the transcripts of these statements from the defendants was limited. It has been argued that this judgment is at odds with the protection that the leniency files of competition authorities are afforded by the Damages Directive and the Damages Directive Implementation Act, which states that Dutch courts may never grant access to a competition authority's leniency files for the purpose of actions for damages (proposed section 846(1) Rv).

In principle, the ACM does not disclose documents obtained in its investigations. The files of the ACM fall within the scope of the Government Information Act, on the basis of which disclosure of information in the files of the authorities can be requested by any member of the public. However, sections 10 and 11 of the Government Information Act provide several grounds, inter alia business secrets, on which the ACM can deny requests for the disclosure of information.

On 13 May 2015 the District Court of Rotterdam issued a ruling on the applicability of the Government Information Act to the files of the ACM.

The district court ruled that section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets, pursuant to which the ACM may not disclose any information gathered while exercising its statutory task except under certain circumstances, prevails over the Government Information Act. In its judgment on appeal, the CBb confirmed that section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets prevails over the government Information Act. However, the CBb furthermore considered that the requested documents may contain information which does not fall within the scope of section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets. Therefore, the ACM has to determine for each requested document which information contained therein is covered by section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets and which information is not (CBb, 17 June 2016).

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

If proceedings regarding the same course of action have already been brought before a court in another EU member state or a state whose court judgments are recognised and enforceable in the Netherlands, a stay of proceedings may be requested. Furthermore, reasons of procedural efficiency may also lead to a stay of proceedings.

Dutch courts are pragmatic in their approach towards requests for a stay of proceedings in follow-on cartel damages cases on the basis of the *Masterfoods* rule of the European Court of Justice. Rather than granting such requests, they have generally opted to continue the proceedings with regard to the matters that are unrelated to the European Commission's decision and procedural matters. By doing so, the courts have managed to await the outcome of the decision of the European Commission while avoiding a formal stay of proceedings.

The hesitancy of the Dutch courts to stay proceedings is well illustrated by the decision of the Amsterdam Court of Appeal of 24 September 2013 in follow-on litigation with respect to the *Airfreight* decision of the European Commission. The Court of Appeal determined that the party demanding a stay of proceeding needs to fulfil three criteria, as follows:

- it has filed a timely appeal at the European Court of Justice;
- it is opposing the decision of the European Commission on reasonable grounds; and
- it wishes to file in the proceedings, so that the national court can decide on that basis whether and, if so, to what extent the assessment of those defences depends on the outcome of the appeals at the European Court of Justice.

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 national or Community proceedings concerning infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) rests on the party or authority alleging the infringement. An undertaking invoking the exemption of article 101(3) TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled.

The applicable standard of proof for claimants is not explicitly defined in Dutch legislation. Section 150 RV in principle places the burden of proof on a party that relies on any specific rights or facts. The burden of proof with regard to passing-on defences has only recently been clarified. In a case relating to the *Gas Insulated Switchgear* cartel the Arnhem-Leeuwarden Court of Appeal did not decide on the division of the burden of proof with respect to the defendant's passing-on defence (Arnhem-Leeuwarden Court of Appeal, 2 September 2014). However, in a judgment of 8 July 2016 concerning the same case, the Supreme Court of the Netherlands ruled that the burden of proving pass-through lies with the defendant.

Despite the absence of a predefined standard of proof, it should be noted that, based on a 21 December 2012 judgment of the Supreme Court of the Netherlands, claimants cannot rely on identifying the defendant's conduct as being in breach of competition law to meet their burden of pleading. Rather, they must submit a detailed description of the relevant market and how the defendant's conduct affected competition on that market. The district courts in the Netherlands have consistently applied this judgment in cases concerning contractual disputes.

However, pursuant to the previously mentioned decision of the European Court of Justice in the *Masterfoods* case, the illegality of the defendant's conduct is presumed if the European Commission has already taken a decision to that effect.

Under the Damages Directive Implementation Act a final decision by the ACM regarding an infringement of competition law will have a binding effect for Dutch courts (proposed section 161a RV). This binding effect is limited to the infringement of competition law and does not cover the existence or amount of harm. However, the Damages Directive Implementation Act also contains a rebuttable presumption that cartels cause harm (proposed section 6:193l BW).

Moreover, the Damages Directive Implementation Act will introduce an ease of the burden of proof of indirect purchaser claimants. The proposed section 6:193r BW establishes a rebuttable presumption that an indirect purchaser claimant suffered overcharge harm if this claimant manages to demonstrate that:

- the defendant has infringed competition law;
- this infringement has led to increased prices for the direct purchasers of the defendant; and
- the indirect purchaser claimant has purchased goods or services that were affected by the competition law infringement.

We note that under the proposed Damages Directive Implementation Act article 9(2) of the Damages Directive will not be transposed into national law. Pursuant to this article findings of infringement by competition authorities from EU member states should at least count as prima facie evidence before the national courts of other EU member states. The explanatory memorandum of the Damages Directive Implementation Act states that, under Dutch law as it currently stands, decisions by national competition authorities from other nations can already be taken into account as prima facie evidence by Dutch courts. In practice Dutch courts will indeed take into account findings by foreign national competition authorities.

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

The duration of civil proceedings will vary according to the facts of each individual case. The courts do aim for the following timetables:

- judgment in first instance within one year; and
- judgment from a court of appeal within two years.

However, in practice it has proven difficult to reach decisions within the intended timetable.

As stated in question 3, a follow-on proceeding for the determination of damages according to sections 612–615b RV will be initiated, which will prolong the duration of the timetable. Practice shows that proceedings concerning competition law take longer than average to resolve because of their complex nature. An example can be found in the follow-on damages proceedings relating to the *Airfreight* cartel, which started in April 2011 and are still ongoing.

For contractual disputes, interlocutory proceedings may be used to accelerate proceedings. However, interlocutory proceedings are less suitable for resolving more complex antitrust cases such as cartel cases.

17 What are the relevant limitation periods?

Pursuant to section 3:310(1) BW, the limitation period for damage claims is five years as from the day that the injured party becomes aware of both the damages and the identity of the liable party. In most cases the publication of a final decision by the relevant authority will trigger the limitation period. However, if an injured party is aware of the damages and the identity of the liable party, he or she should not wait until a final decision has been published, since the limitation period may be deemed to have commenced (and expired) prior to publication of the final decision (see for instance the judgment of the District Court of Rotterdam, 7 March 2007). Section 3:310(1) BW furthermore provides that the limitation period cannot be suspended beyond a period of 20 years after the event that has caused the damage in the first place.

Limitation periods can, however, be interrupted, pursuant to sections 3:316 and 3:317 BW. Section 3:316 BW states that limitation periods will be interrupted as soon as proceedings are commenced. Section 3:317 BW states that a written warning will also interrupt a limitation period.

Under the Damages Directive Implementation Act, the abovementioned limitation periods of five and 20 years will continue to apply (proposed section 6:193t BW). Moreover, these periods are interrupted by the starting of out-of-court dispute settlement procedures and an act of investigation or a procedural act by a competition authority relating to

the competition law infringement on which the damages claim is based (proposed section 6:193u BW).

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

The Dutch judicial system comprises eleven districts. Each one of the eleven districts falls within the jurisdiction of one of the four courts of appeal. According to section 60 of the Judiciary Organisation Act, these courts of appeal are competent to hear appeals that are brought against judgments of the district courts. The courts of appeal consider and reconsider the facts of a case.

The Supreme Court of the Netherlands is competent to hear appeals in cassation. The Supreme Court of the Netherlands considers only questions of law.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

In theory, Dutch legislation provides two options for collective proceedings with regard to antitrust claims. They have, however, not yet been used.

Pursuant to section 3:305a(1) BW, a foundation or association (with full legal personality) may bring a representative action to safeguard interests of a similar nature of other persons, provided that its articles of association specifically focus on such interests. Section 3:305a(3) BW does, however, stipulate that damage claims are not admissible under this section. The foundation or association can seek publication of the judgment, after which individual parties may pursue damage claims in separate proceedings.

The Collective Settlement of Mass Claims Act, as incorporated in sections 7:907–7:910 BW and sections 1013–1018 RV, allows for an agreement with regard to the payment of compensation for mass damages, which can be reached between a foundation or association, representing the claimants, and the defendants. The agreement may be declared binding on all actual and potential claimants by the Amsterdam Court of Appeal. Opt-outs are possible (see question 23).

On 17 January 2012, the Amsterdam Court of Appeal declared an international collective settlement between non-US shareholders and two Swiss issuers binding for all non-US shareholders of a Swiss company. This ruling, based on the Collective Settlement of Mass Claims Act, is particularly interesting, since the majority of the non-US shareholders and the potentially liable parties were not domiciled in the Netherlands. In a provisional ruling of 15 November 2010, the Court of Appeal assumed international jurisdiction, the basis for which was twofold:

- at least some of the shareholders (200 out of 12,000) were based in the Netherlands; and
- the non-US shareholders were represented by Dutch interest groups and the settlement agreement would be executed in the Netherlands.

The last element would suggest that even without any interested party residing in the Netherlands, the Amsterdam Court of Appeal may have jurisdiction to declare the settlement binding.

20 Are collective proceedings mandated by legislation?

Collective proceedings are mandated by legislation. Representation of claimants by a legal entity is set-out in section 3:305a BW to section 3:305c BW. The Collective Settlement of Mass Claims Act is included in sections 7:907–7:910 BW and sections 1013–1018 RV.

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

Under Dutch legislation, there is no certification process for collective proceedings.

Section 3:305a(1) BW and section 7:907(1) BW do however state that the articles of association should focus on the representation of the interests of the claimants (see question 19). Collective settlement agreements will be examined by the Amsterdam Court of Appeal (see question 24).

22 Have courts certified collective proceedings in antitrust matters?

Collective proceedings in private enforcement of competition law have not yet been certified by courts.

Update and trends

The Netherlands remains a popular jurisdiction for follow-on cartel damages litigation. The fact that the Dutch courts are unlikely to declare that they have no jurisdiction to hear a claim and take a pragmatic approach with respect to requests for a stay of proceedings certainly contributes to that popularity. Moreover, the 10 June 2015 judgment of the District Court of Gelderland demonstrates that the Dutch courts are willing to award substantial damages to claimants.

However, in a recent judgment in a follow-on procedure in relation to the *Elevator* cartel, the District Court of Midden-Nederland dismissed a claim for damages owing to the fact that the claimant (a special purpose claim vehicle) had not managed to produce the deeds of assignment on which its claims were based. Moreover, the claimant had not sufficiently substantiated its claim that the parties that had transferred their claims to the claimant had purchased goods that were affected by the cartel and had therefore suffered overcharge harm (District Court of Midden-Nederland, 20 July 2016). This judgment demonstrates that the Dutch courts do adopt a critical attitude towards substantive issues of claims for damages and that claimants should keep proper records of the documents on which they base their claims.

The highly anticipated Damages Directive Implementation Act, which is likely to enter into force in December 2016, will provide claimants with a more detailed set of rules for antitrust damages actions.

23 Can plaintiffs opt out or opt in?

Section 3:305a(5) BW provides individual parties with the possibility to opt out. Individual claimants can furthermore object to certain grounds for action that concern them.

Section 7:907(2) BW states that the collective settlement agreement is legally binding for all actual and potential parties, after the Amsterdam Court of Appeal has approved the agreement. However, pursuant to section 7:908(2) BW, parties that do not wish to be bound can opt out by written notification for a period of at least three months (see question 24).

24 Do collective settlements require judicial authorisation?

Collective settlements based on the Collective Settlement of Mass Claims Act require judicial authorisation from the Amsterdam Court of Appeal. Section 7:907(2) BW set outs the minimum requirements for a settlement agreement. The conditions for a request to declare a collective settlement agreement binding are laid down in section 7:907(3) BW.

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?

There are 11 district courts in the Netherlands. Sections 99–110 RV lay down the rules on territorial jurisdiction of the district courts, which determine which district court should hear the claim. The rules on territorial jurisdiction apply to all of the 11 district courts.

Section 1013(3) RV states that the Amsterdam Court of Appeal has exclusive competence over collective settlement agreements.

26 Has a plaintiffs' collective-proceeding bar developed?

The Dutch Bar Association has not developed a plaintiffs' collective-proceeding bar. It is not envisaged that this will happen any time soon.

Remedies

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

Several forms of compensation are available. Compensation for damage consists of financial loss and other disadvantages pursuant to section 6:95 BW. Financial loss includes the loss of profit (section 6:96 BW). Section 6:97 BW states that the court will determine the damages through means that are in accordance with the nature of the damage. The court may rely on estimates, if it is not possible to accurately determine the damage.

Damage may be compensated through proceedings based on section 6:162 BW. Section 3:305(a) BW does not allow for requests for compensation in representative actions. However, as indicated in question 19, individual

parties can bring claims for damages in separate proceedings on the basis of section 6:162 BW.

A collective settlement reached between a foundation or association with full legal competence and one or more other parties based on the Collective Settlement of Mass Claims Act must provide for compensation of damages.

Section 6:203 BW allows the claimant to demand restitution for the amount unduly paid.

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

A claimant can stop unlawful conduct by means of an injunction on the basis of section 3:296 BW. A claimant may also request a declaratory judgment, on the basis of section 6(2) of the Dutch Competition Act or section 3:40(2) BW, to declare an agreement null and void.

Preliminary injunctions against unlawful actions may be requested through interlocutory proceedings. The claimant must display a certain sense of urgency for an application for interim relief measures.

29 Are punitive or exemplary damages available?

Neither punitive nor exemplary damages are available in the Netherlands.

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

Pursuant to section 6:83(b) in conjunction with 6:119 BW, interest is added to the awarded damages. Interest accrues from the date the damages were incurred and is compound.

The applicable interest rates are laid down in section 6:120 BW. The interest rate in case of tort is determined by governmental decree.

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

The main principle for determining the amount of damages is that the actual damage suffered by the claimants should be compensated. Fines imposed by the competition authority are thus unlikely to be taken into account when setting the damages for infringement of competition law, although there are no rules that prevent this.

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

The legal costs are generally borne by the losing party. Legal costs, including court and lawyer fees, can be recovered. It should, however, be noted that the recoverable costs are maximised by a court-approved scale of costs, stemming from sections 237–241 RV. Consequently, the legal costs that can be recovered are usually just a fraction of the actual legal costs of the proceedings.

33 Is liability imposed on a joint and several basis?

Liability is imposed on a joint and several basis on each person that bears an obligation to compensate the same damage (section 6:102 BW).

Joint and several liability is also the starting principle under the Damages Directive Implementation Act (proposed section 6:193n(1) BW). However, the Damages Directive Implementation Act contains an exception to this principle for small and medium-sized companies. Pursuant to the proposed section 6:193n(2) BW, a small or medium-sized company (within the meaning of Commission Recommendation 2003/361/EC) is only liable for damage towards its direct and indirect purchasers if its market share on the relevant market during the infringement was at all times less than five per cent and application of the starting principle of joint and several liability would irreparably jeopardise its economic viability and would render its assets valueless. We note that this exception does not apply if the small or medium-sized company concerned has played a leading role in the infringement or has incited other companies to take part in the infringement, or has been found guilty of a competition law infringement on a previous occasion (proposed section 6:193n(3) BW).

The proposed section 6:193(4) BW contains a second exception to the starting principle of joint and several liability under the Damages Directive Implementation Act. Pursuant to this new article, companies that have been granted immunity from fines by the competent competition authority are only liable for damages towards their direct and indirect purchasers and suppliers, unless claimants cannot obtain sufficient compensation from the other cartel members.

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

According to section 6:166(1) BW each individual member of a group is both jointly and severally liable towards the other group members for an equal share of the awarded damages. Section 6:166(2) BW does, however, state that certain circumstances may require a different allocation of the damages.

Claims for contribution or indemnity may be asserted in the same proceedings as the principal claim (ie, as an accessory proceeding that is connected to the principal claim). Moreover, such claims may be asserted after a judgment or settlement in the principal claim, provided that the relevant limitation period has not yet expired (see question 17).

Under the Damages Directive Implementation Act, a company that has been granted immunity from fines by the competent competition authority is only liable towards the other cartel members for the damages awarded to its direct and indirect purchasers, in proportion to the extent to which its actions have contributed to these damages (proposed section 1930 BW). We note that this exception applies only to damages awarded to direct and indirect purchasers and suppliers of the cartel members. Consequently, the normal regime for contribution among the cartel member applies to damages awarded to other claimants, such as claimants seeking damages for umbrella pricing.

35 Is the 'passing on' defence allowed?

Dutch statutory law does not exclude the passing-on defence. The possibility of invoking this defence has explicitly been acknowledged by the Arnhem-Leeuwarden Court of Appeal in a follow-on case relating to the *Gas Insulated Switchgear* cartel (Arnhem-Leeuwarden Court of Appeal, 2 September 2014).

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In the above judgment the Court of Appeal assessed how the passing-on defence should be applied. The Court of Appeal considered that damages are about compensating the claimant for losses suffered as a result of wrongful acts by the cartelists and not to take away everything the cartelists may have gained as a result of the cartel. Consequently, loss of income and interest aside, the amount of the damages that can be claimed is determined by the overcharge caused by the cartel minus the part of the damages that were passed on by the claimant. The Court of Appeal accepted the defendant's passing-on defence. However, it did not decide on the division of the burden of proof with respect to this defence. In its judgment of 10 June 2015 the District Court of Gelderland stated that it will follow the ruling of the Court of Appeal, for as long as the Supreme Court of the Netherlands or the European Court of Justice have not issued a contrary judgment. On 8 July 2016 the Supreme Court of the Netherlands issued a judgment in which it upheld the judgment by the Court of Appeal. In its judgment, the Supreme Court ruled that under Dutch law, the passing-on defence is available. In this respect, it referred to the Damages Directive, which states that EU member states must ensure that the defendant in a damages action can invoke a passing-on defence.

Under the Damages Directive Implementation Act passing-on defences are explicitly allowed (proposed section 6:193q BW).

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

The following defences can be invoked by defendants to reduce the amount of compensation for damage.

Section 6:100 BW states that in a case in which the injured party has suffered damage as well as benefited from the action at hand, the compensation of damages should be adjusted accordingly, to the extent that this is reasonable.

If any of the underlying circumstances can be attributed to the claimant, the amount of compensation can be reduced in accordance with section 6:101 BW. The amount may be reduced to the degree to which the damage can be attributed to the injured party.

Unjust enrichment may also be a reason to limit the amount of compensation. Section 6:212 BW determines that a party that has been unjustly enriched at the expense of others must repair the damage up to the amount of enrichment. Repair of the damage must, however, be reasonable.

37 Is alternative dispute resolution available?

Alternative dispute resolution under Dutch civil law includes arbitration, binding advice, mediation and settlements.

The Dutch arbitration rules are laid down in sections 1020–1077 RV. In addition, the Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Parties may choose to document the outcome of binding advice or mediation in a settlement agreement (sections 7:900–7:910 BW).

Scotland

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Legislation and jurisdiction

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

Although part of the United Kingdom, Scotland is a separate jurisdiction which has its own legal system that is independent of the legal systems of England and Wales and of Northern Ireland.

There has been one reported case based on breach of article 101 of the Treaty on the Functioning of the European Union (TFEU). In *Calor Gas Ltd v Express Fuels (Scotland) Ltd and Anor* [2008] CSOH 13, the pursuer (Scots law term for claimant) sued the defender (Scots law term for defendant) for breach of a post-termination restriction in a distribution agreement for cylinders of liquid petroleum gas. The court refused to enforce the agreement on the basis that it restricted competition.

There have been a number of private actions involving alleged abuse of dominance. Pursuers in such actions generally seek the remedies of interdict (Scots law term for injunction) or performance, as an alternative or in addition to damages. No damages have yet been awarded in a Scottish case. To date, remedies have been awarded in two cases. In *Millar & Bryce Ltd v Keeper of the Registers of Scotland* [1997] SLT 1000, an interim order ad factum praestandum (an order requiring continuing performance) was granted, requiring the defender to continue its existing supply arrangements with the pursuer. In *Lothian Buses Ltd v Edinburgh Airport Ltd* [2011] (unreported), an interim interdict was granted to prevent Edinburgh Airport Limited from tendering an exclusive right of access to bus stands at the airport. A number of other cases alleging abuse of dominance have not succeeded. The Competition Appeal Tribunal (CAT) fast-track procedure has proved popular. The fast track is available for Scottish cases but likely to be less attractive, as the CAT does not have the power to grant an injunction.

No follow-on cartel damages actions have yet been brought in the Scottish Courts, although parties domiciled in Scotland have sued (and been sued) in England and Wales.

It is likely that Directive 2014/104/EU on the rules governing actions under national law for infringements of the competition law provisions of the member states and the EU (the Damages Directive) will be implemented close to the deadline of 18 December 2016. On 23 June 2016, the UK voted in a national referendum to exit from the European Union. As a consequence of this vote, there is uncertainty as to whether all of the rules contained in the Damages Directive will continue to be part of UK law after the UK leaves the EU.

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?

Since 2003, monetary claims before the CAT for infringement of competition law have been expressly provided for by statute. The CAT is a specialist competition law tribunal which has jurisdiction over both Scottish and English matters. Orders for interdict or performance may be sought only from the civil courts.

There is nothing in Scots law to prevent indirect purchasers bringing claims. Indeed, in case C-557/12 *Kone AG and others v ÖBB-Infrastruktur AG* (judgment of 5 June 2014) the Court of Justice of the European Union held that domestic legislation must not exclude claims for indirect purchases. When the Damages Directive is implemented in Scotland, such claims will be allowed. (See also question 35 on the 'passing on' defence.)

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

In addition to the competition rules in the TFEU, the Competition Act 1998 (CA) and the Enterprise Act 2002 (EA) are currently the principal pieces of legislation that govern competition law in Scotland. The Consumer Rights Act 2015 (CRA), which came into force on 1 October 2015, has amended the CA and has implemented sweeping reforms of the private antitrust litigation regime in the UK.

The EA provided for the establishment of the CAT and introduced sections 47A and 47B of the CA, which apply to private antitrust actions. These sections have now been amended by the CRA. The CA is likely to be amended further in order to implement the Damages Directive.

The CAT has, since 1 October 2015, had jurisdiction to hear both follow-on and stand-alone damages claims. Collective actions may also be brought before the CAT (see questions 19–26). Procedure in the CAT is governed by the Competition Appeal Tribunal Rules 2015 (CAT Rules).

In Scotland, the Court of Session and the Sheriff Courts have overlapping jurisdiction in civil actions, including competition law matters. The Court of Session has jurisdiction over civil matters throughout the whole territory of Scotland, whereas each Sheriff Court exercises jurisdiction over its sheriffdom. The Sheriff Court is inferior to the Court of Session. The Courts Reform (Scotland) Act 2014 (CR(S)A) created a Sheriff Appeal Court, to which appeals will lie from the Sheriff Courts. The limit above which civil claims can be raised in the Court of Session is £100,000 and the Sheriff Court deals with all actions below that amount.

The final court of appeal in all United Kingdom civil cases is the Supreme Court (successor to the House of Lords). As competition law statutes apply across the UK, the final decisions of the Supreme Court in competition law matters are binding in Scotland.

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 respect of breaches of both UK (Chapters I and II of the CA) and EU competition law (articles 101 and 102 TFEU), in other words, in respect of both cartels and abuse of dominance cases.

In the case of actions based on EU competition law, there must be an effect on trade between EU member states for the article 101 and 102 prohibitions to apply.

A finding of infringement of a competition authority is not required to initiate a private antitrust action in either the CAT or the ordinary courts. Therefore, both follow-on and stand-alone actions may be brought in both venues. However, the jurisdiction of the CAT was extended to cover stand-alone actions only from 1 October 2015. Transitional provisions (CAT Rule 119) mean that only actions where the claim 'arises' after 1 October 2015 can be brought in the CAT on a stand-alone basis.

Section 58A of the CA provides that the courts and the CAT are bound by the following decisions, provided the decision is final:

- a decision of the Competition and Markets Authority (CMA) of an infringement of article 101 or 102 of the TFEU or Chapter I or Chapter II of the CA;

- a decision of the CAT from an appeal by a decision of the CMA finding such infringement; or
- a decision of the European Commission that the prohibition in article 101 or 102 of the TFEU has been infringed.

Such a finding is deemed irrefutable proof in an action for damages and only the quantum of damages will need to be proved. When the Damages Directive comes into force, decisions of EU national competition authorities other than the CMA may treated as at least prima facie evidence that an infringement has occurred.

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?

Jurisdictional issues within the EU are currently governed by 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) (the Recast Brussels Regulation), which came into force on 10 January 2015 and has direct effect within the UK. The general rule under the Recast Brussels Regulation is that a defender domiciled in a member state should be sued in the jurisdiction where it is domiciled. Where an action is brought on the basis of the domicile of one defender, the pursuer may sue others in the same court provided that the claims are closely connected. Alternatively, the pursuer may raise the action in the member state 'where the harmful event occurred'. This can be either where the infringement occurred or where the loss was suffered. As regards third-party proceedings, a pursuer may bring proceedings in the court seised of the original proceedings. Article 25 of the Recast Brussels Regulation also gives effect to exclusive jurisdiction clauses, regardless of where the parties are domiciled.

The Civil Jurisdiction and Judgments Act 1982 (CJJA) determines whether a UK company is domiciled in Scotland. Under the CJJA, a company is domiciled in the part of the UK where it has:

- its registered office or official address;
- its central management or control; or
- a place of business.

The CAT may determine whether proceedings before it are to be treated as proceedings in England and Wales, Scotland or Northern Ireland (CAT Rule 18). The CAT may consider:

- where any individual party to the proceedings is habitually resident, or has its head office or principal place of business;
- where any agreement was implemented; or
- where the conduct to which the proceedings relate took place.

To determine whether collective proceedings or collective settlements should be treated as English or Scottish, the CAT will consider the place where the class representative or settlement representative is habitually resident, or has its head office or principal place of business. The CAT may also have regard to the law applicable to the claim. If the proceedings are treated as Scottish proceedings, it is expected (although this has not been tested in the context of damages actions) that this would result in Scottish procedural rules on matters not specifically covered by the CAT rules being applied, for example, in relation to privilege (known as 'confidentiality' in Scotland), disclosure or the approach to quantification of damages.

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

Private actions can be brought against legal entities (such as corporations or partnerships) and against individuals, including those from other jurisdictions (based on the application of the Recast Brussels Regulation), if they constitute an 'undertaking' as defined by the case law relating to articles 101 and 102 of the TFEU and the Chapter I and II prohibitions. Entities engaged in economic activity, which can include individuals, are regarded as undertakings for the purposes of competition law.

It is furthermore possible that individuals convicted of the 'cartel offence' (section 188 EA) or who have failed to discharge their duties as directors of a company could be liable to third parties who have suffered loss. Infringing companies cannot recover contribution or indemnity in respect of a fine for breach of competition law from their employees (see the English Court of Appeal judgment in *Safeway Stores Ltd & Ors v Twigger & Ors* [2010] EWCA Civ 1472, which has persuasive authority in a Scottish court).

Private action procedure

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

Third-party funding of litigation is permitted in Scotland.

In Scotland, speculative but not contingency fees are permitted. A speculative fee agreement is one whereby the client and his or her lawyer agree that the lawyer will only receive a fee if the client's case is successful. The lawyer's 'winning premium' must not exceed 100 per cent of the solicitor's fees. In contrast to contingency fees, the premium is therefore unrelated to the amount of damages awarded. However, in January 2015, the Scottish government issued a consultation on an Expenses and Funding of Civil Litigation Bill. The legislative proposals include speculative fee agreements, damages-based agreements and qualified one-way costs shifting, so there could be changes in the types of funding available in Scotland in the future.

In the context of litigation before the CAT, the (English) Civil Procedure Rules on funding arrangements apply to proceedings, regardless of jurisdiction (Rule 65 of the CAT Rules). In April 2013, damages-based agreements (contingency fees) were introduced in England and Wales. It is therefore possible that damages-based agreements may be competent in Scottish proceedings before the CAT.

8 Are jury trials available?

No.

9 What pretrial discovery procedures are available?

In Scotland, discovery is referred to as 'recovery'. The Scottish courts have powers to allow one party to recover documents from another party that are relevant to a case which has been or is likely to be raised, unless there is a special reason why the application should not be granted. It is possible to seek to recover documents from a third party. Disclosure will be granted only in respect of identified documents and 'fishing' is not allowed. There is a general trend towards disclosure of information in litigation in Scotland, but full disclosure is not a fundamental right.

Currently, the CAT may give directions for the disclosure between, or the production by, the parties of documents or classes of documents. The CAT has broad discretion on the issue, subject to the rules of privilege (see question 12), once an action is lodged, but it has no power to order pre-action disclosure. The CAT Rules allow parties to make an application to the CAT for pretrial disclosure, which will require to be supported by evidence before proceedings have started, provided that disclosure is necessary in order to dispose fairly of the claim or save costs (CAT Rule 62).

In Scottish proceedings, Scottish rules of privilege are likely to be applicable. (See question 13, regarding disclosure of corporate leniency statements.)

10 What evidence is admissible?

Before the civil courts, the admissibility of evidence is governed by the Civil Evidence (Scotland) Act 1998. Evidence must be relevant to be admissible. Evidence need not be corroborated to be admissible and hearsay is not automatically inadmissible.

Under Rule 21 of the CAT Rules, the CAT can:

- control the evidence and give directions regarding the issues where evidence is required; and
- control the nature of evidence required and the manner in which evidence is to be placed before the CAT.

Currently, the CAT has a very broad discretion over whether to admit or exclude new evidence. The CAT is guided by overall considerations of fairness, rather than technical rules of evidence (see *Argos & Littlewoods v OFT* [2003] CAT 16, *Claymore v OFT* (Case No. 1008/2/1/02) and *Aberdeen Journals v DGFT* (Case No. 1009/1/1/02)).

11 What evidence is protected by legal privilege?

Privileged documents need not be disclosed (again, in Scotland, 'privilege' is referred to as 'confidentiality', but the term 'privilege' is used here for simplicity). There are two categories of legal professional privilege:

- legal advice privilege, which attaches to communications between a lawyer (including in-house lawyers) and his or her client for the purposes of giving legal advice; and

- litigation privilege, which attaches not only to communications between lawyer and client but also to communications with third parties once litigation is in prospect.

The principles on privilege in Scots law are less developed than in English law, but are likely to be similar for the purposes of UK competition law. In cases where the CAT is sitting as a Scottish court, it is thought that Scottish, rather than English, rules on privilege will apply.

Privilege was considered in a competition context by the Court of Session in *BSA International SA v McClelland Irvine & Anor* [2009] CSOH 77, in which the defenders' application for disclosure of privileged documents relating to a cartel investigation was largely rejected. The case related to the interpretation of a competition warranty clause in the share purchase agreement for a company that was a subject of the Office of Fair Trading's *Dairy Cartel* decision.

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

Yes. However, a court's finding that an individual has committed the cartel offence is not a decision that can be used as the foundation of a follow-on action against that individual's employer/company. The UK's cartel offence may be committed by individuals only. Private actions for damages based on breach of Chapters I or II or articles 101 or 102 of the TFEU will generally be brought against undertakings.

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?

Pursuers should typically have no access to evidence that has been collected by authorities under their criminal investigation powers in relation to the cartel offence, other than evidence given in open court.

The EU cases of *Pfleiderer* (Case C-360/09) and *Donau Chemie* (Case C-536/11) held that it is for the national courts of member states to weigh the interests of individuals seeking damages and the protection of the leniency programme in ordering disclosure. However, this does not apply in the context of evidence in criminal proceedings owing to the privilege against self-incrimination.

The fact that an individual has been convicted of an offence is admissible as evidence in civil proceedings for the purposes of proving that an infringement has been committed by the company that employs the individual or of which the individual is a director.

Leniency applicants are not currently protected from follow-on litigation. Limited protection from the effects of joint and several liability will be introduced by implementation of the Damages Directive.

Corporate statements made by leniency applicants during an investigation are likely to be accorded a high degree of protection from disclosure by Scottish courts. They may be expected to follow the approach to the *Pfleiderer* balancing test of the English High Court in cases such as *National Grid Electricity Transmission v ABB Ltd and others* [2011] EWHC 1717 (Ch). The CAT and the English courts have granted access to other documents from authorities' files on a number of occasions, and Scottish courts are likely to take a similar approach. In *Emerald Supplies Ltd v British Airways plc* [2015] EWCA Civ 1024, the Court of Appeal confirmed that the presumption of innocence provides protection for findings of infringement that are not subject to challenge (for example, findings about the conduct of third parties, or which were not contained in the operative part of the decision). Such statements must be redacted.

The Damages Directive will protect from disclosure in damages actions corporate leniency statements and settlement submissions. Any information prepared specifically for a competition authority's enforcement proceedings, or information sent to the parties in the course of the proceedings, is granted protection from disclosure until the enforcement proceedings are finished. However, the directive also provides that information that exists independently of the competition authority proceedings (ie, pre-existing information) can be ordered by the national courts to be disclosed at any time.

In follow-on actions, the CAT may give directions for the disclosure of the confidential version of the regulator's decision. In the case of *Deutsche Bahn AG & Others v Morgan Crucible Company PLC & Others* (Case 1173/5/7/10, order of 27 January 2014), the CAT ordered that the defendants should disclose an index of the European Commission's file and prepare a single English language version of the Commission's decision with only 'leniency information' redacted.

Other rules of disclosure provided in the CAT Rules include:

- ordering disclosure of documents by a person who is not party to the proceedings but only where the documents are likely to support the applicant's case (or adversely affect another party in the proceedings) (CAT Rule 63);
- a person may also be able to apply to the CAT for permission to withhold disclosure of a document on the grounds that to do so would damage the public interest (CAT Rule 64); and
- the CAT rules contain a restriction on the subsequent use of documents that have been provided in proceedings (CAT Rule 102). The restriction means that the documents are allowed to be used only for the purpose of those proceedings unless they have been read to or read by the CAT, or referred to, at a public hearing. The rule will also apply to pleadings or documents annexed to the pleadings. In *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and others* [2016] CAT 6, the CAT ruled that the principle of open justice required disclosure of non-confidential versions of documents referred to or quoted in open court to third parties. The third parties concerned were claimants in cases which involved similar allegations.

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

In principle, a defender can request a stay of proceedings (or, in Scots law terms, a 'sist') in a private antitrust action under the same circumstances that are available in any civil action. A sist of process is considered a serious interference with the progress of procedure, and the onus is on the party moving for it to satisfy the court that it is in the interest of justice that the proceedings should not be allowed to continue. Whether it is appropriate to sist an action to await the decision in another action will depend on the circumstances of the particular case. In England and Wales, parties have applied for actions to be stayed in the following circumstances:

- appeal by one of the parties against a preliminary decision such as a strike out application (eg, *Deutsche Bahn v Morgan Crucible and others*, Case No: 1173/5/7/10, order of 26 July 2011);
- an ongoing appeal against a regulator's decision. Such cases are usually allowed to proceed to disclosure, for example, *Wm Morrison Supermarkets plc v MasterCard Inc* [2013] EWHC 3082 (Comm); and
- related proceedings ongoing in another jurisdiction. An application for a stay was refused in *Cooper Tire and Rubber Co Europe Ltd v Shell Chemicals (UK) Ltd* [2010] EWCA Civ 864.

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 standard of proof in civil proceedings is the balance of probabilities and the burden rests on the pursuer to prove infringement, causation and loss. In cases where the CMA, the CAT, or the European Commission has already established a competition law infringement (ie, follow-on actions), the pursuer need prove only causation and loss.

Where the defender is arguing a passing-on defence, the applicable standard remains the balance of probabilities and the burden rests on the defender to prove that the pursuer passed on its loss.

The Damages Directive establishes a rebuttable presumption that cartels cause harm, and so the defender would need to rebut that presumption. Further, the Directive also states that national courts should be empowered to quantify the harm suffered by the pursuer in circumstances where it is impossible for the pursuer to do so.

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

The time taken to reach judgment in a civil claim in the Scottish courts varies depending on the complexity of the case. There is currently no provision for collective proceedings in Scotland, unless proceedings are issued in the CAT (see questions 19–26). The CRA enabled the CAT to create a fast-track procedure for follow-on damages claims. Rule 58 of the CAT Rules states that parties in the proceedings will be able to apply to request their case to be fast-tracked or that the CAT can itself decide whether the case would be suited to the accelerated procedure. The CAT will consider a number of factors which are set out in rule 58(3) including the size of the parties, the time estimate for the final hearing, whether disclosure is required, and the complexity and the novelty of the issues involved. In *Breasley Pillows*

Limited and others v Vita Cellular Foams (UK) Limited and Vita Industrial (UK) Ltd [2016] CAT 8, the CAT found that follow-on damages claims for a cartel of several years' duration were unlikely to come within the criteria for the fast-track procedure.

The Rules also state that fast-track proceedings should be commenced within six months of a fast-track order by the CAT, and any recovery of costs will be capped.

Although not a form of accelerated procedure, it is possible to ask for interim remedies in private antitrust litigation in Scotland (see question 28).

17 What are the relevant limitation periods?

In the civil courts, the obligation to pay damages for breach of competition law will prescribe five years after the date when the loss, injury or damage occurred. Where damage occurs before the cessation of a continuing act, as is likely with a claim for cartel damages, the date when the damage occurred will be deemed to be the date when the act ceased. If the pursuer could not with reasonable diligence have been aware that loss, injury or damage occurred, time does not start to run until he or she first became, or could with reasonable diligence have become, aware of it. Any period during which the pursuer was induced to refrain from claiming by fraud or error of the defender is not counted towards the five year period. As to the meaning of 'reasonable diligence', the English High Court case of *Arcadia Group Brands Ltd and others v Visa Inc* [2014] EWHC 3561 (Comm) suggests that a pursuer could with reasonable diligence have become aware of an infringement from the time of publication of a competition authority's press release regarding an investigation, but each case will turn on its own facts.

Until 1 October 2015, the limitation period for bringing a follow-on claim before the CAT, was two years from the later of:

- the date on which the relevant infringement decision of the CMA, the CAT or the European Commission is no longer appealable; or
- the date on which the cause of action accrued.

From 1 October 2015, the limitation period in the CAT has been the same as that applicable in the ordinary courts. However, the transitional provisions in CAT Rule 119 provide that claims which 'arose' before 1 October 2015 will continue to be governed by the previous CAT rules (ie, the two-year limitation period outlined above). This means that very few stand-alone claims are likely to be brought in the CAT for a number of years to come.

As regards claims arising before 1 October 2015, issues regarding when time begins to run for bringing an action before the CAT have arisen in a number of cases (eg, *Emerson*, *BCL Old Co*). CAT limitation issues reached the UK Supreme Court in the case of *Deutsche Bahn v Morgan Crucible Co* [2014] UKSC 24, in which the Supreme Court ruled that if an addressee of an infringement decision does not appeal that decision, the limitation period (two years at the time) will start from the date of expiry of that party's right to appeal the decision, even if other parties have brought appeals. This overturns a previous ruling that the start of the limitation period would be postponed for all parties as soon as one addressee appeals the decision. The Supreme Court held that even if one addressee of an infringement decision successfully appeals that decision, this has no effect on the liability for infringement of addressees who did not appeal. Therefore, even if a superior court determines that there was no cartel, the decision will still apply to addressees of the decision who did not bring or succeed in an appeal. In theory, this means an undertaking that does not appeal could find itself jointly and severally liable for all the harm caused by a cartel. This ruling is particularly important for whistleblowers as often, because they receive immunity, they do not appeal against the decision.

The Damages Directive requires that pursuers should have at least five years to bring damages claims, beginning at the moment that the infringement of competition law ceases and the pursuer knows or should reasonably be expected to know of the behaviour and the fact that it constitutes an infringement of competition law, the fact that the infringement caused harm to it and the identity of the infringer. The directive also provides that the limitation period should be suspended where a competition authority launches an investigation or proceedings that relate to the infringement that is the subject of the damages action. The directive states that the suspension should remain in place for at least a year following a final decision by the competition authorities or the termination of the proceedings.

The directive also introduces an alternative dispute resolution procedure in the form of a new consensual dispute resolution process. In this process, the directive allows national courts discretion to suspend the limitation period for up to two years (see question 37).

Amendments to Scots law may be required to fully implement the directive, and particularly the suspension provisions.

Additionally, in regards to collective proceedings, the CAT may take some time before it decides to make a collective proceedings order to commence the action, so section 47E of the Competition Act 1998 provides for the suspension of the limitation/prescription period in respect of claims made under a collective proceedings action. The purpose of the suspension is to avoid the pursuer having to commence a separate single action, if they think that the collective proceedings action may fail, in order to protect their claim from becoming time-barred.

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

In the Scottish civil courts, once a final decision has been issued by the lower court, appeals to a higher court are available, generally without leave of the lower court (until the case reaches the Inner House of the Court of Session – see below). If a party wishes to appeal a point before a final decision has been made by the lower court (ie, interlocutory matters), it must generally seek leave to appeal from that lower court. There is no statutory test setting out the conditions to be satisfied for leave (and little case law on the point), but where leave to appeal is required in Scottish courts, applicants must generally demonstrate at least a prospect of success in relation to a genuine point of law which is of some practical consequence. By contrast, the English test (which requires that the appeal would have a real prospect of success, or that there is some other compelling reason why the appeal should be heard) is more restrictive.

The Court of Session, Scotland's highest civil court, is made up of the Outer House, the first-instance court, and the Inner House, the appeal court. A final decision of the Outer House of the Court of Session can be appealed to the Inner House, on the facts or on a point of law. From the Inner House, further appeals in Scottish civil cases lie to the Supreme Court. Appeals to the Supreme Court from decisions of the Inner House require the leave of the Inner House or, if refused, the Supreme Court.

Under the CA, a CAT decision in relation to a Scottish case can be appealed to the Inner House of the Court of Session on a point of law, with the consent of the CAT. Where the CAT refuses consent to appeal, an application for leave to appeal can be made directly to the Inner House of the Court of Session. As with other Inner House appeals, a further appeal lies to the Supreme Court, but leave is required.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

There is no specific collective action procedure in the normal civil courts in Scotland. However, an action may be brought on behalf of multiple pursuers, and pursuers may be added during the course of the action. The Court of Session may make directions for multiple actions in respect of the same or similar matters, to be managed together (Court of Session Rule 2.2).

The revised section 47B of the CA provides for collective proceedings in respect of antitrust claims. It allows a representative to be certified where it is 'just and reasonable' for the person bringing the claim to act as the class representative. Such claims must raise the same, similar or related issues of fact or law and suitable to be brought in collective proceedings and brought on behalf of two or more consumers (on an opt-out or opt-in basis). Previously under section 47B of the CA, the CAT could hear competition damages claims by specified bodies on behalf of consumers who chose to join the proceedings. However, only one body was ever authorised to bring such proceedings – the Consumers' Association, and it brought only one, unsuccessful, action.

20 Are collective proceedings mandated by legislation?

Collective proceedings are mandated by legislation. Section 47B of the CA introduced a form of representative action before the CAT by allowing representatives to bring claims on behalf of consumers who consented, based on the same infringement. The CRA has established procedures for opt-in and opt-out collective actions under the new sections 47B to 47E.

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

The revised section 47B of the CA provides that collective actions will involve a certification process. A collective proceedings order will authorise the representative; describe the class of persons eligible for inclusion

in the proceedings; and specify whether the proceedings are opt-in or opt-out. The CAT will also have to certify that the individual claims are eligible to be included in the collective action.

Section 47B(5) provides that the CAT may make a collective proceedings order only if the person who brought the proceedings is a person who, if the order were made, the CAT could authorise to act as the representative in those proceedings, and if the representative and the claims are eligible for inclusion in collective proceedings. Eligible claims must raise the same issues of fact or law and must be suitable to be brought in collective proceedings. A person may be a representative whether or not the person is a class member, but only if the CAT considers that it is just and reasonable for that person to act as a representative in those proceedings. A consultation carried out by Sir John Mummery on the draft CAT rules noted that government policy was that law firms, third-party funders or special purpose vehicles would not be permitted to be representatives leading such claims, but the final determination will be made by the CAT.

In deciding whether the collective proceedings should be on an opt-in basis, the CAT will take into account all matters it thinks fit, including but not limited to, the strength of the claims, and the estimated amount of damages that individual class members may recover.

22 Have courts certified collective proceedings in antitrust matters?

Not yet. Once a body is specified under section 47B of the CA, the current law does not require further certification of proceedings. Under the CRA, the CAT will authorise representatives in collective proceedings. The first such application was made in May 2016 in the matter entitled *Dorothy Gibson v Pride Mobility Products Limited*, CAT Case No. 1257/7/7/16.

23 Can plaintiffs opt out or opt in?

The CRA has introduced opt-out actions, which may be brought by authorised representatives on behalf of a collective class of consumers and/or businesses who have suffered loss as a result of anticompetitive conduct. Anyone within that class will be bound by any judgment unless they opt out. However, any person not domiciled within the UK will have to opt in to become part of the collective action.

24 Do collective settlements require judicial authorisation?

Under CAT Rule 42, a pursuer may withdraw his or her claim provided that either the defender or the CAT consents. It appears, therefore, that judicial authorisation is not required for the terms of a settlement of an action under section 47B, although it may be needed in order to withdraw the claim.

The CAT is able to approve a collective settlement in a situation where a collective proceedings order has already been made and also if it has not yet been made. The CAT will consider whether the terms of the collective settlement are 'just and reasonable'. Where a collective proceedings order has already been made, the representative and defender will need to apply to the CAT for approval of the collective settlement. Further, where there are multiple defenders, those that want to be bound by the approved collective settlement will be required to apply to the CAT separately. Where a collective proceedings order has not been made, the CAT is required firstly to make a collective settlement order, and then the proposed representative and defender are required to apply to the CAT for approval of the collective settlement.

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?

Scotland is one jurisdiction within the United Kingdom. Scotland itself is not divided into multiple jurisdictions. For administrative purposes, Scotland is divided up into six sheriffdoms, each with jurisdiction over its own area. Antitrust litigation would normally be raised in the Court of Session, which has jurisdiction over the whole of Scotland. Scots law applies equally throughout Scotland. Private actions could be brought simultaneously in the different jurisdictions of the UK, but would be vulnerable to jurisdiction challenges in favour of the court first seised.

26 Has a plaintiffs' collective-proceeding bar developed?

No.

Remedies

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

Pursuers may seek damages before the civil courts or the CAT as well as interim or final interdict before the civil courts.

In Scots law, damages are awarded to restore the pursuer to the position it was in before the wrong was committed. No damages have yet been awarded in a competition case before the Scottish courts.

To date, the CAT has awarded damages three times. In *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19, both general and exemplary damages were awarded. In *Albion Water v Dŵr Cymru Cyfyngedig* [2013] CAT 6, only general damages were awarded. In *Sainsbury's Supermarkets Ltd v MasterCard* [2016] CAT 11, damages of £68 million were awarded. Damages are usually limited to actual loss.

Under the amended CA, exemplary damages are not available in collective actions (see question 29).

The Damages Directive clarifies that pursuers are entitled to full compensation for the harm suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid.

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

Interdict and interim interdict may be sought from the civil courts, but not the CAT (in contrast to the position in England and Wales where the amended CA now gives the CAT the power to grant injunctions). Before granting an interim interdict, the courts will consider the applicant's interest to sue, whether he or she has a prima facie case, and whether the balance of convenience lies in the applicant's favour (including whether damages would be an adequate remedy in the absence of an interim interdict order). An interim interdict for a limited period of time can be granted without the defender being present, and the onus is then on the pursuer to make the defender aware of it. There will then be a hearing at which the defender has the opportunity to appear. A 'caveat' can be lodged with the court at any time by any person. This prevents the court from granting an interim interdict unless the person who lodged the caveat has had an opportunity to be heard.

The CRA has also introduced voluntary redress schemes, whereby the CMA has the power to certify redress schemes which will be entered into by businesses which are the subject of an infringement decision by a competition authority. The CMA may also take into account the entering into a voluntary scheme when assessing the level of fine that it will impose on the infringing business. Further, any pursuer that receives compensation through the redress scheme cannot bring a claim for damages in the courts in respect of the same infringement decision.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available in Scotland since, generally, all damages awarded must correspond to a loss suffered by the pursuer. It was suggested in *Redrow Homes Ltd v Bett Brothers plc* [1997] SC 142 that punitive and exemplary damages may be available when specifically provided for in legislation. The CAT in England and Wales has awarded exemplary damages in *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19. The CAT relied on the English case of *Rookes v Barnard and others* [1964] AC 1129 to justify the award of exemplary damages. This case has not been followed in Scotland. It is likely (but not established) that exemplary damages are not available when the CAT is sitting as a Scottish tribunal.

Section 47C of the CA prohibits the award of exemplary damages in collective proceedings.

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

Section 1(1) of the Interest on Damages (Scotland) Act 1958 provides for the award of interest on damages at such rate as the court sees fit (usually the judicial rate of 8 per cent), although in some recent cases a lower rate has been used (*Farstad Supply v Enviroco Ltd* [2011] CSOH 153, affirmed by [2013] CSIH 9). Interest will normally be awarded from the date the wrongful act occurred, until the date of payment by the defender. The Scottish courts are not currently entitled to award compound interest on damages. The Scottish judicial interest rate is currently 8 per cent (Rules of the Court of Session, Rule 7.7).

Update and trends

Brexit

The UK referendum on UK membership of the EU in June 2016 means that, after a period of negotiation, the UK is expected to leave the EU. It is unclear what arrangements will be reached as a result, but some effect on private antitrust litigation is likely. For example, the Brussels Regulation that determines jurisdiction and enforcement of judgments is expected to cease to apply, although its predecessor the Brussels Convention remains in force and the UK is a signatory to it. Most significantly, EU law will cease to be law in the UK from the date of Brexit. However, certain aspects of EU competition law have been enacted in UK law and would continue unless repealed. The Damages Directive will require to be implemented by the UK into UK law and, unless that implementing law were repealed upon Brexit, would continue to apply post-Brexit.

It is likely that there will be difficult issues in a transitional period where a decision relates to the period prior to Brexit but the damages claim is brought post-Brexit. In practice the UK may join the EEA or enter into arrangements akin to the EEA, in which case EU law may continue to apply and European Commission decisions may bind the UK courts. Were Scotland to leave the UK and join the EEA or the EU, then EU law would apply in the Scottish courts.

The Scotland Act 2016 section 39 provides for the Tribunals Service, which includes the Competition Appeal Tribunal, to be devolved to Scotland, and this is currently expected to take place from 2020/2021. The Scottish government is considering how this might be put into effect.

The Consumer Rights Act 2015

The Consumer Rights Act 2015 came into force on 1 October 2015 and introduced some important changes to the UK competition damages regime, principally:

- the possibility of collective proceedings including opt-out claims in the Competition Appeal Tribunal (section 81 of the CRA 2015, amending section 47B of the CA, and also Rule 82 of the CAT rules);
- it allowed stand-alone claims to be brought in the CAT; and
- it amended the limitation period for bringing competition damages actions before the CAT (Rule 119 of the CAT rules).

The ability to bring opt-out actions was expected to lead to an increase in collective claims. However, the transitional provisions in CAT Rule 119 provide that claims that 'arose' before 1 October 2015 will continue to be governed by the previous CAT rules. As these earlier rules contemplated pure follow-on claims only, they present real difficulties for stand-alone and collective claims with a stand-alone element and this is likely to deter the bringing of such claims for some time to come.

Fast track

The CRA enabled the CAT to create a fast-track procedure for follow-on damages claims. The fast-track procedure has proved popular. Four cases have been brought under the fast-track procedure, as follows:

- *Breasley Pillows Limited and others v Vita Cellular Foams (UK) Limited and another* (CAT No. 1250/5/7/16) – the CAT found that follow-on damages claims for a cartel of several years' duration were unlikely to come within the criteria for the fast-track procedure;
- *Socrates Training Limited v The Law Society of England and Wales* (CAT No. 1249/5/7/16) – on 16 May 2016, the case was designated for the fast-track procedure;
- *Shahid Latif and Mohammed Abdul Waheed v Tesco Stores Limited* (CAT No. 1247/5/7/16) – this case was settled and the claim withdrawn on 17 March 2016; and
- *NCRQ Ltd v Institution for Occupational Safety and Health* (CAT No. 1243/5/7/16) – this case was settled on 11 January 2016.

The CAT may order the defender to pay interest on all or any part of the damages awarded at a rate of 8 per cent or more if it sees fit (CAT Rule 56). Although this has not yet been tested, the CAT could, in principle, award compound interest on damages to a successful pursuer.

In a cartel damages case, the damages award is likely to include interest and there are strong arguments, supported by the Damages Directive, that such interest should be calculated on a compound basis. Compound interest was awarded in *Sainsbury's Supermarkets Ltd v MasterCard* [2016] CAT 11.

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

No. The purpose of damages in Scots law is to compensate the pursuer for its loss. Therefore, fines imposed are in principle irrelevant to any damages claim.

In England and Wales, whether a fine has been imposed by the competition authority on the infringing organisation is relevant only to the availability of exemplary damages (see the *2 Travel* case in question 29). However, as exemplary damages are not available in Scotland, whether or not a competition authority has imposed a fine will be immaterial to the calculation of damages.

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

The losing party in civil cases will normally be ordered to pay the successful party's costs. The CAT may make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings. The CAT may take into account the conduct of the parties in relation to the proceedings and a wide range of other factors, including the respective economic strength of the parties.

Under the CRA, the CAT may award any damages that are unclaimed in collective opt-out proceedings, to the pursuers' representative to recover their costs.

33 Is liability imposed on a joint and several basis?

In cases before the CAT and the civil courts, liability is likely to be joint and several where more than one defender has taken part in the injurious action. It is expected that a pursuer who has suffered loss as a result of a cartel may bring an action for damages against any member of the cartel for his or her whole loss. This is pursuant to delictual provisions of Scottish private law. Any defender found liable is entitled in a separate action to recover a contribution from others who could have been liable. If not all cartelists are sued, the defenders may join other cartelists as further defenders. This is done by way of an application to the court for service of a 'third party notice' on the party claimed to share joint and several liability with the defender.

The Damages Directive also recognises the normal position whereby cartel participants are jointly and severally liable for loss caused. However the directive limits the potential liability of successful leniency applicants. Leniency applicants will still be liable for damages to their own direct and indirect purchasers. The directive also states that the leniency applicant should remain fully liable to the injured parties (other than its direct or indirect purchasers) only where they are unable to obtain full compensation from the other infringers. The directive provides that when a pursuer settles with an infringing party, if that pursuer then brings another action against another non-settling infringer, the damages in the subsequent actions must be reduced by the amount of damages that have already been paid. Further, the settled infringer cannot then be asked to contribute to the subsequent actions, unless the pursuer cannot recover his remaining claim from the other infringers.

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

There is a possibility for contribution and indemnity between or among defenders. Where the defenders have caused the same damage, they are obliged to pay damages in such proportions as the court may deem just (section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940).

Such claims could be asserted during the principal proceedings by application to the court for an order for service of a third-party notice. A claim could also be pursued after judgment or settlement provided the claim is brought in time.

35 Is the 'passing on' defence allowed?

Yes. *Sainsbury's Supermarkets Ltd v MasterCard* [2016] CAT 11 established that the 'passing on' defence is an aspect of the process of the assessment of damage. It will succeed when the defendant can show there exists another class of claimant downstream of the claimant in action to whom the overcharge has been passed on.

The Damages Directive provides that a purchaser who had 'passed on' any cartel overcharge to its own customers would not have suffered a loss. Instead, the indirect purchaser to whom the overcharge was passed may be able to claim, or the original purchaser may be entitled to a reduced amount of damages to reflect the level of harm actually suffered.

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

There are certain exclusions from the application of the CA. Where such an exclusion applies, a private action on competition grounds would not be available. Any defence under the general law that might limit the effectiveness of the EU competition rules would not be available (see the judgment in the preliminary reference to the European Court of Justice in *Courage Ltd v Crehan* [1999] ECC 455).

37 Is alternative dispute resolution available?

Alternative means of dispute resolution are available for competition claims, as for other claims. Mediation is commonly used. In practice, almost all cases settle out of court, so, in that sense, by alternative means of dispute resolution.

The Damages Directive also promotes the use of consensual dispute resolution through the use of mediation, arbitration and out-of-court settlements.

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Legislation and jurisdiction

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

South African competition law is regulated by the Competition Act 89 of 1998, as amended (the Competition Act). Section 3 of the Competition Act provides that it applies to all economic activity occurring within or having an effect within South Africa.

The Competition Act establishes three competition authorities: the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (CAC).

The Commission's role is both investigative and prosecutorial, while the Tribunal's role is adjudicative. The CAC's role is primarily to hear appeals against, and reviews of, decisions made by the Tribunal. However, in *American Natural Soda Ash Corporation and another v Botswana Ash (Pty) Ltd and others* [2005], the Supreme Court of Appeal (the SCA) held that the CAC did not have final jurisdiction in relation to competition law matters because its decisions were capable of being taken on appeal to the SCA. This is no longer the position after a recent amendment to the Constitution of the Republic of South Africa 108 of 1996, as amended (the Constitution) re-established the CAC as the apex court in relation to all antitrust matters (with the exception of antitrust matters which raise constitutional concerns over which the Constitutional Court is the court of final instance).

Private antitrust litigation in South Africa is essentially a two-stage process – while the Competition Act makes provision for the participation by private litigants in complaint and merger proceedings before the competition authorities, such litigants must pursue any actions for damages suffered as a result of anticompetitive conduct before the civil courts (either the High Court or the Magistrates' Court).

Competition law jurisprudence in South Africa abounds with examples of vigorous participation by private litigants in proceedings before the competition authorities in the context of both complaint and merger proceedings. To illustrate, ArcelorMittal South Africa's appearance before the CAC on charges of excessive pricing was at the hands of private litigants (after the Commission's investigation concluded with a finding of no anticompetitive conduct). The unsuccessful litigation against British American Tobacco (South Africa) for, inter alia, abuse of dominance was pursued by a private litigant (albeit together with the Commission); the unsuccessful litigation against participants in the stolen vehicle recovery market was pursued by a private litigant (together with the Commission); and the abuse of dominance complaint against Telkom SA (dismissed by the Tribunal) was launched and pursued by a private litigant, Phutuma Networks. As regards merger proceedings, the prohibited merger between Sasol and Engen was opposed before the Tribunal by the Commission and five private litigants. The prohibited merger between Telkom and Business Connexion was opposed before the Tribunal by the Commission and three private litigants in 2007 (although it bears mention that in 2015 the parties concluded the same transaction once again and received conditional approval from the Tribunal this time round). The acquisition by Wal-Mart Stores of a 51 per cent interest in Massmart was opposed by various government departments and trade unions while enjoying the support of the Commission. The abandoned merger between Vodacom and Neotel in late 2015 was opposed by five private litigants and various government departments.

In stark contrast, there is a marked absence of precedent insofar as the second stage of private antitrust litigation in South Africa is concerned. In *Commission v South African Airways* [2005], the Tribunal and the CAC upheld the complaint lodged with the Commission by Nationwide Airlines that the national carrier had engaged in an abuse of its dominant position. The parties subsequently settled the matter out of court; however, Nationwide Airlines and Comair have instituted civil claims in the High Court for damages arising out of the aforementioned abuse of dominance by South African Airways. The civil damages claims are currently before the High Court, and it remains to be seen what the outcome of these precedent-setting matters shall be. In *Commission and another v Netstar (Pty) Ltd and others* [2010], the applicants specifically sought a declaratory order from the Tribunal that the respondents were guilty of contravening the Competition Act, thereby empowering them to pursue a civil claim for damages against the respondents. However, as a result of the dismissal of the complaints against the respondents in the subsequent appeal decision, the applicants were unable to pursue a civil claim for damages against the respondents.

Nevertheless, the legal landscape is changing rapidly with private litigants being galvanised into action by recent decisions of the competition authorities in relation to cartel activities. In November 2010, two urgent class action applications for civil damages against Tiger Consumer Brands, Pioneer Foods and Premier Foods (the respondents) were instituted in the Western Cape High Court. These applications constituted the first class action applications brought in respect of antitrust claims in South Africa. The applicants included, inter alia, the trustees of the Children's Resource Centre Trust, the trustees of the Black Sash Trust and the National Consumer Forum, filing class action applications on behalf of bread consumers and bread distributors respectively (the bread cartel class action applications). The applications were dismissed by the High Court and subsequently taken on appeal to the Supreme Court of Appeal. The Supreme Court of Appeal, after establishing that a certification process is a procedural requirement in class applications, remitted the bread consumers' class action application to the High Court for further determination. The Supreme Court of Appeal dismissed the bread distributors' class action application, which decision was taken on appeal to the Constitutional Court. The Constitutional Court confirmed that a certification process is a procedural requirement that must be met before instituting class action applications. The Constitutional Court, however, overturned the Supreme Court of Appeal's dismissal and remitted the bread distributors' class action application to the High Court where it also remains under determination. Nevertheless, the legal proceedings surrounding these two class action applications have already resulted in greater procedural certainty regarding class action applications by establishing that a certification process is a necessary prerequisite for such applications. It will be important to monitor any further developments which may occur as a result of these ongoing legal proceedings. Furthermore, extensive cartel activities in the South African construction industry were uncovered as a result of a customised fast-track settlement process in which fifteen firms admitted to collusive tendering. This process has resulted in the Tribunal issuing of a number of section 65 certificates which serve as confirmation by the Tribunal that a prohibited practice has taken place. As the issuing of such certificates is a necessary precursor to any damages claim under the Competition Act, it is likely that victims will be preparing themselves for civil litigation to recover damages. In that regard, the City of Cape Town has filed suit aiming to recover damages resulting from cartel conduct in the construction industry.

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, the express mandate for private antitrust actions, both before the competition authorities and the civil courts, is set out in the provisions of the Competition Act.

There is currently no South African jurisprudence that specifically pertains to indirect purchaser claims. In terms of the first stage of private antitrust litigation, section 49B of the Competition Act recognises the right of any person to submit a complaint to the Commission in relation to an alleged prohibited practice. In terms of the second stage of private antitrust litigation, section 65 of the Competition Act recognises the right of a person who has suffered loss or damage as a result of a prohibited practice to commence an action for damages in the civil courts. Thus, in principle, it would appear that the Competition Act affords an indirect purchaser the right to institute a claim provided that it can prove a loss or damage as a result of a prohibited practice. It is worth mentioning that in the above-mentioned bread distributors' class action, the application was instituted by claimants who were allegedly directly affected by the conduct of the respondents. In the above-mentioned bread consumer class action, the application was instituted by claimants who were allegedly indirectly affected by the conduct of the respondents. The High Court in this matter did not make a ruling on the availability (or otherwise) of an indirect purchaser claim. However, the Court did recognise that section 38 of the Constitution identifies the following persons that may approach a court to institute a class action:

- anyone acting in their own interest;
- anyone acting on behalf of another person who cannot act in their own name;
- anyone acting as a member of, or in the interest of, a group or class of persons;
- anyone acting in the public interest; and
- an association acting in the interests of its members.

Furthermore, while neither the SCA nor the Constitutional Court provided express clarity on the availability (or otherwise) of an indirect purchaser claim, the remission of the matter by the SCA to the High Court suggests that the South African courts are willing to accept that class actions can be brought on behalf of both direct and indirect purchasers.

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

Insofar as complaint proceedings are concerned, section 51 of the Competition Act provides that a complainant may refer a complaint to the Tribunal for adjudication in circumstances where the Commission elects not to pursue such complaint. Where the Commission prosecutes a complaint before the Tribunal, section 53 of the Competition Act provides for the participation by private litigants in such proceedings, but only to the extent required for the interests of such party to be represented adequately. Section 37 of the Competition Act provides for unsuccessful private litigants before the Tribunal to launch appeal or review proceedings, or both, before the CAC. In the event of an unfavourable decision from the CAC, private litigants may seek to prosecute an appeal or review, or both, before the Constitutional Court, provided that the party concerned is able to establish jurisdiction on the part of the Constitutional Court.

Section 53 of the Competition Act, read with rule 46 of the regulations relating to the functions of the Tribunal provides for the participation by private litigants in merger proceedings before the Tribunal, once again, only to the extent required for the interests of such party to be represented adequately. While private litigants may not launch an appeal against an unfavourable decision of the Tribunal in such circumstances, section 61 of the Competition Act affords them a right of review to the CAC.

Civil actions for damages arising from anticompetitive behaviour are provided for in section 65 of the Competition Act. In terms of this section, the assessment of the quantum or awarding of damages resulting from 'prohibited practices', or both, lies within the domain of the civil courts. Prior to instituting an action for damages in the civil courts, the plaintiff must obtain a certificate from the Tribunal or the CAC certifying, inter alia, that the conduct upon which the civil action for damages is based was found to be a prohibited practice in terms of the Competition Act. Thus, the civil courts are proscribed from considering the competition law merits of any damages claim brought under and in terms of section 65 of the Competition Act.

Importantly, section 65 excludes the possibility of a civil claim for damages in relation to persons that have already been compensated for damages flowing from the anticompetitive behaviour in question by way of a consent order in terms of section 49D(1) of the Competition Act (a negotiated settlement agreement).

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?

As set out above, private antitrust litigants are permitted to participate in complaint and merger proceedings before the competition authorities (the first stage of private antitrust litigation in South Africa). This includes complaints in terms of:

- section 4 of the Competition Act which pertains to prohibited restrictive practices engaged in between competitors (such as price fixing, bid rigging, market division and the like);
- section 5 of the Competition Act, which pertains to prohibited restrictive practices engaged in between parties in a vertical relationship (such as minimum resale price maintenance); and
- sections 8 and 9 of the Competition Act, which pertain to abuse of dominance.

A civil action for damages (the second stage of private antitrust litigation in South Africa) is available to a private litigant where such party suffers damages or loss as result of a prohibited practice (as defined in the Competition Act).

As mentioned in questions 2 and 3, section 65 of the Competition Act sets out the requirements for initiating private antitrust action in South Africa. In terms of section 65(6)(b) of the Competition Act, in order to initiate a private antitrust action, the plaintiff must obtain a certificate from the Tribunal or the CAC certifying that the conduct constituting the basis of the action was found to be a prohibited practice in terms of the Competition Act.

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 section 3 thereof, the Competition Act applies to all economic activity occurring within or having an effect within South Africa. Predicated on this foundation, section 49B(2)(b) of the Competition Act provides that any person may initiate a complaint against an alleged prohibited practice with the Commission.

As set out in question 3, the complainant may prosecute a complaint before the Tribunal where the Commission decides not to pursue the matter. If the Commission does prosecute a complaint before the Tribunal, the complainant may participate to the extent required for the interests of such party to be represented adequately.

As civil actions for damages arising from anticompetitive behaviour are adjudicated by the civil courts, the issue of jurisdiction will be determined by the relevant High Court or magistrates' court rules (as the case may be). In the first instance, the civil court exercising jurisdiction where the defendant is ordinarily resident or principally carries on business will have jurisdiction to hear the matter. Furthermore, the court exercising jurisdiction where the wrongful conduct was committed or where its effects were felt, would also have jurisdiction. It further bears mention that the quantum claimed will determine whether the matter falls within the jurisdiction of a High Court or a magistrates' court. Should the quantum exceed the threshold (set from time to time by the minister of justice) the matter will fall within the jurisdiction of the relevant High Court. Should the quantum fall below such threshold, the matter will fall within the jurisdiction of the relevant magistrates' court. For more detail in this regard, see question 27.

In circumstances where the defendant is not resident or carrying on business in South Africa, the relevant court rules make provision for the service of court processes outside of South Africa and, in certain circumstances, the courts may found jurisdiction to hear the matter.

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

The prohibited practice provisions of the Competition Act refer to anti-competitive conduct engaged in by 'firms', which include persons, partnerships or trusts. Accordingly, private antitrust litigation is capable of being brought against individuals. In practice, however, the subjects of complaints tend more towards legal entities such as companies and the like. To the best of our knowledge, no individual has been successfully prosecuted for anticompetitive activities in South Africa.

The South African competition authorities and courts will have jurisdiction over corporations or individuals from other jurisdictions provided that the anticompetitive behaviour resulting in damages or loss, or both, occurs within, or has an effect within, South Africa (as per section 3(1)(a) of the Competition Act).

Private action procedure

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

There is no statutory impediment in the Competition Act to third parties funding litigation.

Legal practitioners are also permitted to enter into contingency fee agreements with their clients. The contingency fee ultimately passed is the subject of negotiation between the parties.

The Contingency Fees Act provides that a contingency fee agreement cannot permit a legal practitioner to charge a contingency fee in excess of 25 per cent of the capital amount awarded. Furthermore, if the action proves ultimately to be unsuccessful, the legal practitioner shall not be entitled to recover any fees or disbursements whatsoever.

8 Are jury trials available?

Jury trials are not a feature of the South African legal system.

9 What pretrial discovery procedures are available?

Pretrial discovery procedures apply to both stages of private antitrust litigation in South Africa: proceedings before the competition authorities and damages actions before the civil courts.

Section 27 of the Competition Act, read with rule 22(1)(c)(v) of the regulations relating to the functions of the Tribunal provides that the Tribunal may give directions in respect of the production and discovery of documents (whether formal or informal) at a pre-hearing conference. For completeness, it bears mention that private litigants are entitled to attend such pre-hearing conferences in relation to those matters in which they are eligible to participate (qua complainant or intervener). The protocol is for such discovery procedures to follow those employed in the civil courts, although rigid adherence to the formalities of the civil courts does not occur. For example, in *Allens Mescho (Pty) Ltd and others v the Commission and others* [2010], the Tribunal held that it has a discretion whether or not to import the High Court discovery rules into competition law proceedings. Where such rules are adopted, this does not occur on a wholesale basis – rather, practical elements thereof are adopted as and where appropriate. In addition, the Tribunal held that only documents relied upon to support an allegation in a complaint referral need be disclosed; and an inference as to the existence of a particular document set out in a complaint referral does not necessarily create an obligation to disclose such document. In the recent case of *Goodyear South Africa Proprietary Limited v The Competition Commission* [2016] the Tribunal held that in the context of its proceedings the High Court rules that relate to discovery are not rights-based but serve to provide guidance to the Tribunal in its assessment of fairness to the parties when requests for documents are made.

Given the more informal nature of proceedings before the competition authorities, orders relating to the ad hoc production of relevant documents are not uncommon at appropriate times during the course of the proceedings. In *Telkom SA Ltd v the Competition Commission* [2013], for instance, the Tribunal held that the standard by which it assesses an applicant's claim for discovery is fairness and not by the technical formalities of motion proceedings in the High Courts.

Discovery procedures in all civil actions instituted in the High Court are determined by rule 35 of the High Court rules. Parties to a civil action are obliged to disclose to the other party all documents, tapes or recordings in their possession or under their control that either serve to advance their case or adversely affect their case, or advance the case of the other party to the proceedings.

A party's failure to discover any document will result in that party not being able to rely upon such document in the action. Failure to discover documentation relevant to the action may result in the party desiring such discovery instituting an application compelling the recalcitrant party to make discovery of the documentation in its possession, and this may give rise to adverse cost implications for the party against whom such an application is made. A failure to make discovery pursuant to an application to compel may result in the recalcitrant party's claim or defence (as the case may be) being dismissed.

A party can also request the other party to make further and better discovery of any documentation that they have discovered, failing which the same procedures adopted above would also apply.

Either party can call on the other to provide copies of its discovered documents or to make same available for inspection.

Any documentation that is subject to legal privilege is not discoverable. These documents, however, must be listed in a separate schedule to be furnished to the other side, stating that they are privileged.

10 What evidence is admissible?

The stringent rules of evidence that apply in the civil courts (for instance, the rules that apply to the admissibility of hearsay evidence) are not followed before the competition authorities. As with discovery procedures, a more informal approach to evidentiary matters is adopted before the competition authorities.

Section 55(3) of the Competition Act addresses the nature of evidence that is admissible before the Tribunal. In this regard, the Tribunal may accept as evidence any relevant oral testimony, document or other thing, whether or not it is given or proven under oath or affirmation or would be admissible in court.

Since the civil courts are precluded from considering the competition law merits of any damages claim brought under and in terms of section 65 of the Competition Act, the more important evidentiary matters are determined by the competition authorities. To the extent that evidence is required for the assessment of the amount or awarding of damages, the traditional rules of evidence that pertain to the civil courts will apply.

11 What evidence is protected by legal privilege?

As a general principle of South African law (which applies equally within the context of South African competition law), communications between a legal adviser and his or her client will be legally privileged if:

- the legal adviser was acting in a professional capacity at the time the communication is made. In this regard, the payment of a fee by the client is a good but not conclusive indication that the legal adviser was acting in a professional capacity;
- the legal adviser was consulted in confidence. It is typically inferred that if the legal adviser was consulted in a professional capacity, and that the communication related to the transaction upon which the client seeks advice, such communication was intended to be confidential. This inference may however be rebutted;
- the communication was made for the purposes of obtaining legal advice. There is no need for the legal advice to have been concerned with litigation, actual or contemplated. However, for legal privilege to attach to the statements of agents or third parties, the communication must have been concerned with litigation; and
- the advice does not facilitate the commission of a crime or fraud.

In *South African Airways SOC v BDFM Publishers Proprietary Limited* [2015] the court affirmed the general principles of legal privilege in South Africa and laid down the following principles – the document itself is not privileged, it is the information therein that is privileged; the right vests in the client and not in the information; this right is an entitlement to claim privilege over the information.

There are two principal forms of legal privilege. First, there is litigation privilege, which arises once litigation has commenced or is contemplated. It attaches to all documents produced for the dominant purpose of litigation and not only protects all communications between legal adviser and client, but also those between a legal adviser and third parties such as witnesses or experts in the litigation.

Second, and more broadly, there is legal advice privilege that protects all communications between client and legal adviser, provided they are confidential and are for the purposes of seeking or giving legal advice. The essential difference between these two forms of legal privilege is

that litigation privilege attaches additionally to relevant third-party communications, whereas legal advice privilege does not.

As regards advice obtained from in-house counsel, South African law recognises that legal privilege applies not only to practising attorneys and advocates, but also to in-house counsel operating in alternative roles. For example, the High Courts have held that a qualified advocate not practising as such but working as in-house counsel in an international auditing firm giving tax and legal advice and a salaried in-house counsel in government, giving advice to a member of Cabinet, both operate within the sphere of legal privilege. In the latter case, a distinction was made between the in-house counsel's advisory functions and any other functions he may have as part of his employment, which would not be protected by legal privilege.

Trade secrets are not protected under rules of privilege under South African law. Section 44 of the Competition Act makes provision, however, for confidential information submitted to the competition authorities to be claimed by the party submitting it as confidential. It is an offence under the Competition Act for confidential information to be disclosed by the competition authorities unless the confidential status of the information in question has successfully been challenged or waived. Confidential information is defined in section 1(v) of the Competition Act as 'trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others'.

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

On 1 May 2016 certain sections of the Competition Amendment Act 1 of 2009 (the Amendment Act) came into force criminalising individual involvement in cartel activity. In terms of section 73A of the Amendment Act a person commits an offence if, while being a director of a firm or part of management within the firm, such person caused the firm to engage in cartel activities or knowingly acquiesced in the firm engaging in cartel activities.

Be that as it may, one would not ordinarily be precluded from instituting a civil action for damages where a criminal conviction based on the same facts has been handed down. As a general proposition, civil liability is entirely divorced from criminal liability under South African law, which recognises the existence of civil liability as being a separate and distinct cause of action from criminal liability.

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?

In terms of South African case precedent, the evidence relied on and the findings from criminal proceedings are inadmissible in parallel or subsequent civil actions.

A person may be prosecuted for an offence in terms of the Amendment Act only if the relevant firm has acknowledged, in a consent order contemplated in section 49D of the Competition Act, that it engaged in a prohibited practice in terms of section 4(1)(b) or if the Tribunal or the CAC has made a finding that the relevant firm engaged in a prohibited practice.

The immunity granted to leniency applicants in terms of the Commission's Corporate Leniency Policy (CLP) applies only to prosecution under the Competition Act for participation in cartel activities.

Provided the leniency applicant is cited as a respondent, the granting of immunity under the CLP does not shield the successful applicant from civil action but may shield a successful applicant from criminal proceedings (as explained below) that may arise from the cartel conduct in question.

In terms of the Amendment Act the Commission may not seek or request the prosecution of a person for an offence if the Commission has certified that the person is deserving of leniency in the circumstances. Furthermore the Commission may make submissions to the National Prosecuting Authority (NPA) in support of leniency for any person prosecuted for an offence in terms of this section, if the Commission has certified that the person is deserving of leniency.

The ultimate decision on whether to prosecute, however, rests with the NPA. It will be interesting to see how this interaction between the Commission and the NPA plays out in practice.

Competition law jurisprudence has affirmed that a private litigant is entitled access to the leniency application submitted by a leniency applicant in terms of the CLP (including all annexures in support thereof). In *Competition Commission v ArcelorMittal South Africa and another* [2013], the SCA held that while the Commission was entitled to claim privilege over documents prepared for the purpose of litigation, the Commission had waived such privilege by making reference to the documents in its complaint against Mittal and Cape Gate. The SCA remitted to the Tribunal for determination the question of whether the leniency application documents constituted restricted information in terms of the Promotion of Access to information Act 2 of 2000. To date, such determination has not yet been made by the Tribunal. In *Premier Foods (Pty) Ltd v Manoim NO and others* [2013] the North Gauteng High Court was faced with a situation where a leniency applicant had not been cited as a respondent to a complaint referral by the Commission to the Tribunal. A prospective class of plaintiffs sought to obtain a section 65 certificate from the Tribunal which included a declaration that the leniency applicant had engaged in anticompetitive conduct. However, the point was raised that they could not obtain the certificate because the party against whom it was sought had not formally been cited as a respondent. Ultimately the court held that the Commission's failure formally to cite the leniency applicant in the compliant referral proceedings did not prevent the Tribunal from issuing a certificate against that party. Premier Foods appealed this decision and judgment was handed down in November 2015. The SCA held that, on the facts, the Tribunal had had no power to make the order relating to Premier Foods. It further held that the order by the North Gauteng High Court was a nullity and that the court ought to have granted the application. Notably the Commission lodged an appeal against this decision with the Constitutional Court. The appeal was subsequently withdrawn as a result of Premier settling out of court with the plaintiffs who had sought to obtain the section 65 certificate from the Tribunal.

The disclosure of documents obtained by the competition authorities during their investigations is regulated by sections 44 and 45 of the Competition Act. When a person submits information to the Commission or the Tribunal they may claim that information as confidential in the prescribed manner and form. 'Confidential information' is defined in section 1 of the Competition Act as meaning 'trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others'. A private claimant who seeks access to information that is the subject of a confidentiality claim may apply to the Tribunal for access to such confidential information. The Tribunal will determine whether or not the information is confidential, and if it finds that the information is confidential, it may make an appropriate order concerning access to that confidential information. The CAC's ruling in the case of *Commission v Unilever PLC* [2002] provides clarity on the order a Tribunal may make regarding access to confidential information. The CAC held that the Competition Act does not place an absolute bar upon the disclosure of confidential information. The CAC further held that access to confidential information may be granted in the most restrictive manner possible without denying a litigant's right to a fair hearing, and at the same time recognising the importance of the rights to privacy accruing from a confidentiality claim. It should also be noted that from the time information comes into the possession of the Commission or the Tribunal until a final determination has been made concerning the confidential status of that information, the Commission and Tribunal must treat as confidential any information that the Tribunal has determined is confidential information or that is the subject of a confidentiality claim in terms of the Competition Act. Once a final determination has been made concerning any information, it is confidential only to the extent that it has been accepted to be confidential information by the Tribunal or the CAC.

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

While there exists no formal procedure in terms of which a defendant can petition the court for a stay of proceedings in a private antitrust action, it is submitted that a defendant may seek to achieve this result in one of the following ways:

- the parties to a private antitrust action before the Tribunal may agree to postpone that hearing, by entering into an agreement to that effect and notifying the registrar of the Tribunal of such agreement forthwith;
- a defendant may seek a permanent stay of proceedings in relation to a private antitrust action where the applicant's claim has prescribed (see question 17) or where the defendant has already been the defendant in completed proceedings relating to the same or substantially similar conduct (per *Sappi Fine Paper (Pty) Ltd v the Commission and another* [2002]);

- where the Tribunal's decision in relation to an interlocutory proceeding brought during a private antitrust action becomes the subject of an appeal or review to the CAC, the competition authorities may be persuaded to stay the main proceedings pending the finalisation of the interlocutory appeal or review;
- where in proceedings before the Tribunal, separate appeal or review proceedings are already underway in the civil courts, the Tribunal may grant a stay pending the outcome of the appeal or review proceedings in the civil courts (per *Council for Medical Schemes v South African Paediatric Association and another* [2014]); and
- the CAC has confirmed that the decision as to whether a stay should be granted is not susceptible to appeal (per *Allens Mescho (Pty) Ltd and others v Competition Commission* [2015]).

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?

In all civil actions (including those before the competition authorities), the standard of proof required is a 'balance of probabilities' for all parties involved in the proceedings. For completeness, section 68 of the Competition Act provides that the 'balance of probabilities' is the standard of proof that applies to any proceedings brought in terms of the Competition Act.

The burden of proving a contravention of the Competition Act usually lies with the complainant, whether private litigant or Commission. In certain instances, however, once a complainant has discharged the requisite onus, the respondent bears the onus of successfully invoking one or more of the defences that may be available (again, subject to the 'balance of probabilities' standard).

There are a limited number of rebuttable presumptions recognised in South African competition law jurisprudence. The presumption of collusion is set out in section 4(2) of the Competition Act. This presumption relates to price-fixing, market division and bid-rigging, which conduct is strictly prohibited in terms of section 4(1)(b) of the Competition Act and incapable of being justified. In terms of section 4(2) of the Competition Act, an agreement to engage in conduct prohibited by section 4(1)(b) is presumed to exist between two or more firms if:

- any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and
- any combination of those firms engages in that prohibited conduct.

This presumption may be rebutted if a firm, director or shareholder concerned establishes that a reasonable basis exists to conclude that the engagement in conduct prohibited by section 4(1)(b) was a normal commercial response to conditions prevailing in that market.

In terms of section 7(b) of the Competition Act, a firm is presumed to be dominant in a market if it has at least 35 per cent, but less than 45 per cent, of that market. This presumption may be rebutted if a firm can show that it does not have market power. Market power is defined as the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers, or suppliers. If the presumption of dominance is not rebutted by such a firm, then the firm is presumed to be dominant and its conduct may be assessed under sections 8 and 9 of the Competition Act, which pertain to the abuse of dominance.

The Tribunal has confirmed the existence of a rebuttable presumption regarding predatory pricing. Section 8(d)(iv) of the Competition Act, which relates to the prohibition against predatory pricing, provides that a dominant firm cannot sell goods or services below their marginal or average variable cost unless the firm concerned can show technological, efficiency or other procompetitive gains which outweigh the anticompetitive effects of its act. In the case of *Nationwide Airlines (Proprietary) Limited and others and South African Airways (Proprietary) Limited and others* [2000], the Tribunal held that section 8(d)(iv) assists a complainant with the aid of presumption. The logic of the presumption is that once a firm is pricing below marginal or average variable cost, its behaviour is prima facie either unlawful or irrational and the onus should shift to the firm to show technological, efficiency or other procompetitive gains which outweigh the anticompetitive effects of its act. Jurisprudence suggests that the remaining exclusionary acts prohibited in section 8(d) of the Competition Act may also be viewed as rebuttable presumptions, as the conduct prohibited therein is presumed to be exclusionary and such a presumption may be rebutted if the firm concerned can show technological, efficiency or other procompetitive gains that outweigh the anticompetitive effects of its act.

With regard to the second stage of private antitrust litigation, as stated in question 3, the civil courts are proscribed from considering the competition law merits of any damages claim brought under and in terms of section 65 of the Competition Act. Therefore the rebuttable presumptions noted above lie exclusively within the realm of the first stage of private antitrust litigation.

While the 'passing-on' defence has not been addressed specifically by the competition authorities in South Africa, the standard of proof in a matter involving such an allegation would be the 'balance of probabilities'. In this regard, the burden of proof would probably lie with the party alleging that passing on has occurred in a given matter.

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

Since the Competition Act does not make provision for collective proceedings, all actions initiated thereunder are subject to the same timing considerations.

17 What are the relevant limitation periods?

Section 67(1) of the Competition Act provides that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.

Insofar as civil claims for damages arising from anticompetitive activities are concerned, such actions must be instituted within three years of the date on which a final determination of the matter was made by the competition authorities. A person's right to bring a claim for civil damages comes into existence on the date that a final determination has been made by the competition authorities in respect of a matter that affects that person. It is not mandatory that a claimant be aware of the infringement as the trigger for such a claim is a final determination on the matter.

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

A decision of the Commission may be taken on appeal to, or subject to review by, the Tribunal. A decision of the Tribunal may be taken on appeal to, or subject to review by, the CAC. Finally, should the matter in question raise issues under the Constitution, leave to prosecute a further appeal or review, or both, before the Constitutional Court may be granted.

A civil action for damages will typically be heard by a single judge of the High Court. If leave to appeal or review this judgment is granted, such appeal or review will be heard by three judges (a full bench) of the High Court. The decision of the full bench of the High Court may be appealed to the SCA and will be heard by a bench of five judges. Should the requisite leave be refused by the full bench of the High Court, it is possible to petition the SCA to hear the appeal or review. Appeals focus on the merits of the judgment itself. As such, appeals may be brought either on the law, or on the facts, or on both the law and the facts.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings or class actions are a relatively new and unlegislated concept in South African law, having first been recognised as recently as 1994. They are provided for in section 38(c) of the Constitution. In addition, the Law Commission of South Africa (the Law Commission) has released a report titled 'The Recognition of Class Actions and Public Interest Actions in South African Law (Project 88 – August 1998)' (the Law Commission's Report) with guidelines on the procedure to be followed in class actions. As will be detailed below, certain elements of the recommendations provided in the Law Commission's Report were applied recently in the bread cartel class action applications referred to in question 1. As set out previously, the Competition Act does not make any specific provision for these actions.

20 Are collective proceedings mandated by legislation?

Section 38(c) of the Constitution provides for collective proceedings as one of the rights contained in the Bill of Rights. By way of illustration and as stated in our response to question 1, in November 2010, the Bread cartel class action applications were brought in the Western Cape High Court.

The bread consumers alleged that their constitutional rights of access to sufficient food and basic nutrition, as outlined in sections 27(1)(b) and 28(1)(c) of the Bill of Rights respectively, had been violated by the three respondents. The bread distributors alleged that their right to choose their trade, occupation and profession freely, as outlined in section 22 of the Bill of Rights had been violated by the three respondents. However, as found in the SCA's decision in the bread consumers' application and the Constitutional Court's decision in the bread distributors' application, an applicant need not show that there has been an infringement of a right enshrined in the Bill of Rights before being permitted to proceed. Instead, the courts found that an application for a class action may be brought for both a Bill of Rights and a common law infringement.

The Competition Act does not make any specific provision for such proceedings.

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

Until recently, there has been no formal certification process recognised in the South African legal system. However, in the above-mentioned *Bread* cartel class action applications, the High Court recognised a certification process to be applied to the applications. The High Court noted the recommendation in the Law Commission's report that a preliminary application should be brought requesting leave to institute an action as a class action, and applied the six-step test outlined in the Law Commission's report. However, the High Court found that the test applied did not necessarily require application in every class action brought before the courts. The SCA in the bread consumers' class application found that it is a requirement for a party seeking to represent a class to make an application to a court for the certification of the proposed class action. The SCA, in a list of requirements which correspond substantially with the Law Commission's six-step test, held that an application for certification as a class action may be granted when:

- there is an existence of a class identifiable by objective criteria;
- there is a cause of action raising a triable issue;
- a right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class;
- the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- if the claim is for damages, there is an appropriate procedure for allocating the damages to the class members;
- the proposed representative is suitable to conduct the action and to represent the class; and
- given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

The Constitutional Court, in the bread distributors' class action application, found that the SCA had laid down requirements for the validation of the certification of a class action but that these requirements are not to be treated as conditions precedent or jurisdictional facts that must be present before an application for certification can succeed. A court can allow the certification of a class action if one or another requirement is absent as long as it is in the interests of justice to so. These decisions have established that a certification process is a formal procedural requirement that has to be satisfied before instituting a class action application. In determining whether to grant the certification of a class action, the courts must consider the factors set out by the SCA in the bread consumers' class application but the ultimate test remains whether it is in the interests of justice to grant such certification. The Constitutional Court decision in the bread distributors' class application created some uncertainty as to whether the certification process is a prerequisite when making class action applications to enforce a right found in the Bill of Rights. In *Nkala and others v Harmony Gold Mining Company Limited and others* the court stated the need for the court to protect its own process (ie, through the requirement of certification) does not disappear in a matter where a right in the Bill of Rights has been invoked. It further stated that section 173 of the Constitution makes it clear that the court has inherent power to protect its own processes. Insofar as bringing a class action application to enforce a common law right, the certification process is now recognised as a prerequisite that must be met.

22 Have courts certified collective proceedings in antitrust matters?

As stated above, the Bread cartel class action applications constituted the first (and so far, only) class action applications brought in respect of an antitrust claim, however, the class actions have not yet been certified. In respect of the class action application brought by the bread consumers, the SCA found that a certification process certifying a particular class is a prerequisite that the party seeking to represent a class must first apply for and obtain from the court before instituting the class action. The SCA did not certify the bread consumers' class action but remitted the matter to the High Court for determination in accordance with the requirements set out in question 21. The High Court has not yet made any determination in this regard.

In respect of the class action application brought by the bread distributors, the Constitutional Court overturned the SCA's decision and remitted the matter to the High Court for determination in accordance with the requirements set out in question 21. The High Court has not yet made any determination in this regard.

23 Can plaintiffs opt out or opt in?

There has been no express indication that class actions may be sought on an opt out or an opt in basis in respect of antitrust claims. However, the above-mentioned Bread cartel class action applications indicate that plaintiffs may opt out or opt in. With regards to the bread consumers' application, certification of the class was sought on an opt-out basis, and thus all bread consumers would be regarded as applicants unless they expressly indicated otherwise. With regards to the bread distributors' application, certification of the class was sought on an opt in basis, and thus bread distributors would not be regarded as applicants unless they expressly indicated that they wished to be applicants.

24 Do collective settlements require judicial authorisation?

While there is currently no precedent addressing this issue in terms of South African competition law, in the ordinary course of antitrust and civil litigation in South Africa, settlements between parties may be made with or without judicial authorisation.

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?

In the *Bread* cartel class action applications, the applicants anticipated a national class action as the applications were brought on behalf of bread consumers and bread distributors in the Western Cape Province and elsewhere in South Africa. The SCA, in the bread consumers' class action application, dismissed the national class action on the basis of being overbroad and because there was no common issue of fact or law shared by all members of the class. Therefore, while in theory a national class action is possible, there are no examples of successful national class actions brought in respect of antitrust claims.

Under the Competition Act, the competition authorities (comprising the Commission, the Tribunal and the CAC) are seized with enforcing the South African antitrust regime on a national basis. Furthermore, the discrete roles fulfilled by each arm of the competition authorities in South Africa make it impossible for simultaneous private actions to be brought in respect of the same matter.

The above position is further reinforced by the fact that private litigants are only entitled to pursue a damages claim arising from a contravention of the Competition Act before the civil courts once the competition authorities have finally adjudicated a matter and issued a certificate certifying the perpetration of a prohibited practice.

26 Has a plaintiffs' collective-proceeding bar developed?

No. As stated in question 19, collective proceedings are a relatively new and unlegislated concept in South African law.

Remedies

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

In civil actions for compensation pursuant to a finding by the competition authorities of anticompetitive conduct, claims are limited to the actual loss

or damage suffered by the plaintiff as a result of the anticompetitive conduct in question.

For the reasons set out in question 1, the civil courts in South Africa have yet to consider a claim for damages in terms of section 65 of the Competition Act. Predicated on existing jurisprudence in relation to damages claims, however, the amount claimed must be capable of being quantified in monetary terms and seek to restore the plaintiff to the position he or she was in before the wrongful conduct causing the damage took place. It is possible to claim for consequential loss (loss of profit) and prospective losses (future loss of business or profit) resulting from the damage caused by the wrongful conduct. The onus is on the plaintiff to quantify and prove the damages sought and the court will determine the amount of damages to be awarded, although these will not exceed the actual amount claimed by the plaintiff.

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

The remedies contemplated in this question fall within the first stage of private antitrust proceedings in South Africa identified in question 1 (within the remit of the competition authorities as opposed to the civil courts).

Section 58 of the Competition Act affords the Tribunal a wide discretion in making appropriate orders including:

- interdicting any prohibited practice;
- ordering parties to engage in specific conduct so as to end a prohibited practice;
- ordering divestiture of any shares, interests or assets;
- declaratory relief;
- declaring the whole or part of an agreement to be void; and
- ordering access to an essential facility on terms reasonably required.

Importantly, the list of remedies set out in section 58 is not exhaustive.

Section 49C of the Competition Act regulates the provision of an interim remedy in respect of an alleged prohibited practice in the first stage of private antitrust proceedings. Section 49C states that the Tribunal must give a complainant (being the claimant) a reasonable opportunity to be heard having regard to the urgency of the proceedings, and the Tribunal may grant an interim order if it is reasonable and just to do so, having regard to the following factors:

- the evidence relating to the alleged prohibited practice;
- the need to prevent serious or irreparable damage to the complainant; and
- the balance of convenience.

In this regard, the claimant must provide evidence of a restrictive practice or serious or irreparable damage that will allow the balance of convenience to favour the claimant.

29 Are punitive or exemplary damages available?

The philosophy employed by South African courts in awarding damages is restorative as opposed to punitive. As such, it is unlikely that punitive or exemplary damages will be awarded pursuant to civil actions under section 65 of the Competition Act.

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

Yes, all damages awards made by a court will attract interest at the prescribed rate of 10.25 per cent per annum. This will commence on the date of issue of the certificate from the competition authorities certifying, inter alia, that the conduct upon which the civil action for damages is based was found to be a prohibited practice in terms of the Competition Act.

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

While there is currently no precedent addressing this issue in terms of South African competition law, it is submitted that the answer is likely to be no. Administrative penalties imposed on a firm by the competition authorities are paid directly into the National Revenue Fund and, accordingly, do nothing to compensate a firm for damages or loss, or both, suffered as a result of anticompetitive conduct.

Update and trends

Although not in the context of antitrust litigation, the past year has seen the successful certification by the courts of several classes in public interest cases such as the silicosis class action. This was following the Constitutional Court's endorsement of class actions in the *Bread* cartel class action application. The increased use of class actions to litigate public interest cases is likely to pave the way for their increased use in antitrust litigation.

Aside from the developments in class action litigation, this year is likely to see new pronouncements on private damages arising from infringements of the Competition Act. The long-awaited matter between Comair and the now liquidated Nationwide Airlines against South African Airways relating to damages arising from the fact that South African Airways had been found to have contravened the Competition Act is currently ongoing. A judgment in the matter will provide the first piece of guidance relating to damages arising from anticompetitive conduct. Further, the City of Cape Town recently filed a suit against WBHO claiming 485 million rand in damages arising from collusive conduct in the construction industry. The outcomes in both cases are eagerly anticipated. Finally, the coming into force of the Competition Amendment Act brings about the introduction of personal, criminal liability, which is a new form of punishment for cartel conduct in South Africa.

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

In the context of private antitrust litigation, a decision of the competition authorities is usually accompanied by an order as to legal costs. As a general rule, it is the unsuccessful party who must bear its own legal costs as well as those of the successful party, including the costs of the successful party's counsel and experts. The legal costs recoverable are limited to the High Court tariff that awards legal costs on a 'party and party' basis. That is to say, only those costs reasonably necessary to be incurred by a party in order to obtain justice will be awarded. In exceptional circumstances, punitive costs orders may also be granted as a means of expressing the authorities' displeasure at the conduct of one of the litigants.

33 Is liability imposed on a joint and several basis?

While there is currently no precedent addressing this issue in terms of South African competition law, it is common (in ordinary civil proceedings) for two or more defendants who have been found liable for wrongful conduct to be held jointly and severally liable for damage caused by such wrongful conduct in terms of the Apportionment of Damages Act.

A defendant facing a claim for damages may join to the proceedings any party that is jointly liable for the damage and as such, can claim a contribution from such party for the satisfaction of the damages amount awarded.

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

While there is currently no precedent addressing this issue in terms of South African competition law, a defendant (in ordinary civil proceedings) who has satisfied the full amount claimed in damages by the plaintiff has a right of recourse against a joint wrongdoer for a contribution towards the amount paid in satisfaction of the damages awarded to the plaintiff after a judgment or settlement.

35 Is the 'passing on' defence allowed?

The 'passing on' defence has not been addressed by the competition authorities and its application to South African competition law is uncertain. In civil proceedings, however, there does not appear to be a legal impediment preventing a defendant from arguing this point in mitigation of damages claimed by a plaintiff.

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

Save for the prohibited horizontal practices of fixing prices or trading terms, or both, dividing markets and bid rigging, all other anticompetitive conduct engaged in between competitors is capable of being justified on the basis of a 'rule of reason'-type analysis (a balancing of the anticompetitive

effects of particular conduct against the procompetitive gains arising from such conduct) (section 4 of the Competition Act).

Except for the prohibited vertical practice of minimum resale price maintenance, all other anticompetitive conduct engaged in between firms in a vertical relationship is capable of being justified on the basis of the aforementioned 'rule of reason'-type analysis (section 5 of the Competition Act).

Certain conduct engaged in by a dominant firm that constitutes an abuse of dominance is capable of being justified on the basis of the aforementioned 'rule of reason'-type analysis (section 8 of the Competition Act). Furthermore, price discrimination on the part of a dominant firm may be justified on the basis of:

- objective cost differentials;
- meeting the prices or benefits offered by a competitor; or
- changing conditions affecting the markets concerned (section 9 of the Competition Act).

37 Is alternative dispute resolution available?

Not in the context of competition law litigation, although litigants may invoke alternative dispute resolution as a means of resolving damages claims instead of approaching the civil courts.

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Legislation and jurisdiction

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

The former Swedish Competition Act (1993:20), which was adopted in 1993, introduced an explicit right to damages for parties who have suffered injury as a result of infringements of the prohibitions in the Competition Act against anticompetitive agreements or abuse of a dominant position. This act was replaced by the current Competition Act (2008:579), which came into force on 1 November 2008. The current act retained the wording of the former act regarding the right to damages but also introduced the possibility of bringing private enforcement actions together with cases of administrative fines brought by the Competition Authority. This means that damages and fines can be consolidated into the same proceeding.

Although the provisions on damages for infringements of competition rules have been in force for more than 20 years, only one final court judgment directly relating to damages has yet been handed down (*Europe Investor Direct AB et al v Euroclear Sweden AB* (formerly VPC AB), where the plaintiffs were awarded damages by Svea Court of Appeal due to Euroclear's abuse of its dominant position). Final court judgments are, however, pending in two follow-on claims (see 'Update and trends'). Some cases have been settled out of court (see question 37). Furthermore, a number of cases have been subject to arbitration, such as *V&S Vin & Sprit v Systembolaget*, in which the claimant was awarded damages for an abuse of dominance by Systembolaget, the Swedish retail monopoly for alcoholic beverages.

As of 1 August 2005, the scope of those entitled to damages was widened to include not only undertakings and parties to agreements but also private individuals and other non-undertakings, such as governmental bodies. The limitation period was also extended from five years to 10 years; however, the former limitation period of five years still applies to claims that arose before 1 August 2005. The Swedish government has now proposed to amend the limitation period when implementing the EU Damages Directive (see question 17 and 'Update and trends').

There has been an increase in the number of cases where contractual nullity due to competition law infringements is claimed. Contractual nullity has successfully been claimed, inter alia, in *Civil Aviation Authority v SAS*. In this case, the appeal court found that the Civil Aviation Authority had abused its dominant position by applying discriminatory prices. The Civil Aviation Authority was obliged to repay approximately 600 million kronor to the airline SAS, and SAS was relieved from paying approximately 400 million kronor to the Civil Aviation Authority.

Furthermore, recent years have seen several cases where undertakings have used their right, when subjected to an unfavourable decision by the Competition Authority, to bring action themselves before the Swedish Market Court. Such action may, for example, seek an injunction that requires another undertaking to cease certain behaviour in breach of the prohibitions against anticompetitive cooperation and abuse of a dominant position (see question 3), under penalty of a fine. In *Saint-Gobain Isover AB v Norvästra Skåne Södra Halland Energi AB*, *Uppsala Taxi v Europark Svenska Aktiebolag and Swedavia AB* as well as in *Bring CityMail Sweden AB v Posten Meddelande AB*, the defendants were found to have abused their dominant positions and were ordered by the Swedish Market Court to cease the abusive behaviour. More recently, in *Association of Swedish Wholesalers of Car Parts v KIA Motors Sweden AB*, the Swedish Market Court found that KIA's application of a condition in its new car warranty was anticompetitive and ordered KIA to cease applying the condition.

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. Indirect purchasers may bring claims.

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

There are two antitrust prohibitions in Sweden, one against anticompetitive cooperation between undertakings (Chapter 2, section 1 of the Competition Act) and one against the abuse of a dominant position (Chapter 2, section 7 of the Competition Act). These prohibitions mirror the prohibitions in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). It follows from Chapter 2, section 6 of the Competition Act that agreements and clauses that infringe Chapter 2, section 1 are void. Although not explicitly stated in the Competition Act, it is established case law that agreements and clauses infringing Chapter 2, section 7 are also void.

A private antitrust action on the basis that an agreement or provision is in violation of the Swedish or EU competition rules, and thus void, may be brought under the general procedural rules.

Chapter 3, section 25 of the Competition Act stipulates a right to damages for parties injured as a consequence of infringements of Chapter 2, sections 1 or 7 of the Competition Act or articles 101 or 102 TFEU. Antitrust class actions may be brought under the Class Actions Act (2002:599).

Chapter 3, sections 1 and 2 of the Competition Act stipulate that if the Competition Authority decides in a particular case not to order an undertaking to terminate an infringement of Chapter 2, section 1 or 7, an undertaking affected by the infringement may seek such an order from the Market Court. An undertaking may, however, not initiate such proceedings if the Competition Authority's decision is founded on article 13 of Regulation 1/2003.

The general courts are competent in private antitrust actions according to the forum rules in Chapter 10 of the Code of Judicial Procedure (1942:740). The competent court is primarily the district court where the defendant resides or has its seat, as the case may be. An action for damages can also, alternatively, be brought where the infringement took place or where the injury occurred.

On 1 September 2016 a new judicial system for competition cases will enter into force, whereby a new Patent and Market Court (organisationally part of the Stockholm District Court) will serve as a first-instance court, while a new Patent and Market Court of Appeal (organisationally part of the Svea Court of Appeal) will be the court of second, and last, instance (the Patent and Market Court of Appeal may, however, allow a judgement to be appealed to the Supreme Court). The general courts are still competent in private antitrust actions, although this may be changed following the implementation of the EU Damages Directive.

In addition, the Arbitration Act (1999:116) stipulates that the civil law consequences of competition law may be the subject of arbitration.

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 or nullity are available in respect of breaches of both Chapter 2, sections 1 and 7 of the Competition Act and articles 101 and 102 TFEU. A finding of infringement by a competition authority is not required to initiate a private antitrust action. In general, a Swedish court is neither bound by a previous finding of infringement by a competition authority, nor by a court's decision to uphold a such a finding. Instead, the court has to make an individual assessment of the issues raised in both cases. However, this main rule does not apply when the European Commission has found an infringement of article 101 or 102 TFEU, or when such a finding has been upheld by the Court of Justice of the European Union. In such a case, a Swedish court would be bound by the previous finding. It should be mentioned, however, that, in light of the EU Damages Directive, the Swedish government has suggested the introduction of a provision stating that a finding of a breach of the provisions in the Competition Act in a final ruling may not be re-examined in a subsequent action for damages.

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?

As regards international relations, EC Council Regulation 44/2001 (the Brussels Regulation) applies in Sweden. As for jurisdiction issues between Sweden and non-member states, there is no general rule determining whether Sweden has jurisdiction or not, and so cases are evaluated on a case-by-case basis. Simply put, a Swedish court would probably consider itself as having jurisdiction in a case where a Swedish rule on forum would be applicable, that is, where the defendant resides or has its seat in Sweden, as the case may be, or alternatively, if the infringement took place or the injury occurred in Sweden.

Under the Brussels Regulation, parties may agree that a court in a member state should have jurisdiction to try a claim between the parties, as long as at least one of the parties is domiciled in a member state. Certain formal requirements apply to such agreements on jurisdiction.

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

Private actions can be brought against corporations and individuals (including those from other jurisdictions, as long as Sweden has jurisdiction – see question 5), provided they constitute undertakings within the meaning of the Competition Act. Chapter 1 section 5 of the Competition Act defines an undertaking as a natural or legal person engaged in activities of an economic or commercial nature. An action for damages cannot, however, be brought against an employee of an infringing corporation.

Private action procedure

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

Litigation may be funded by third parties. Within the framework of a class action, a plaintiff may agree with his or her counsel that the fee should depend on the outcome of the case. Such an agreement requires the approval of the court. Otherwise, the Swedish Bar Association does not accept that its members charge contingency fees.

8 Are jury trials available?

No, jury trials are not available.

9 What pretrial discovery procedures are available?

Discovery in the generally accepted meaning of the word does not exist in Swedish law. Under the Swedish system, exchanges of documents pretrial can only be made on a voluntary basis. However, within the framework of a court procedure, there is a general obligation on a party (whether a party to a proceeding or a third party) holding a written document that can be assumed to be of importance as evidence to produce that document. A court may issue an order to that effect. A party seeking such an order from the court should identify the document and explain what information is included in the document. The party obliged to produce the document may be compelled to do so under threat of a fine.

The general rule on disclosure is subject to certain exceptions. Legally privileged documents (correspondence between a client and his or her attorney) need not, for instance, be disclosed.

As a general principle, documents received or drawn up by a public body (including the Competition Authority and the courts) are public. This principle is, however, made subject to a number of exceptions in the Public Access to Information and Secrecy Act (2009:400), which lists a number of situations where documents are confidential. In the Competition Authority's case files, information on an undertaking's business operations, inventions and research results must be treated as confidential where the undertaking in question may be expected to suffer injury if the information is disclosed. In cases under the Competition Act before courts, similar rules apply.

Typically, confidentiality is only maintained as regards third parties and not as regards a party to the relevant proceeding. However, a party may request that confidentiality be respected regarding certain information even in relation to a party to the proceeding in question (where there are particularly strong reasons for doing so).

It is possible to appeal against a decision not to disclose a document, but not against a decision to disclose a document.

The Swedish legal framework on disclosure is, however, subject to review in light of the EU Damages Directive. A government inquiry proposes, for example, a provision stating that the Swedish rules on disclosure shall not cover certain documents held by a competition authority.

10 What evidence is admissible?

Parties may rely on virtually all kinds of documents, statements and occurrences in attempting to prove their case. The court may freely evaluate the evidence presented by the parties at its discretion. In other words, virtually all kinds of evidence are admissible and the parties cannot rely on any technical rules regarding admissibility of certain forms of evidence. One exception is that written witness statements are normally not allowed; however, as of 1 November 2008, a written statement may be used as evidence so long as the parties agree to it and it is not manifestly unsuitable. These principles are, however, being reviewed by the Swedish government following the EU Damages Directive. For instance, it is suggested that certain documents accessible to a party only through its access to a competition authority's case file shall not be admissible in damages actions (see also question 9).

11 What evidence is protected by legal privilege?

Written correspondence to and from external lawyers held by the lawyer or by the client is protected by legal privilege and may not be subject to a court order to produce such document. External lawyers are also prevented from giving evidence on matters confided to them in their practice. Advice from in-house lawyers is not legally privileged in Sweden.

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

Competition law infringements are not criminalised under Swedish law.

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?

As indicated in question 12, competition law infringements are not criminalised under Swedish law. Findings and evidence in proceedings brought by the Competition Authority under the Competition Act may be relied upon as evidence in private actions. Such findings will not, however, be binding on the court in a private proceeding. There is no protection from private actions for leniency applicants. The above-mentioned proposal in light of the EU Damages Directive does, however, suggest the introduction of a provision limiting the joint and several liability of an immunity recipient. The Swedish Competition Authority follows the principle of public access to official records. Accordingly, all documents received or drawn up by the authority are public if they do not contain secret information (eg, trade secrets).

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

Under the Swedish Code of Judicial Procedure (Chapter 32, section 5), the court can decide on a stay in a proceeding if it is of extraordinary importance that a question which is subject to another legal proceeding is decided before the proceeding continues. For example, if the Competition Authority has initiated an ongoing proceeding regarding fines owing to a breach of the antitrust prohibition, the court can decide on a stay in a proceeding regarding damages due to the same alleged breach.

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 general rules on evidence for civil law cases are applicable to cases concerning damages for infringements of the Competition Act. The standard of proof is that the relevant fact must be 'proven' or 'shown'. This is below the 'beyond reasonable doubt' level, but does not as such involve a 'balance of probabilities' exercise. There are currently no specific rules of evidence relating to competition law infringements (eg, cartels).

In proceedings for damages under Chapter 3, section 25 of the Competition Act, the plaintiff has the burden of proof in relation to the infringement, intent or negligence, the injury suffered and the causal link between the infringement and the injury. In proceedings where the plaintiff claims unenforceability of an agreement due to competition law, the burden of proof lies with the claimant. With respect to, for example, a passing on defence, the burden of proof lies with the defendant. Under general principles of procedural law, once a party has discharged its burden of proof in a given respect, the burden then shifts to the other party.

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

It is difficult to state on a general basis how long proceedings will take, as it will depend on the circumstances of each case. Depending on the complexity of the case and the number of instances, the length of a case can vary between roughly one year for a 'simple' case with no appeal to perhaps five years or more for a complex case in three instances. There are no formal possibilities to accelerate proceedings.

17 What are the relevant limitation periods?

Chapter 3, section 25 of the Competition Act stipulates that the right to damages for breach of the Competition Act or articles 101 or 102 TFEU lapses if no claim is brought within 10 years from the date on which the injury was sustained – for example, when a customer is forced to pay a higher price due to an infringement of the competition rules (irrespective of whether the injured party had knowledge about the injury or its cause, or both). Other events, such as the initiation of an investigation, do not 'stop the clock'. For injuries that arose before 1 August 2005, the right to damages lapses if no claim is brought within five years from the date on which the injury was sustained.

As to proceedings relating to the enforceability of an agreement, the general rule on limitation applies. Under the Swedish Act on Limitation (1981:130), the limitation period is 10 years from the date when the claim arose.

It has, however, now been suggested that the limitation period should be reduced to five years from when the infringement ceased and the claimant knew, or could reasonably have been expected to know:

- of the behaviour and the fact that it constituted an infringement of competition law;
- of the fact that the infringement of competition law caused harm to it; and
- the identity of the infringer.

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

A private action is first heard in a district court. The judgment of a district court may be appealed to a court of appeal. A court of appeal's judgment may be appealed to the Supreme Court. Leave to appeal is required for proceedings before both a court of appeal and the Supreme Court. Appeal is available both on the facts and on the law. In the proposal to introduce a new act governing private antitrust matters, it has been suggested that all damages actions shall be handled by the Patent and Market Courts, which are to be established on 1 September 2016.

Update and trends

In March and May 2016, the Stockholm District Court delivered its judgments in two follow-on damages claims brought against Telia (formerly TeliaSonera), which in 2013 had been found to have abused its dominant position through margin squeeze. In both cases, Telia was found liable to pay damages to the plaintiffs, Yarps (damages totalling 65 million kronor) and Tele2 (damages totalling 240 million kronor). The cases have been appealed to the Svea Court of Appeal by Telia as well as by the plaintiffs (as damages were not awarded to the full extent of the claims). It is at this stage unknown when judgments can be expected.

On the policy front, the Swedish government has proposed amendments to Swedish law necessary in order to fulfil the requirements of the EU Damages Directive. The amendments are proposed to enter into force on 27 December 2016, and include changes and clarifications concerning, eg, liability, limitation periods, compensation, recourse, passing-on of overcharges, disclosure and other general procedural provisions. The amendments are proposed to be introduced through a separate competition damages act governing actions for damages for infringements of the competition law provisions.

In a consolidated damages and fines case, the Market Court (or the Patent and Market Court of Appeal after 1 September 2016) is the competent court of appeal and leave to appeal is required.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Yes, collective proceedings are available in respect of antitrust claims.

20 Are collective proceedings mandated by legislation?

Class actions are mandated by the Class Action Act (2002:599), which entered into force on 1 January 2003. There are three forms of class action:

- A private class action may be initiated by any person or entity, provided that such person or entity has a claim of its own and is a member of the class.
- An organisation class action may be brought by certain organisations without them having claims of their own. Such actions may be initiated by consumer and labour organisations and must, as a general rule, concern disputes between consumers and providers of goods or services.
- A public class action may be initiated by an authority authorised by the government to act as plaintiff and litigate on behalf of a group of class members. This form of action is intended to allow authorities to pursue claims where the public interest, in a broad sense, suggests that action should be taken.

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

There is no certification process as such, but certain conditions must be fulfilled when bringing a class action. The questions of fact must be common or similar to the entire class. Although the threshold for fulfilling this requirement is set rather low, a class action will not be permitted if there are substantial individual differences between the claims within the class. The law also requires that a class action is the best alternative compared to other forms of procedure such as joinder of claims and the pilot case model. In addition, the group must be suitable with regard to, inter alia, size and character. It must also be well defined, to enable individuals to establish whether they are covered by the class action. The plaintiff must be suitable to represent the class.

22 Have courts certified collective proceedings in antitrust matters?

No antitrust class proceedings have thus far been brought in Sweden.

23 Can plaintiffs opt out or opt in?

The court must give notice to all group members named in the application advising them that they must opt in through a written notice to the court by a particular date. If a group member does not notify the court within the specified time limit (typically one month), he or she will not be covered

by the class action. An opt-in notice becomes binding after the stipulated time limit has run out. Group members are thus prevented from opting out at a later stage. A group member can, however, intervene as a party to the dispute and withdraw his or her individual claim.

24 Do collective settlements require judicial authorisation?

Yes, the court must approve any settlement entered into by the plaintiff on behalf of the group members. Such approval shall be given unless the terms of the settlement are unreasonable or discriminatory.

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.

26 Has a plaintiffs' collective-proceeding bar developed?

No. It may be noted, however, that unlike the general rule that parties in legal proceedings are not required to have legal representation, claimants in private class actions and organisation class actions must, in general terms, be represented by a member of the Swedish Bar Association.

Remedies

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

Under Chapter 3, section 25 of the Competition Act, compensation shall cover damages caused by the infringement. The travaux préparatoires of the former Competition Act (1993:20) state that such compensation shall cover pure financial loss, in particular loss of income and loss of or damage to property. The current Competition Act has not introduced any changes in this respect.

The object of damages for infringement of competition law is to restore the plaintiff's financial situation to that which it would have been had the infringement never occurred. Therefore, when setting the damages, the courts will compare the plaintiff's actual financial situation with the hypothetical financial situation in the absence of the infringement.

In the government proposal concerning the EU Damages Directive, the introduction of a provision specifically stating that compensation shall cover actual loss, loss of profit and interest has been suggested.

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

The court may in some circumstances order security measures if there is reason to suspect that the defendant is trying to evade payment.

29 Are punitive or exemplary damages available?

No, Swedish law does not provide for punitive or exemplary damages.

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

Yes. Interest will accrue on the amounts due from the 30th day after the plaintiff claimed compensation from the defendant in writing or, if no previous claim has been made, from the date of service of the summons application. The interest is 8 per cent above the reference rate of the Central Bank.

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

No, fines imposed by competition authorities are not taken into account when determining damages.

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

Normally, the losing party bears the legal costs. The winning party can thus recover all reasonable litigation costs from the losing party. The costs may also be apportioned between the parties depending on the degree of success of each party.

Under Swedish law, a non-EEA resident bringing an action before a Swedish court against a Swedish national or legal person must, at the defendant's request, furnish security to guarantee payment of the costs for the judicial proceedings, which the person or company may be ordered to pay.

In the case of class actions, where the defendant is liable for the plaintiff's litigation costs but is unable to pay, group members have a duty to use the received compensation to pay for the plaintiff's litigation costs.

If a case regarding administrative fines is consolidated with a claim for damages brought by a plaintiff, the plaintiff will only risk bearing the particular costs added to the case by the claim for damages, thus not the opposite party's costs relating to the administrative fines part of the case.

33 Is liability imposed on a joint and several basis?

When two or more undertakings are liable for the same injury caused by an infringement of competition law, they are – according to the general principles of Swedish tort law – jointly and severally liable. The Swedish government has suggested the inclusion of provisions specifically outlining this joint and several liability in private antitrust matters through the proposed implementation of the EU Damages Directive.

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

A party who has been obliged to pay compensation to an injured party has a right of recourse against other liable parties. Such claims may be pursued after a judgment or settlement. The rules on contribution from liable parties are currently being clarified in light of the EU Damages Directive. The Swedish government has proposed, eg, that co-infringers are to be held jointly and severally liable for the harm caused by the infringement and that a co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The share is

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proposed to be determined to what is reasonable based on its market share and the circumstances in general.

35 Is the 'passing on' defence allowed?

When quantifying damages, the passing on defence is available in principle. Such a defence would be successful if it has a bearing on the injury suffered by the plaintiff, since the defendant is only liable to compensate injury actually sustained by the plaintiff.

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

As long as the plaintiff has been able to prove the existence of an intentional or negligent infringement, actual injury and the causal link between the two, there are no specific grounds of justification as regards liability as such.

As regards the amount of the damages, this can be reduced if the plaintiff has contributed, by fault or negligence, to the injury sustained. Also, if the plaintiff has benefited from the infringement, this would have an impact on the amount of the damages.

37 Is alternative dispute resolution available?

Section 1 of the Swedish Arbitration Act stipulates that arbitrators may rule on the civil law effects of competition law between the parties. Parties may also freely decide to settle disputes out of court.

No public figures or studies on these issues are available. However, to our knowledge there has been only one Swedish court case to date on damages for breach of competition law that has led to a final judgment (although there are a number of cases pending). This suggests that alternative means of dispute resolution are sometimes used.

Switzerland

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Legislation and jurisdiction

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

In Switzerland, competition law is primarily enforced by the competition authority. These investigations are governed by administrative law. The reasons why the administrative procedure is more attractive are manifold. First, in civil proceedings the cost risk is substantial. Second, the claimant bears the burden of proof, whereas in the administrative procedure the Secretariat of the Competition Commission has several measures and tools to gather evidence (such as dawn raids, requests for information, etc).

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 in Switzerland are provided by statutory law (see question 3).

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

Private antitrust actions in Switzerland are governed by articles 12–17 of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Cartel Act). Article 12 of the Cartel Act governs the remedies that are available to a claimant, including the elimination of or desistance from the hindrance, damages and satisfaction or the surrender of lawfully earned profits. Article 13 prescribes the enforcement of the right to elimination and desistance and article 15 sets forth an obligation for the civil courts to refer questions on the lawfulness of a restraint of competition to the Competition Commission (articles 14 and 16–17 were repealed with effect as of 1 January 2011).

The Federal Act on Swiss International Private Law of 18 December 1987 (SIPLA) governs international private antitrust actions. Article 137, paragraph 1 of the SIPLA provides that the applicable law shall be the law of the state in whose market the direct effect of the restraint of competition on the claimant occurs.

On 22 February 2012, the Swiss Federal Council submitted its draft for a number of amendments of the Cartel Act to Parliament for approval. The proposals submitted to Parliament for consideration included the recognition of legal standing to final consumers and the suspension of the statute of limitations for civil actions during an investigation of an alleged anticompetitive practice by competition authorities. On 17 September 2014, Parliament rejected the proposed revisions to the Cartel Act in their entirety.

The EU Damages Directive is not applicable in Switzerland and there are no concrete endeavours to implement its rules in domestic law after the rejected revision of the Cartel Act (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 the European Union, OJ L 349/1). The EU Damages Directive differs from Swiss legislation in various aspects. For example, the Damages Directive governs the disclosure of evidence and states that national courts are able to order the defendant or a third party to disclose relevant evidence that lies in their control (article 5). Another example is the limitation periods for bringing an action for damages. According to article 10 of the Damages Directive the limitation periods are at least five years (see question 15 and 17 for the Swiss legislation).

Material and territorial jurisdictions of the civil courts in domestic antitrust cases are determined by the Civil Procedure Code of 19 December 2008 (CPC, in force as of 1 January 2011) and cantonal law. Pursuant to article 36 CPC, the case shall be filed by the competent court at place of business of the claimant or the respondent or where the restraint of competition has occurred or had its effect. Cantonal law shall designate the specific court that has jurisdiction as sole cantonal instance for cartel law disputes. The 'single cantonal court' has an exclusive jurisdiction to order interim measures.

In international antitrust cases, a venue is determined by articles 2 and 5 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention), or by article 129 SIPLA if the convention is not applicable. Both the Lugano Convention and SIPLA provide for the same venues as the CPC, except for the place of business of the claimant, which is not available in international contexts.

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 Switzerland, private actions may be brought in cartel cases (horizontal and vertical infringement of competition) and cases of an abuse of a dominant position. Swiss law does not provide for private actions in merger control cases. A finding of infringement by a competition authority is not required to initiate a private antitrust action in a civil litigation in Switzerland.

If the competition authority finds an infringement, the civil court usually does not need to get an expert report about the legality of a restraint of competition.

Principally, the civil and the administrative procedures are separate. There is an academic debate whether a decision of the Competition Commission is binding. The prevailing doctrine is in favour of a binding effect to avoid contradictory decisions. In any case, the finding of infringement by the Competition Commission will have an impact on the private antitrust action, provided it covers the same time period.

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?

A claimant may bring an action before the civil court under the Cartel Act, as long as he or she is affected by the restraint, regardless of whether the restriction is directly aimed at the claimant or not. The person should be an undertaking under the Cartel Act. Undertakings (all buyers or suppliers of goods or services active in commerce regardless of their legal or organisational form (article 2 Cartel Act)) which encounter a restriction of competition have legal standing to bring a claim under the Cartel Act, irrespective of whether they are competitors, purchasers, suppliers or enterprises which operate in neighbouring markets. Thus, indirect purchasers can bring an action before the civil court too. Final consumers, however, do not currently have standing to bring a private claim under the Cartel Act (see proposed but rejected revisions to the Cartel Act, question 3).

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

In Switzerland, a private antitrust action may only be brought against an undertaking. The Cartel Act qualifies all buyers or suppliers of goods or services active in commerce as undertaking, regardless of whether it is a corporation or an individual (see question 5). It is not necessary that the undertaking is domiciled in Switzerland. The Cartel Act applies to practices that have an effect in Switzerland, irrespective of their origin. Accordingly, the competition authorities may investigate conduct that occurred in a foreign jurisdiction and that have an effect in Switzerland. Whether Swiss or foreign antitrust law must be applied by the court in a civil proceeding is subject to the relevant international treaties and private international law, such as the Lugano Convention or the SIPLA in Switzerland (for the relevant courts and tribunals, see question 2). Bringing same private antitrust actions (that is, same parties, same matter) before different courts is not possible in both domestic and international cases. If the same action is pending before two courts, the second court in Switzerland shall suspend its proceeding until the first has decided on its jurisdiction. In contrast, bringing connected private antitrust actions (different parties, but claims based on the same facts and grounds) before different courts is basically possible. However, the second court may transfer the case to the first court provided the first court agrees.

Private action procedure

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

There is no rule applicable in Switzerland that would prohibit third parties from funding a private antitrust litigation procedure.

However, contingency fees are problematic. Pure profit-sharing schemes replacing the fees for the services rendered are prohibited. However, it is now allowed to agree upon an additional remuneration in the case of a success. For instance, it is possible to agree upon an hourly fee that would be increased if the result of the litigation meets defined criteria.

8 Are jury trials available?

No, there are no jury trials available in Switzerland.

9 What pretrial discovery procedures are available?

Common law-style discovery procedures are not available in Switzerland. Swiss law does not provide for pretrial discovery procedures. There is no general right for the (potential) claimant to request that the defendant produces documents or other relevant information. The parties have to rely on the evidence in their hands, and they will be able to ask for witness interrogations and interrogations of the parties. However, there is a special procedure for the preliminarily collection and securing of evidence if the applicant demonstrates an interest worthy of protection, or if the evidence-gathering process would be more difficult or not possible at a later stage (see article 158 of the CPC).

10 What evidence is admissible?

The claimant may base its claim on any available evidence, including:

- documents (contracts, letters, printouts of emails, etc);
- witness statements;
- expert opinions;
- evidence by interrogation of the parties; or
- evidence by inspection.

These are the means of evidence that are normally admitted in civil proceedings. In case of antitrust law damages cases, expert opinions are of great importance with regard to the calculation of fine.

11 What evidence is protected by legal privilege?

Swiss law generally recognises the attorney–client privilege, where all information is protected if such information derives from the professional representation of the respective party by an external attorney. The following conditions have to be met for a document to be protected from search and seizure during dawn raids. First, the attorney must be entitled to practise before Swiss courts in accordance with the Attorney Act of 23 June 2000. The concept of legal privilege does not extend to in-house counsel. Second, only profession-related activity such as litigation and legal advice are protected. Last, the documents need to be issued in connection with a mandate. Pre-existing evidence that was originally not prepared for attorneys is not protected.

Trade secrets are protected under Swiss civil procedural law, as well as in proceedings before the Swiss Competition Commission. Parties may request the non-disclosure of documents containing such trade secrets.

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

There is no specific statutory provision under Swiss law condemning infringements of competition law. For this, there is no restriction of private actions regardless of whether there has been a prosecution under competition law or criminal law (ie, fraud in connection with an infringement of competition). Furthermore, affected plaintiffs may seek indemnification within the criminal procedure. The judgment of a criminal court is not binding upon a civil judge with respect to guilt and the determination of the damage.

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 obtained in proceeding before the Swiss Competition Commission or in criminal proceedings may be used in civil proceedings without limitation. However, all documents relating to leniency applications may not be copied or otherwise duplicated by the involved parties. The authority holds that the access to such leniency files is limited to consultation on the premises only (eg, see the case involving road construction companies operating in the canton of Aargau: *RPW 2012/2 Zwischenverfügung vom 10 August 2011 in Sachen Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau betreffend Akteneinsicht*, 264 ss). In addition, the Swiss Competition Commission has not disclosed documents submitted by leniency applicants to civil courts. Apart from this, leniency applicants are not protected from litigation and may be subject to follow-on litigation as any other party involved in an administrative proceeding.

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

The court may suspend proceedings if it finds it in its wide discretion appropriate. Therefore, a party may request the court for a stay at any time. The proceedings may be suspended in particular if the decision depends upon, or is likely to be influenced by the outcome of other proceedings. Another generally accepted petition for a stay is settlement negotiations of the involved parties.

In article 15(1), The Swiss Cartel Act obliges civil courts to obtain an expert opinion from the Swiss Competition Commission if the legality of a restraint on competition is questioned in the course of the civil proceeding (the Federal Supreme Court is relieved from this obligation). However, the expert opinion is not binding on the civil judge, and there has been an example in the *Etivaz* case confirmed by the Federal Supreme Court, where the court has ruled against the expert opinion of the Swiss Competition Commission.

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 plaintiff bears the burden of proof and must therefore demonstrate that it incurred damages as a result of an unlawful restraint of competition attributable to the tortfeasor (including the tortfeasor's culpability). Therefore, any plaintiff, including direct or indirect customers, must prove and quantify its damage. A court takes its decisions on the balance of probabilities.

The Swiss Cartel Act provides for rebuttable presumptions of certain hard-core horizontal and vertical agreements that such agreements lead to the elimination of effective competition. The most recent judgment of the Federal Supreme Court no longer requires the Swiss Competition Commission to take an effects-based approach for hard-core restrictions. According to the Federal Supreme Court, even undertakings with low market shares can get sanctioned if they have participated in a hard-core restriction (see 'Update and trends').

The defendant has a duty to allege the passing-on damage, but the ultimate burden of proof in connection with the quantification of damages

Update and trends

In a judgement dated 28 June 2016, the Federal Supreme Court rejected the appeal filed by Elmex manufacturer Colgate-Palmolive Europe Sàrl (formerly Gaba International Ltd) against the Federal Administrative Court's decision. It confirmed that the contractual obligation between Gaba International Ltd and its Austrian licensee was a vertical infringement that affected the Swiss market significantly. Furthermore, the Federal Supreme Court stated in a 3:2 vote that agreements regarding fixed or minimum prices, the quantity and the allocation of territories according to article 5(3) and (4) of the Cartel Act are considered unlawful based on their quality even when the presumption of elimination of competition can be overturned. This applies regardless of the quantitative criteria such as market share. Such agreements are unlawful and fines can be imposed subject to grounds of economic efficiency. This judgment lowers the burden of proof for future antitrust claims.

The Altherr initiative aims to expand full abuse control (including sanctions) to companies that are not dominant but have relative market power. The threshold for relative market power is lower than the dominance test. The concept of relative market power is well known in Germany, but German law is not as extensive as Altherr's proposal. The concept as proposed in the parliamentary initiative would probably force many small and medium-sized entities to invest in compliance systems to avoid the risk of sanctions. This could lead to an increase in private antitrust litigation owing to the fact that more undertakings may bring a claim against suppliers or other (potential) contractual partners. A claimant could base its claim on the proposed concept of relative market power if it is not supplied at all or if it is supplied at higher prices than other buyers. The claimant would not have to prove that the defendant is dominant. However, the Altherr initiative does not foresee any specific stimuli for private antitrust litigation (ie, recognition of legal standing to final consumers or suspension of the statute of limitations during the investigation by the competition authority).

remains with the plaintiff. If the undertaking harmed by an unlawful restraint of competition cannot establish the exact amount of damages, the judge estimates and assesses the amount at his discretion.

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

Procedures regarding interim measures in antitrust matters are usually treated within one and six months from the filing of the application.

The ordinary procedure before the first instance lasts usually between 12 and 24 months, depending on the complexity and the workload of the court and the judges responsible for the procedure.

In case of an appeal to the Federal Supreme Court, the length of the procedure may take up to four years in total.

17 What are the relevant limitation periods?

According to tort law, a private antitrust action for damages or for remittance of profits becomes time-barred one year after the injured party has learned of the damage, and in any event 10 years after the date on which the claim first arose. If the restraint of competition continues without interruption for a period of time, the limitation period runs from the moment the restraint of competition is abandoned.

The EU Damages Directive is not applicable in Switzerland (see question 3).

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

Decision of the civil court of first instance is subject to appeal before the Federal Court. As a rule, the minimum amount in dispute is 30,000 Swiss francs. However, the court will deal with cases below this threshold if a question of law is of 'fundamental significance'. However, only the court's findings of law and certain due process issues are subject to appeal. The court's findings of fact are basically not subject to appeal (unless a court of first instance made a manifestly incorrect or inaccurate appraisal of the facts).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

In Switzerland, collective proceedings (as known, for example, in US law with their system of class actions) are not available in respect of antitrust claims. In general, claims must be brought by individual plaintiffs. However, provided that the claims of different individual parties are based on similar facts or similar legal basis, several plaintiffs may jointly bring proceedings against the same defendant.

20 Are collective proceedings mandated by legislation?

See question 19.

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

See question 19.

22 Have courts certified collective proceedings in antitrust matters?

See question 19.

23 Can plaintiffs opt out or opt in?

See question 19.

24 Do collective settlements require judicial authorisation?

See question 19.

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?

With regards to collective proceedings, see question 19. In general, private actions cannot be brought simultaneously in respect of the same matter in more than one jurisdiction. A claim is only admissible if the dispute is not subject to a pending litigation elsewhere, in order to avoid multiple contradicting rulings. The CPC requires each canton to designate a court that shall have jurisdiction as sole cantonal instance for cartel law disputes. However, if there are multiple plaintiffs, it is possible that each of them brings its action to a different court.

26 Has a plaintiffs' collective-proceeding bar developed?

No. See question 19.

Remedies

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

According to article 12 Cartel Act, a claimant may claim damages if a person unlawfully causes loss or damage to the claimant, whether wilfully or negligently. The rules for calculating damages are set forth in the Code of Obligation of 30 March 1911, and specified by the Federal Court Jurisprudence. Civil courts can award damages in the amount of the actual loss incurred by the claimant and caused by the tortfeasor, including both property loss and lost profits. It consists of the difference between the actual net position on assets and liabilities of the injured party at the time of judgment and the hypothetical net position on assets and liabilities at the time of the judgment, assuming that no restraint of competition occurred. The claimant bears the burden of proof, and it must be demonstrated that it incurred damages as a result of an unlawful restraint of competition attributable to the tortfeasor. Negligence by the tortfeasor is sufficient for this purpose. Article 137 of the SIPLA provides that, if a claim for damages is based on foreign antitrust law, no award may be rendered by a Swiss court in excess of what would be available under Swiss law.

Alternatively, the claimant can petition the court to order the remittance of unlawfully earned profits by the tortfeasor (article 12 Cartel Act). Similarly as with a claim for damages, the claimant bears the burden of proof and must demonstrate the tortfeasor's earned profits that are attributable to the unlawful restraint of competition, and that the tortfeasor acted with malice.

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

The other forms of remedy available in Switzerland are request injunctive or performance claims and declaratory relief (article 12 Cartel Act). Courts may also order interim remedies, suitable to prevent the imminent harm, in particular:

- an injunction;
- an order to remedy an unlawful situation;
- an order to a registered authority or to a third party;
- performance in kind; or
- the payment of a sum of money in the cases provided by the law.

However, the applicant must show credibly that a right to which it is entitled has been violated, or a violation is anticipated, and the violation threatens to cause not easily reparable harm to the applicant (article 261 CPC). Given that the harm resulting from anticompetitive behaviour might not be fully compensated by damages or the restitution for the unlawful profits, the interim measures constitute the main object of private civil enforcement.

An example of a private antitrust action that was brought successfully under the Cartel Act is a recent decision regarding an abuse of a dominant position in the cheese market. The Swiss civil courts considered whether the refusal to provide access to the defendant's caverns could constitute an abuse of dominant position in a case related to IP rights. Specifically, a producer of a type of Swiss cheese (called Etivaz), which is subject to an appellation of protected indication of origin regulation, requested access to certain caverns of the defendant (IP holder) in order to stock its cheese during its ripening process. The Cantonal Court in Vaud confirmed in its decision the view of the Secretariat of the Competition Commission, ruling that the defendant's refusal to provide storage space in its caverns was not abusive pursuant to the Cartel Act. However, the Swiss Federal Court overruled the lower courts in its decision of 23 May 2013 (case 4A_449/2012) and held that the refusal to provide access to the defendant's caverns was based on unjustified reasons and, thus, constitutes an abuse of a dominant position.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available in Switzerland, even if the court must apply foreign antitrust law.

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

Swiss tort law provides for interest on the damages award. Damages yield a 5 per cent minimum rate of interest from the moment of causation. The claimant is allowed to plead a higher interest rate.

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

The direct sanctioning regime in case of infringements against article 5 (unlawfully agreements) or against article 7 (abuse of dominant position) was introduced in 2005. There are not many final and conclusive sanctioning judgments. Therefore, there are no decisions that deal with the question of whether fines imposed by competition authorities should be taken into account when setting damages. According to the general rules on the calculation of damages, the claimant has the right to seek full compensation. Therefore, the majority of the scholars in Switzerland reject the opinion that sanctions should have an influence on the level of the damage.

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

Legal costs include the fees for the court procedure and the cost of external counsel. Costs are imposed on a pro rata basis to the parties in accordance with the success of each party.

The successful party is entitled to recover the cost of external counsel. However, the courts do not usually accept the full amount charged by counsel for the winning party.

33 Is liability imposed on a joint and several basis?

Yes, if two or more undertakings have infringed competition law and caused damage (eg, in horizontal cartel cases or abuse of collective dominance), then they shall be jointly and severally liable.

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

If several undertakings have caused the damage together, each undertaking is jointly and severally liable for the total damage. If one of these undertakings has compensated more than its portion, it can take a recourse action against the other undertakings involved in the infringement. Such claims are pursued after a judgment or settlement or in the same proceedings as the principal claim.

35 Is the 'passing on' defence allowed?

The Federal Supreme Court has never decided whether the passing on defence is allowed in private antitrust litigations. However, according to general tort law principles the plaintiff cannot ask for more than full compensation of the damage suffered. If the damage is reduced because increased price levels have been passed on to the customers, then the plaintiff should only be entitled to seek for compensation for this reduced loss. As the EU Damages Directive is not applicable, the general principles regarding the burden of proof for the passing-on defence apply (see question 15).

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

According to article 41 of the Code of Obligations of 30 March 1911, four conditions must be met in order to establish liability for compensation claims:

- the claimant must have suffered damage;
- the defendant's act that caused the damage was unlawful;
- there is a link of proximate causation between the wrongful act and the damage; and
- the defendant was at fault (ie, it acted intentionally or negligently).

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Therefore the respondent may try to defend itself by alleging no damage suffered out of infringement, the absence of causality between the damage and the restraint of competition or the absence of fault. Additionally, the judge may reduce the amount of compensation if the claimant's behaviour caused the damage to increase or not to diminish.

37 Is alternative dispute resolution available?

Pursuant to article 124 paragraph 3 CPC, the court may at any time during the civil proceeding attempt to achieve an agreement between the parties. The court may schedule a special hearing or submit to the parties a written proposal for a settlement. The settlement can cover all claims or only a part of the claims. The parties may also at any time try to negotiate a settlement by their own volition and without the knowledge of the court. In that respect, an administrative proceeding before the competition authorities may also be settled amicably (article 29 Cartel Act). However, in this case such settlement does not in principle release the tortfeasor from being sanctioned. It may, however, result in a reduction of the sanction.

Civil antitrust matters may be resolved before an arbitral tribunal. Domestic arbitration is normally governed by the CPC, while international arbitration is governed by the SIPLA.

Turkey

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Legislation and jurisdiction

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

In Turkey, private antitrust litigation has been applicable since the Law on the Protection of Competition No. 4054 (the Competition Law) entered into force in 1994. There have been a number of pending cases on the issue of private enforcement of competition law. Therefore, judicial developments have been relatively limited and there have not been many precedents of the High Court of Appeal for indemnity. This is mostly because of the limited number of actions for damages, as injured parties are mostly unaware of this compensation opportunity. Additionally, the long proceeding period and the rules regarding the lapse of time are factors hindering private antitrust litigation from becoming attractive to injured parties. Moreover, the lack of experience of civil courts and difficulties encountered in accessing evidence for antitrust practices also constitute obstacles in the way of the development of the private antitrust litigation.

However, academics' increasing interest encourages future private antitrust suits. Another promising aspect is the discussion platforms that create a positive opportunity to bring the Turkish Competition Authority (TCA), the High Court of Appeal and academics together. This also enables academics and practitioners to put forward their views and discuss the possible ways to create a tradition of private antitrust litigation in Turkey.

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 in the Competition Law. Albeit granting the right to claim damages for third parties, section 5 of the Competition Law does not provide any definition of parties who have suffered harm as a result of a breach of the Competition Law. For example, it is still controversial as to whether indirect purchasers can claim for damages. However, it appears that the greatest difficulty which indirect purchasers may encounter would be to satisfy the conditions of being a 'plaintiff' in the relevant antitrust action since it has to be proved that there is a causal link between the competition infringement and the damages under the Turkish law. Therefore, it is considered that potential claims of indirect purchasers will be dismissed by the court in the near future.

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 the right for injured parties to claim treble damages before the civil courts, which have exclusive jurisdiction in these matters. In order to solve the conflicts regarding the damages, the civil courts will apply general principles concerning illicit acts in the Code of Obligations No. 1618 (the Code of Obligations). Nevertheless, it is also possible for both parties to lodge an appeal against the decisions of civil courts.

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 the Competition Law, private actions can be taken in accordance to article 57 of the Competition Law. According to article 57 of the Competition Law, private actions are available in case of a breach of any rules under the Competition Law. Those who prevent or restrict the competition via concerted practices, decisions or agreement as well as one abusing its dominance are under the obligation to compensate the injured parties for any damages. Therefore, any person suffered because of any competition law infringement.

In a recent decision, the High Court of Appeal ruled that the injured parties should claim for their damages as soon as they become aware of the person who violates the Competition Law and the existence of the injury. In addition to this, the Court also stated that a decision of the TCA is not a prerequisite to put forward a compensation claim. Therefore, it is suggested to bring an action for the damages as soon as possible after submitting the complaints to the TCA.

However, in a lawsuit based on competition law infringement without a previous application to the TCA, it is likely that the civil court would request the plaintiff to make its complaints to the TCA so that it can determine whether there is a breach of the competition law and whether there are legal grounds for the alleged competition law breach. On the other hand, the civil court will only evaluate whether the applicant has suffered harm and will not take into consideration arguments of the defendants against the existence of the breach determined by the decision of the TCA. In other words, civil courts do not have jurisdiction regarding the appeal of the TCA's decision. However, the parties who engaged in a violation may appeal before the administrative courts against the TCA's decision.

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 Code of Civil Procedure (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 competence, the court of the place where the illicit act or competition infringement has occurred will be defined as the place where the essential elements of the act have been committed. As to the location where the damage has arisen, this will likely be linked to the place where the claimant has suffered from the infringement. Taking into account that the TCA defines the relevant geographical market as 'Turkey', the court of the domicile of the claimant will become competent in a significant part of the cases.

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

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 courts, even though antitrust investigations and filings before the TCA can be conducted by representatives who are not attorneys-at-law.

As to fees, according to article 164 of the Attorney's Act, the attorney's fee may be agreed as a certain percentage or money to be litigated or adjudicated, not to exceed 25 per cent.

Contingency fees are available in 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, where the claimant and representatives (attorneys) agreed on this beforehand.

8 Are jury trials available?

No. Jury trials have been recognised in neither civil nor criminal cases under Turkish law.

9 What pretrial discovery procedures are available?

Under Turkish law, 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. There are some discovery proceedings such as requesting declaratory decisions for the breach of trademark and recording of evidence; however, these are not within the scope of antitrust private litigation.

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 fact that is at issue in the proceeding. As per the CCP that the Competition Law refers to, evidence may be divided into direct evidence (confession, documents, oath and definitive judgment) or circumstantial evidence (witness, expert opinions and viewing). Hence, according to CCP, all kinds of evidence are admitted in private law proceedings. As stated below (see question 15), any kind of evidence is admissible in private antitrust actions.

The question whether or not a decision of the TCA can constitute direct evidence is controversial; however, the majority opinion in this regard is that the TCA's decision cannot be considered as direct evidence until the finalisation of the TCA's decision. 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 complaints regarding the practices of another undertaking, both parties are entitled to make an appeal and claim the annulment of the decision of the TCA or issue of stay order before the administrative courts, or both. If none of the parties applies for an appeal within the time period or the relevant courts uphold the decision of the TCA, the decision of the TCA becomes finalised. Then, the TCA's decision may be referred to as direct evidence in the private antitrust litigation. In other words, if one of the parties in a decision of the TCA was not appealed or the decision of imposing a fine was affirmed by the courts, the claimant may also use this as direct evidence to prove that the behaviour is against the law. In a recent case, the High Court of Appeal also clarified the question whether or not the finalisation of the TCA's decision shall be considered mandatory to bring a legal action for the damages. The court of first instance in this case rejected the claims for treble damages as the TCA's decision was not finalised. In other words, the court of first instance ruled that the finalisation of the TCA's decision is a condition to bring a treble damages action. Nevertheless, the High Court of Appeal annulled the decision and stated in its judgment that the finalisation of the TCA's decision shall be considered as a preliminary issue rather than a condition to bring a legal action for damages.

11 What evidence is protected by legal privilege?

Generally, 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 proceedings, the procedural law will be the procedure of the courts according to the CCP. In other words, the private enforcement is not subjected to the procedural rules of the TCA. Then, pursuant to the general rules of law, the judges will provide required measures to protect legal privilege including the documents, electronic communication, etc. However, courts may also order one of the parties or a third party to submit relevant documents regarding the case or request documents from the TCA's file. Parties are not allowed to decline from submitting evidence to the court based on the reason that such information constitutes trade secret.

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

In accordance with the Turkish legislation, competition law infringements are not subject to criminal law. In the event that the TCA imposes an administrative fine based on the Competition Law, criminal proceedings related to the same matter are not allowed. However, if the actions or behaviour that will normally constitute a crime under criminal law or specific law area, (ie, public procurement law), and are part of the cartel practice, then they will also be penalised under the competition law. As a result, there are no private actions where there has been a criminal conviction in respect of the same matter since the private actions depend on the competition law infringements, which are penalised by the TCA.

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?

As stated above (see question 12), criminal proceedings are not recognised in Turkish competition 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, it avoids punishment or benefit from a reduction of fine under certain circumstances. However, there are currently no rules on leniency during private enforcement procedure. In practice, leniency applications may not be protected from follow-on litigation, in order to recover the losses of the claimant. Further to this, the Draft Act on the Amendment of the Competition Law (the Draft Competition Law) stipulates an essential amendment on the article that envisages private enforcement against infringements. Article 26 of the Draft Competition Law protects defendants from triple damage claims, in case a non-imposition and reduction of fines is applied with regard to those actively cooperating with the TCA and limits the damage claims to the total amount of actual damage.

As for the disclosure of the documents to claimants, the Communiqué on the Regulation of the Right of Access to the File and Protection of Trade Secrets shall provide guidance. The purpose of the Communiqué is to set forth the procedures and principles concerning the exercise of the right of access to the file by parties and classifying the information submitted by the parties during the investigation as trade secrets and protecting those pieces of information as trade secrets. Within the scope of the right of 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 within the file, except for correspondence among the TCA's departments and information that constitutes trade secrets and other undertakings' confidential information. Request for access to the file is evaluated by the TCA (investigation committee of the case) within the framework of the Communiqué. As a result of this evaluation, the TCA may deny this request if it is convinced about the legitimacy of this demand. However, if the request for access to the file is denied, the reason thereof shall be notified to the submitter of the request.

Nevertheless, if the court requests the documents regarding the investigation file from the related parties or the TCA with a formal decision, both parties and the TCA are obliged to submit any and all requested documents to the court without having any right related to reserving trade secrets or confidential information.

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 Competition Authority's enforcement decision that is pending or appealed. Thus, it is possible to bring a private action even if no administrative proceedings (ie, investigation or preliminary investigation) have been initiated or no final decision has been adopted by the Turkish Competition Authority.

However, the High Court of Appeal ruled in one of its decisions that if there are no TCA decisions that constitute the basis of the action for damages under competition law, a court of first instance dealing with private action must wait for a decision of the TCA before proceeding with the file. Thus, if the TCA has already launched an investigation regarding the infringements of competition rules 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 investigation of the TCA is finished before continuing civil proceedings. In addition to this, if the TCA has not launched any investigation related to the assertions in the private action case before the national court, the national court will request that the plaintiff apply to the TCA in order to be given an administrative decision regarding the alleged competition violation.

It should be noted that although there are no direct legal obstacles to bring a private action related to the competition law infringements before the courts, the courts of first instance prefer to wait to proceed with the file based on the above-mentioned High Court of Appeal practice. In this respect, the new Draft Competition Law includes a provision that aims to solve this problem. For instance, the court may request that the Competition Authority provides an opinion with regard to the alleged anticompetitive conduct as a mandatory legal expert. In this case, the court will wait until the Competition Authority submits its opinion on the case to the court.

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 placed on the plaintiff who sets forth that the acts of the other party constitute an infringement of Competition Law. It should be noted that actions for damages on the grounds of competition law infringements are subject to general evidence rules applicable to the illicit acts in civil law. In this respect, to convince the judge to receive compensation for damage, plaintiffs shall provide sufficient evidence of a breach of competition rules attributable to the defendant, the existence of damage and the causal link between the unlawful act and the damage that has occurred.

The CCP does not define the standard of proof such as 'balance of probabilities' or 'beyond reasonable doubt'. However, it can be stated that proof of relevant facts is sufficient. Moreover, in terms of Turkish legislation, the judge has a discretionary power to assess the evidence and decide whether it is sufficiently convincing.

In accordance with the article 59 of the Competition Law, it is sufficient to provide evidence that illustrates the existence of agreements, decisions and practices restricting competition. There is an exception to the above-mentioned general rule and if certain conditions are satisfied, the burden of evidence passes to the defendant regarding proof of the concerted practice. Accordingly, if the injured parties submit to the courts proof such as the actual sharing of markets, stability of the market price for a long period of time and the price increase within close intervals by the undertakings operating in the market, which give the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof lies with the defendants that the undertakings are not engaged in concerted practice.

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

'Collective party proceedings' have not been recognised in private enforcement proceedings in Turkey. In terms of 'single party enforcements', however, there are no standard timetables for court proceedings. The High Court of Appeal is the last instance for reviewing rulings and judgments rendered by first instance courts upon appeal. It is also able to modify and revise its own ruling upon request.

The parties have no explicit rights to accelerate proceedings. Each party has the possibility to accelerate the proceedings by its own conduct, for instance by not requesting an extension of time limits. The duration of court proceedings is relatively long and the total length of proceedings including all instances takes approximately two-and-a-half to three years. Besides this, according to articles 184 and 186 of the CCP, following the legal examination, the court shall summon the parties to a hearing after the evidence is evaluated. In other words, there will be no hearing in case the evidence on claims and the defences are not examined. This practice is relatively new since the CCP entered into force in 2011; nevertheless it may reduce the long process. In addition, in order to achieve uniformity in applications, opinions and judgments of the High Court of Appeal are considered as precedents for legal rulings in the courts of first instance. It is also possible for the parties to include more precedents in their applications to accelerate long discussion proceedings.

17 What are the relevant limitation periods?

The Competition Law does not set forth any rules regarding time-limitation to bring a claim of treble damages compensation. The question whether a private action is time-barred has always been arguable, and it has been tried to make the lapse of time clearer by the principles of the Code of Obligations. According to article 72 of the Code of Obligations, a private claim shall expire in two years, but in any case, the ability to claim for damages expires after 10 years.

As for the starting dates of the limitation, the two-year period (one year within the previous regime) for general or intangible damages based on tort liability under competition law starts from the date when the party received awareness. The 10-year period starts from the date of the act causing damages took place. Customising these to the competition rules requires a comprehensive interpretation.

Regarding antitrust actions, the Competition Law does not have any provision regarding a time period for private enforcement. Therefore, the general two-year limitation period for private actions starts from the date when the injured party of the infringement became aware of the infringement and the violator.

Recently, however, the High Court of Appeal amended its precedent regarding lapse of time regulations and clarified the principles governing the implementation of time limitations with regard to private antitrust actions. According to article 60 of the Code of Obligations No. 818, the general law was applicable in injury cases including antitrust cases until being repealed by the Code of Obligations No. 6098 that entered into force on 1 July 2012. In its former decisions, the High Court of Appeal had stated that there was a one-year time limit for the injury claims upon the injured party becoming aware of the offender and the existence of the injury. However, in a recent decision of the High Court of Appeal regarding the request of revision of its former decision, the Court ruled that the time limitation of eight years, as regulated under article 20 of the Misdemeanour Act No. 5326, is applicable in terms of bringing a private antitrust action. In determining the lapse of time, the High Court of Appeal put emphasis on the penal characteristics of the administrative fines imposed by the Competition Authority. According to the second sentence of article 72 of the Code of Obligations (article 60 of the former Code), the longer lapse of time shall be taken into account if a right to claim compensation arises from conduct prohibited under the criminal laws. Therefore, the High Court of Appeal ruled out the argument regarding the two-year time period to claim compensation due to anticompetitive behaviour (one year according to the former Code) and extended the liability for treble damages to eight years. Moreover, the judgment of High Court of Appeal provided certainty by accepting that the lapse of time starts from the date of issuing a complaint to the Competition Authority.

In this case, the High Court of Appeal also clarified the question whether or not the finalisation of the TCA's decision shall be considered mandatory to bring a legal action for the treble damages. The court of first instance in this case rejected the claims for treble damages as the TCA's decision was not finalised. In other words, the court of first instance stated that the finalisation of the TCA's decision is a condition to bring a treble damages action. Nevertheless, the High Court of Appeal annulled the decision and stated in its judgment that the finalisation of the TCA's decision shall be considered as preliminary issue rather than a condition to bring a legal action for damages.

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

The decision of the court of first instance can be appealed due to the errors regarding the assessment of the facts and procedural errors. There are two kinds of legal remedies under the CCP for decisions of courts of first instance. These are the Regional Courts of Appeal and the High Court of Appeal. Appealing a decision before the Regional Court of Appeal allows all evidence to be assessed based on grounds including errors of law, facts, or procedures in the court of first instance's proceeding. However, under the Turkish legal system, regional courts of appeal have not entered into effect yet. Therefore, the High Court of Appeal fills this gap as the single appeal authority regarding the decisions of the courts of first instance, including private antitrust action.

Update and trends

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Collective actions

19 Are collective proceedings available in respect of antitrust claims?

There were no provisions regarding collective actions under the previous Code of Civil Procedure. However, the CCP, which entered into force in 2011, recognises collective action proceedings. However, it should be noted that the collective action proceedings that will be recognised have a very limited scope. A 'class' will consist of a group of people who are members of an association or another legal entity and it will not be possible to widen the scope of this class to other persons who are harmed as a result of the same action but who are not the members of the said association or legal entity. In other words, it will not be 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, with the CCP, collective proceedings have been available in respect of antitrust claims, though with a very limited scope.

20 Are collective proceedings mandated by legislation?

No, collective proceedings are not mandated by the Competition Law.

Some associations have the right to commence collective proceedings within the scope of consumer law. Consumer organisations are allowed to represent consumers regardless of their memberships. However, the scope of this right is limited to the violation of consumer law and does not cover the disputes arising from competition law. Thus, consumer organisations cannot commence collective action and claim damages in regards to an antitrust injury.

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

Since collective proceedings are not allowed in terms of antitrust injury, there is no certification process.

On the other hand, the CCP has a ground for certification process for the violation of consumer law. According to article 113 of the CCP, only an association or a legal entity can 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 (for example, 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 certified collective proceedings in antitrust matters yet, since there is no legislation for collective proceedings within the scope of violations of competition law.

However, considering that consumer law allows consumer organisations the right to launch collective proceedings in certain issues, it is arguable before the court that these organisations will also be allowed to use such a right in antitrust issues as well.

23 Can plaintiffs opt out or opt in?

According to article 57/c of the CCP, the plaintiffs are able to opt in as long as their claims have a common basis with the claims of the pending adjudication. The plaintiffs are also able to opt out if they wish to do so. However, the plaintiff may lose his or her right to raise the same claims again in the future.

24 Do collective settlements require judicial authorisation?

As a general rule, disputing parties are allowed to reach an out-of-court settlement. However, since collective settlements are not mandated by legislation in Turkey, judicial authorisation is not required for the collective settlements under Turkish law.

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?

Turkey is not divided into multiple jurisdictions.

26 Has a plaintiffs' collective-proceeding bar developed?

No, a plaintiffs' collective-proceeding bar has not developed in Turkey yet since the collective proceedings is a relatively new institution for the Turkish legal system that was recognised for the first time under the CCP, which entered into force in 2011.

Remedies

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

In the Turkish Law of Obligations, principally, the injured party is only entitled to request compensation amounting to its damages. However, the treble damages practice in Turkish competition law is an exception to this rule.

According to the Competition Law, the amount of damage that the injured parties can claim is the difference between the amount that they actually paid and the amount that they would have paid if there were no restriction 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 of their damages. In determining the damage, lost profit damages, in other words all profits the competitors have expected to gain, are calculated and previous years' balance sheets are also considered in this regard. As per the Code of Obligations, the amount of compensation is determined by the court depending on the nature of the situation and the level of the defendant's fault. If the injured party had any benefits as a result of the infringement, these benefits will be deducted from the amount of compensation.

In the Competition Law, it is specifically provided that the injured party has the right to claim damages, which is the difference between the cost they paid and the cost they would have paid if competition had not been limited. Also, treble damages is claimable in Turkish competition law where the damages arise from an agreement or decision of the parties, or

from cases involving gross negligence of them including abuse of dominance cases.

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 decision, the claimant may request from the court to seize the 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 under circumstances in which the claimant would otherwise lose important customers. The Draft Competition Law on the Amendment of the Competition Law provides the claimants with the possibility of demanding interim measures in order to cease the infringement. Therefore the claimant must prove that in case this infringement will not be ceased, it will cause irreparable harm due to anticompetitive behaviour of the defendant.

29 Are punitive or exemplary damages available?

If the claimant requests, the court can determine compensation in favour of the claimant amounting to three times more than the material damages suffered. Treble damages are intended to serve a purely punitive function.

It should also be noted that the current treble damage clause of the Competition Law will be amended within the Draft Competition Law to 'up to three times the damage', which will enable the judge to rule for an indemnification less than treble, which is not possible under the relevant clause of the current Competition Law.

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 in Court of Appeals in 2005 in respect of interest on damages arisen from torts, which is 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 of a competition infringement are entitled to indemnity as of the date when the damage has arisen from the competition infringement. Under Turkish law, the claimant must claim the interest and specify the date of the damage with the petition explicitly. If the claimant does not specify the date that the damage has arisen from the competition infringement, the judge shall rule for interest on damages from the date of the judgment.

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 in determining civil damages. Even if the competition authorities impose the highest fine, the damaged party has the right to request full compensation.

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

The legal costs, including litigation costs and attorney's fees, are allocated depending on the outcome of the case. To put it differently, the party that loses the case shall bear the legal costs. Attorneys' fees are calculated on the basis of statutory fees.

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 or all of the defendants who severally or jointly caused the damages. This principle is also introduced 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.

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

In cases where several defendants together violate their anticompetitive behaviour, any of the defendants can be held liable for the entire scope of damage caused by all the defendants. In this regard, the Turkish 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 harm.

However, the Turkish 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 fault and the intensity of the characteristic risk imputable to each of them. A jointly and severally liable person who has paid in excess of his or her share has a right of recourse from 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 whether the defendant may claim the recourse of the payment made to compensate the damage and, if the defendant has the right to recourse, then the court will also determine the amount each defendant is liable for. In determining these amounts, the court shall take into consideration the degree of seriousness of the fault committed by each defendant and its resultant effect. Therefore, the defendants may put forward their contribution and indemnity arguments in the same proceedings as the principal claims.

35 Is the 'passing on' defence allowed?

Since there is no relevant precedent on this matter, the answer is not yet known.

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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 required by a different area of law, the undertaking concerned can avoid the liability by putting forward the provision of law leading to the breach of competition.

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. Thus, alternative dispute resolutions are available in order to create a time- and cost-efficient way to solve the conflicts. Such proceedings are only admissible if an arbitration clause has been agreed between the parties. However, in terms of the compensation of damages due to the breach of competition rules, it is not clear whether or not it is possible since there is no relevant precedent.

Ukraine

Igor Svechkar, Alexey Pustovit and Oleksandr Voznyuk

Asters

Legislation and jurisdiction

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

Private antitrust litigation in Ukraine is developing slowly and the relevant practice area is still in the process of formation. A relatively large number of competition law-related cases are brought before courts each year, yet private antitrust cases constitute only a small proportion. This is because Ukrainian competition law is at a developing stage and there are no specific regulations for private antitrust litigation.

Although the legislation and court practice in this area remains scarce, the past year has shown a positive trend of a gradual growth in the number of private antitrust litigation cases with respect to different types of antitrust matters (eg, abuse of dominance, unfair competition, distortion of tender results, etc). In particular, a comparatively large private antitrust case concerning the award of damages in excess of 90 million hryvnya for distortion of the results of a tender was heard by the Commercial Court of the Kiev region, and the claim was satisfied.

As the legislative basis improves, private antitrust litigation is expected to gain significant practical importance in the near future.

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.

A claim can be brought by any undertaking or individual that has been affected as a result of a violation of competition law (eg, competitor, purchaser, supplier or consumer). A causative link between the competition law violation and the violation of the claimant's rights is indispensable for the claimant to succeed with the claim.

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

The Ukrainian private antitrust litigation includes:

- the Civil Code of Ukraine 2003;
- the Commercial Code of Ukraine 2003;
- The Code of Administrative Proceedings of Ukraine 2005;
- the Commercial Procedural Code of Ukraine 1991;
- the Law of Ukraine on Protection of Economic Competition 2001 (the Competition Law); and
- the Law of Ukraine on Protection from Unfair Competition 1996.

Private antitrust actions are considered by Ukrainian commercial courts; the proceedings are regulated by the Commercial Procedural Code of Ukraine.

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 generally available in all types of antitrust matters (eg, anticompetitive concerted practices, abuse of dominance, cartel and merger cases, unfair competition, etc).

A finding of a violation by the Antimonopoly Committee of Ukraine (the AMC) is considered to be prima facie evidence as to liability enabling claimants to pursue follow-on claims for damages in court; however, such a finding is not necessary to initiate a private antitrust action or to be in place in order to have the claim granted. Moreover, since any dispute may be referred by the interested party directly to court for consideration, a violation may be found directly by the court and a finding by the AMC should not be treated as exclusive evidence of a violation. Further, the AMC may refuse jurisdiction if a competition law violation gravitates towards infringement upon a private interest rather than a public one, whereby the court would remain the sole venue for rights protection. However, in practice the AMC refrains from pursuing that approach, in particular because the authority (especially in abuse of dominance cases) has exclusive jurisdiction in defining relevant markets and establishing dominance, while the reform to change this has only just started taking shape.

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?

Ukrainian competition law applies extraterritorially to the extent that there is, or may be, an impact on economic competition in Ukraine (except for the cases involving unfair competition offences).

The parties cannot influence the subject-matter jurisdiction and private antitrust actions are heard by the commercial courts of Ukraine. As for territorial jurisdiction, normally a private antitrust action should be brought in the local court in the jurisdiction in which the defendant (or one of the defendants) resides or has its registered office, or where the damage occurred.

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

Private actions can be brought against corporations and individuals registered as individuals – entrepreneurs, including those from other jurisdictions in the circumstances described in question 5.

Private action procedure

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

Third-party funding of competition law claims is permitted. However, the court fees are required to be paid by the claimant itself or its representative. Furthermore, the recovery may be awarded exclusively regarding the costs incurred by the party in the case and not the third parties.

Contingency fees are permitted.

8 Are jury trials available?

Jury trials are not available in Ukraine.

9 What pretrial discovery procedures are available?

The law does not provide for pretrial discovery procedure. In some cases before opening proceedings a court may issue a preliminary injunction to secure (request) evidence that may not be available or hard to obtain at a later stage. Such preliminary injunction may be issued both with respect to the prospective defendant and any third party.

10 What evidence is admissible?

There are no particular limitations on the forms of evidence that may be put forward; however, courts have sole discretion to decide whether to admit the provided evidence.

The parties may submit any factual data, which enables the court to establish facts or other circumstances in the case. The following forms of evidence can be accepted:

- explanations of the parties and other third parties;
- written evidence, such as documents, letters, acts of public authorities and court decisions. The parties may submit copies of original documents as written evidence. The documents of foreign public authorities should be duly legalised/apostilled and accompanied by a notarised translation into Ukrainian, except for the documents issued in CIS countries;
- physical evidence (including sound and video recordings, emails, electronic files); and
- expert opinions.

Expert opinions are admissible in the form of written expert reports regarding the questions posed by the court. The parties may suggest questions to be asked and the experts to be appointed by the court.

In commercial proceedings the expert is appointed by the judge, while in civil and administrative proceedings the parties may agree to nominate an expert, who should further be appointed by the judge.

11 What evidence is protected by legal privilege?

Advice from an attorney admitted to the bar, as well as any other documentary or material evidence obtained by such attorney acting for a client, is generally considered privileged. Advice from in-house counsel is not privileged unless such counsel is admitted to the bar; there is no privilege with respect to work product of law firms established as LLCs and the like.

A company may specify in its internal documents that certain information constitutes a trade secret. If the law does not expressly exclude such type of information from that which may be treated as trade secret, such information shall be privileged.

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

Competition law violations themselves are not of a criminal nature. However, private actions are available if criminal proceedings are initiated in respect of a related matter. The civil claim may be filed either within the criminal case or, if a criminal proceeding only partly concerns the relevant facts, as a separate suit referring to the facts established in a criminal proceeding.

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?

A party to a private antitrust action may rely on evidence or findings in criminal proceedings initiated with respect to a related matter; however, in each such case a judge shall assess the evidence and findings and decide on their admissibility. Leniency applicants are not protected from follow-on litigation.

The Ukrainian antitrust authority (the AMC) does not disclose documents obtained in its investigations to private claimants. Such documents are often protected as confidential and may be disclosed only to law-enforcement authorities or to the courts in exceptional cases provided by law. However, commercial court may request for the documents from the AMC upon a motion of a party to the pending proceedings. Recent amendments to the law allow the AMC to disclose evidence if required for human rights protection. However, the mechanisms to implement these changes are not yet clear.

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

The court can stay the proceedings if the case cannot be resolved until another related case is resolved or until the court receives legal assistance from a foreign entity or a court. The court may also stay the proceedings for the time needed to receive the results of an expert examination, or if the court reveals a violation of law and decides to send the case file to the relevant authorities (ie, prosecutor's office) to check whether such violation has criminal elements.

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 court establishes the facts in the proceedings based on the evidence submitted by the parties. The court should assess the evidence with a comprehensive, complete and objective consideration of all the circumstances in the case in its entirety. In view of a limited number of private claims, courts have not developed any specific standards of proof with respect to competition law cases. In the most common damages claims, it is necessary to prove that:

- the defendant's conduct constituted a violation of the law;
- such conduct was intentional;
- the plaintiff has suffered damage; and
- there is a tie between the violation and the damage.

Usually, the AMC decision serves as a presumption that the conduct was unlawful (unless such decision is appealed in parallel), while the other facts are analysed by the court in accordance with the above-mentioned principles of assessing evidence.

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

Under the general rule a court shall consider a case within two months (at the first-instance court and at the court of appeal). In exceptional cases in the first-instance court proceedings may be extended by another 15 days. The cassation review and review by the Supreme Court of Ukraine lasts up to one month. Taking into account the duration of appeals, it takes about six to eight months, on average, from bringing a case to trial to a final judgment. (Under certain circumstances the proceedings may take much longer, eg, if expert opinion is sought or the case is returned for a new trial at first instance, etc.)

It is not possible to accelerate the proceedings.

17 What are the relevant limitation periods?

Pursuant to the Competition Law, the general statute of limitations for antitrust violations (eg, abuse of dominant position, anticompetitive concerted practices) is five years from the date of the violation or, in the case of a continuous violation, five years as of its termination.

In civil law cases (such as compensation for damage), the general limitation period is three years from the date when an aggrieved party became, or could have become, aware of the violation of its rights. However, while considering damages claims arising from antitrust causes, the courts sometimes opined that lawsuits for compensation of damages may be lodged within the above-mentioned five-year period. However, it is unclear whether the three-year or five-year limitation period applies with respect to other private antitrust matters (eg, termination of unlawful action violating a claimant's rights, restoration of pre-violation position, etc).

The limitation period in unfair completion cases is three years from the date of the violation or, in the case of a continuous violation, three years as of its termination.

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

The decision of the court of first instance may be appealed within 10 days after its announcement in full in the court hearing or (in case the full version has not been announced) after the decision is made and signed by a judge. The decision may be appealed on the following grounds:

- breach of material law;
- breach of procedural law (if the latter caused an improper court decision);
- incomplete consideration of the circumstances of the case;
- inconsistency of the court decision with the established facts of the case; and
- lack of evidence.

The court of appeal is competent to review the case within the same scope as the first-instance court.

The decisions of the court of appeal may be subject to cassation appeal by the Supreme Commercial (Civil or Administrative, as appropriate)

Court of Ukraine within 20 days after the appeal decisions comes into force in the case of breach of material or procedural law.

The decision by the Supreme Commercial Court of Ukraine may be further appealed (although on extremely limited grounds) to the Supreme Court of Ukraine.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

There are no collective claims or class actions in Ukraine. However, under the law several plaintiffs may take out a joint action against the same defendant if their claims are similar and based on a similar cause of action. Also, the court may consolidate several actions if the claims are sufficiently homogeneous, ie, linked to the extent that there is no rationale for the court to hear them separately (eg, in cases concerning an indefinite number of persons). However, consolidation of claims based on competition law offences is quite rare in practice.

20 Are collective proceedings mandated by legislation?

See question 19.

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.

23 Can plaintiffs opt out or opt in?

Not applicable.

24 Do collective settlements require judicial authorisation?

Not applicable.

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.

26 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Remedies

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

The courts may impose remedies only within the limits of what is sought by the plaintiff. However, based on the petition of the plaintiff, commercial courts may go beyond the initial claims, though it is quite rare for the claimants to use this right.

It is for the claimant to determine the scope of remedies that would be sufficient to restore its rights that have been violated as a result of competition law violation.

In particular, the following remedies may be available:

- to order that a defendant discontinue an unlawful practice violating a claimant's rights and/or to force the defendant to perform certain actions (eg, in case the activity/inactivity of the defendant constitute a violation of antitrust laws and such violation negatively affects the rights or legally protected interests of the plaintiff);
- to restore the claimant's standing that would have existed should the infringement not have occurred;
- to invalidate the agreement (in case the challenged agreement has been made in violation of antitrust laws and such agreement negatively affects the rights or legally protected interests of the plaintiff);
- to invalidate a government agency's (state or municipal body) decision (eg, in case the act issued by the defendant constitutes a violation of antitrust laws and such violation negatively affects the rights or legally protected interests of the plaintiff);
- to award damages to the injured party. The court may grant this remedy if:
  - the defendant's actions or activity constitute a violation of antitrust laws;
  - such violation negatively affects the rights or legally protected interests of the plaintiff;
  - as a direct result of such violation, the plaintiff suffered damage; and
  - the amount of damage is proven by sufficient evidence; and
- to publicly disprove false and/or inaccurate, or incomplete information, or all of the above The court may grant this remedy if information disseminated by the defendant about the plaintiff is incorrect, untrue or false, and dissemination of this information negatively affects the plaintiff's business reputation.

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

Interim remedies are available and may be awarded by courts both upon request of a party and on its own initiative (except for civil claims) if an omission to order interim measures could complicate the execution of the court's final decision or make such execution impossible.

As an interim remedy, a court may issue a preliminary injunction seizing the defendant's property or monetary funds, or prohibiting the defendant or third parties from taking certain actions.

Interim remedies may be applied if failure to grant them would make enforcement of a future judgment on the merits of the case impossible or complicated. In order to obtain interim remedy the claimant shall prove that failure to grant such interim remedy would make the enforcement of the future judgment on the merits of the case impossible or complicated.

29 Are punitive or exemplary damages available?

Exemplary double damages are available for the following types of competition law violations:

- anticompetitive concerted practices;
- abuse of dominance;
- implementation of a notifiable transaction without merger clearance;
- implementation of the conditionally approved merger or concerted practices without fulfilment of the conditions imposed by the AMC; and
- imposition of restrictions on business activity of an undertaking following its application to the AMC with a complaint regarding an alleged competition law offence.

Moral damages are also available and may be awarded both to individuals and legal entities. The court determines the amount of the award taking into account the nature of violation; physical or psychological suffering; degradation or loss of reputation, credit and social position; time and effort required for the recovery of initial standing; as well as a degree of guilt of the defendant (except for the claims against public authorities where the guilt on their part is presumed). Moral damages are awarded irrespective of pecuniary damages and the amount awarded alongside.

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

There is no provision for interest on damages awards; the court determines the amount of damages according to the amount of actual damages and lost profit duly evidenced within the proceedings. To be awarded compensation, the plaintiff shall prove that the actual damages and the lost profit were directly caused by the defendant's violation of the law and the rights or interests of the plaintiff.

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

Under the law the amount of damages to be awarded does not depend on the fact or amount of the fine imposed by the competition authority. In addition, courts shall take into account the defendant's actions on awarding damages to the aggrieved party based on the evidence provided by the parties.

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

As a general rule, the unsuccessful party will be ordered to recover the costs of court fees, court experts' fees, translators' fees, legal costs and

Update and trends

Private antitrust litigation is a still-developing field of Ukrainian law; there is a positive trend of a gradual growth of a number of private antitrust litigation cases in different types of antitrust matters, and this trend is likely to continue in the future. It is expected that complex reform of Ukrainian courts will increase confidence in court defence that, in turn, should have a positive effect on the development of private antitrust litigation in general.

other expenses incurred by the winning party. If a claim is awarded in part, the costs are recovered pro rata. In case of settlement, the costs are divided between the parties in equal parts, unless otherwise agreed by the parties in the settlement agreement.

33 Is liability imposed on a joint and several basis?

As a general rule, persons committing violations of antitrust and competition laws may be held liable on a joint and several basis. However, procedural laws require that the plaintiff should clearly determine in the lawsuit the claims against each of the defendants.

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

As a matter of practice courts distribute the awarded sum between defendants based on the role of each defendant, or decide the indemnity should be joint. In the latter case a defendant who paid the whole indemnification to the plaintiff may claim a refund of the appropriate share from other defendants in line with their actual contribution, and such claim shall be asserted in a separate proceeding.

35 Is the 'passing on' defence allowed?

The passing on defence is available in Ukraine. However, owing to the lack of practice in this area, general uncertainty and difficulties in calculating damages, defendants rarely resort to this type of defence.

Under the Competition Law any person that suffered damage as a result of a competition offence has legal standing to sue. Therefore indirect purchasers may also bring actions for damages. However, we are not aware of any such cases yet, which may be explained by the difficulty of proving the fact of passing on from a direct to an indirect purchaser.

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

There are no other specific forms of defence for the purposes of antitrust cases.

37 Is alternative dispute resolution available?

Ukrainian law provides for alternative dispute resolution (arbitration), which is available only upon agreement by the parties. Arbitration may be applied to practically all types of antitrust cases, with only specific exceptions, such as cases involving state authorities.

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Legislation and jurisdiction

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

Private antitrust litigation in the United States has seen a relatively steady decline in civil complaints brought on by the Supreme Court's 2007 decision in *Bell Atlantic Corp v Twombly*. That case, and others such as *Ashcroft v Iqbal* and *Verizon Communications v Law Offices of Curtis v Trinko LLP*, have made it more difficult for plaintiffs to maintain antitrust claims. The trend of reduced antitrust litigation is expected to continue in light of Supreme Court decisions requiring rigorous analysis of antitrust class actions in the US, such as *Wal-Mart Stores Inc v Dukes* and the more recent *Comcast Corp v Behrend*.

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?

Under federal law, direct purchasers and rivals who suffer 'antitrust injury', as defined in question 15, may bring private lawsuits for antitrust violations. Indirect purchasers may seek injunctive relief, but may not bring private antitrust suits for damages under federal law, even if the direct purchaser passes on the full amount of the overcharge to the indirect purchaser. See *Illinois Brick Co v Illinois*, 431 US 720 (1977). In 2007, the Antitrust Modernization Commission recommended legislatively overturning this rule, but to date Congress has not done so.

Many states have enacted what are known as '*Illinois Brick* repealer' statutes, which allow indirect purchasers to sue for damages under state law. At this time, more than half of the states authorise a private cause of action to indirect purchasers who suffer antitrust injury. The Supreme Court has held that state causes of action for indirect purchasers are not pre-empted by federal law.

Other actors such as employees, shareholders and creditors generally lack standing to sue under antitrust law.

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

Section 4 of the Clayton Act authorises private plaintiffs to seek damages for violations of antitrust laws. A plaintiff is entitled to recover treble damages plus costs and reasonable attorneys' fees. Section 16 of the Clayton Act permits plaintiffs to seek injunctive relief to stop or prevent the illegal conduct. Indirect purchasers have standing to seek injunctive relief even though they lack standing to sue for damages.

Federal courts have exclusive jurisdiction over federal antitrust claims. State antitrust claims can be heard in state courts but may be removed to a federal court if they supplement a federal claim. Since 2005, the Class Action Fairness Act has also permitted certain class action litigations that would otherwise be heard in a state court to be removed to a federal court.

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 for most types of anti-competitive conduct. Actionable violations can take the form of coordinated conduct (such as price-fixing, market division and group boycotts), single-firm conduct (such as tying, predatory pricing and other exclusionary conduct), and mergers that would substantially lessen competition in a relevant US product and geographic market. Private causes of action are available to antitrust plaintiffs regardless of whether the government has also taken action.

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?

There are three requirements that must be met before a court can hear a given case. First, the court must find whether it can exercise 'personal jurisdiction' over the parties. Second, the court must determine whether it has 'subject matter jurisdiction' over the issues raised in the lawsuit. And third, the court must be the proper venue for the litigation.

The question of personal jurisdiction addresses a specific court's ability to adjudicate a dispute between a specific set of parties. Personal jurisdiction is also governed by a two-part test. First, a defendant must purposefully avail himself of the benefits of doing business in the forum state. Second, requiring the defendant to appear must comport with principles of fair play and substantial justice.

Subject matter jurisdiction, on the other hand, deals with the specific court's ability to hear the type of case that is being brought. As noted above, federal courts have exclusive jurisdiction over federal antitrust claims (ie, Sherman Act and Clayton Act claims). As the globalisation of business continues to grow, multinational antitrust actions are becoming more and more common. The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA):

> *initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, ie, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, ie, the 'effect' must 'giv[e] rise to a [Sherman Act] claim'.*
> *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004) (citing 15 USC section 6(a)).

Federal courts remain split on whether the FTAIA constitutes a question of subject-matter jurisdiction or should be assessed as a substantive element of an antitrust claim. Compare, for example, *Minn-Chem Inc v Agrium Inc*, 683 F3d 845 (7th Cir 2012) ('[T]he FTAIA's criteria relate to the merits of a claim, and not to the subject-matter jurisdiction of the court.'); *Animal Science Prods Inc v China Minmetals Corp*, 654 F3d 462, 466 (3d Cir 2011) ('[T]he FTAIA imposes a substantive merits limitation rather than a jurisdictional bar.'), cert denied, 132 S Ct 1744 (2012), with *In re Monosodium Glutamate (MSG) Antitrust Litig*, 477 F3d 535, 537 (8th Cir 2007) (reviewing the case as a matter of subject-matter jurisdiction); *United States v LSL Biotechnologies*, 379 F3d 672, 683 (9th Cir 2004) ('The FTAIA provides the standard for establishing when subject-matter jurisdiction exists over a foreign restraint of trade.'); *Filetech SA v France Telecom SA*, 157 F3d 922, 929-31 (2d Cir 1998); *Caribbean Broad Sys Ltd v Cable & Wireless PLC*, 148 F3d 1080, 1085 (DC Cir 1998) (assessing the FTAIA as a question of subject-matter jurisdiction). The Supreme Court recently declined to grant certiorari to a case on this issue (*Motorola Mobility LLC v AU Optronics*

Corp, 775 F.3d 816 (7th Cir 2015), amending 773 F.3d 826 (7th Cir 2014), cert denied, 135 S Ct 2837 (15 June 2015)).

Two additional appellate court cases were decided within the past year with FTAIA implications. One in the Seventh Circuit held an en banc rehearing of Motorola's suit against AU Optronics (*Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816 (7th Cir 2015), amending 773 F.3d 826 (7th Cir 2014), cert denied, 135 S Ct 2837 (15 June 2015)). The other was in the Ninth Circuit (*United States v Hui Hsiung*, 778 F.3d 738 (9th Cir 2015), amending 758 F.3d 1074 (9th Cir 2014)). Both decisions addressed the 'directness' prong of the FTAIA. Both courts held that the domestic effect on commerce had to be relatively immediate on the United States. In the end, the outcomes in each case depended on the role that foreign subsidiaries and purchasers played with respect to the finished products before they reached the United States.

Once the hurdles of personal jurisdiction and subject-matter jurisdiction are crossed, plaintiffs have wide latitude to choose the venue for the proceedings, subject to certain limitations. Section 4 of the Clayton Act authorises suit in any district in which the defendant is found or has an agent, and section 12 (15 USC section 22) adds any jurisdiction in which the defendant transacts business. Of course, private antitrust suits by nature often have many plaintiffs across multiple jurisdictions. To reduce the burden on the defendant as well as the court, the cases may be consolidated and the resulting multi-district litigation may be heard in a different venue than that which the plaintiff chose.

Finally, even if the plaintiff satisfies all of the above requirements, a court may dismiss a suit on forum non conveniens grounds if there is another available forum that is better suited to hearing the case.

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

Section 1 of the Clayton Act authorises private causes of action against individuals, corporations, and associations, including those from foreign jurisdictions, as long as subject matter and personal jurisdiction would otherwise be proper.

Private action procedure

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

Third parties may fund private antitrust litigation. Plaintiffs' attorneys are allowed to work under a contingency fee arrangement, subject to court approval.

8 Are jury trials available?

In suits for damages, the plaintiff and defendant are both ordinarily entitled to a jury trial if they desire it. The right to a jury trial is protected by the Seventh Amendment of the United States Constitution. Suits for equitable relief are tried by the court.

9 What pretrial discovery procedures are available?

In federal court, pretrial discovery procedures are governed by the Federal Rules of Civil Procedure. The rules permit oral and written depositions (Fed R Civ P 28–32), interrogatories (Fed R Civ P 33), requests for admission (Fed R Civ P 36), and production of documents and electronically stored information (Fed R Civ P 34). State discovery procedures are governed by state law, but often closely track their federal counterparts.

The discovery process can become extremely expensive and time-consuming for defendants. Recognising this, the Supreme Court requires an antitrust plaintiff in a federal court to show more than mere speculation based on circumstantial evidence in order to even reach discovery. In *Bell Atlantic Corp v Twombly*, 550 US 544 (2007), the court explained that a complaint must cross 'the line between possibility and plausibility'. See also *Ashcroft v Iqbal*, 556 US 662 (2009) ('threadbare recitals of a cause of action's elements, supported by mere conclusory statements' are insufficient). In addition, on 1 December 2015, the new Federal Rules of Civil Procedure went into effect. The new rules adopt a proportionality standard for setting the scope of discovery in order to further ameliorate the burden of excessive discovery (Fed R Civ P 26(b)(1)).

10 What evidence is admissible?

In a federal court, admissibility of evidence is governed by the Federal Rules of Evidence. The rules contain many nuances and exceptions, but generally prohibit evidence that is irrelevant, misleading, unduly prejudicial, privileged or hearsay. A particularly important rule for corporations is Rule 801(d)(2)(D), which allows statements made by an employee to be used against the company as long as the statement addressed a matter within the scope of the employment relationship.

States apply their own evidentiary rules to antitrust suits in state courts, although, like the procedural rules, state evidentiary rules are often similar to the federal ones.

11 What evidence is protected by legal privilege?

Federal and state evidentiary rules prevent many different types of privileged communications from being introduced in court, but that most relevant to civil antitrust litigation is the attorney–client privilege. The attorney–client privilege protects confidential communications between a client and his or her attorney made for the purpose of seeking legal advice. When corporations seek legal counsel, the privilege generally belongs to the corporation rather than the individual employees who speak to the attorney (*Commodity Futures Trading Comm'n v Weintraub*, 471 US 343 (1985)). In the United States, attorney–client privilege extends to in-house counsel as well.

The privilege belongs to the client and may not be waived without the client's consent, but confidentiality is important. If the client communicates with the attorney in the presence of third parties (not including agents for the attorney), the privilege may be waived inadvertently. See, for example, *United States v Gann*, 732 F2d 714, 723 (9th Cir 1984).

Legal privilege does not cover the underlying information conveyed in the communication; it only covers the communication itself. See *Fisher v United States*, 425 US 391 (1976). For instance, an incriminating document is still discoverable even if it is given to a lawyer.

Attorney–client privilege also does not apply for communications made in furtherance of a crime (*United States v American Tel & Tel Co*, 86 FRD 603 (DDC 1979)). For instance, if a client asks a lawyer to help destroy evidence, that communication would not be privileged.

In civil antitrust litigation, joint defence groups are common because plaintiffs often sue multiple defendants simultaneously. In these cases, defendants must be able to coordinate their litigation strategies. Attorney–client communications made in the presence of other members of the joint defence group are protected by the joint defence privilege as long as the communications are made in furtherance of the joint defence effort.

The attorney work-product doctrine, though not technically a privilege, is a related concept that exempts from discovery materials that were prepared in anticipation of or in preparation for litigation. The key enquiry is whether the materials were created in the normal course of business or for the purpose of preparing for litigation. The requesting party can overcome the exemption for otherwise unprivileged information by showing a substantial need and an inability to obtain equivalent information without undue burden. This is a difficult standard to meet, however.

Trade secrets are not legally privileged but courts can take steps to limit outside disclosure of the sensitive information.

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

Private actions are available after a criminal conviction. Indeed, private actions become more likely in the aftermath of a conviction. This is because potential plaintiffs have knowledge of evidence that arose in the criminal proceedings, which makes it easier to get past the complaint stage. Further, defendants may be estopped in some circumstances from contesting liability in a subsequent civil proceeding if they have already been convicted of the same conduct in a criminal trial.

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 introduced at a criminal antitrust trial will almost certainly be admissible during a subsequent civil proceeding, although a civil plaintiff will still need to obtain that evidence through the ordinary discovery process. The public trial record often provides a roadmap to plaintiffs regarding where to find critical pieces of evidence.

The result of a government antitrust action, criminal or civil, may ordinarily be introduced as prima facie evidence of a defendant's guilt in a subsequent civil proceeding as long as the result represents a final judgment

(15 USC section16(a)). Even a consent decree may satisfy this criteria, but not if it was reached before any testimony was taken in the case. If the original action was brought by the Department of Justice specifically (but not the FTC), the Clayton Act even permits district courts in follow-on civil litigation to give conclusive effect to the original judgment. As a practical matter, this rule can preclude a defendant from even contesting findings in follow-on litigation if the prior factual determinations are 'critical and necessary' to the original judgment. Courts are especially likely to accept the use of offensive collateral estoppel in the follow-on litigation if the initial proceeding resulted in criminal liability, since the defendant likely had even greater incentive to litigate the issue the first time.

Under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), a corporate amnesty applicant may avoid treble damages in follow-on civil litigation if it provides 'satisfactory cooperation' to the civil plaintiffs. In light of the US provision for treble damages, ACPERA creates a very important incentive for antitrust conspirators to self-report. ACPERA is currently scheduled to run until 2020.

Because government agencies routinely access sensitive business information in the course of their investigations, they do not generally disclose the documents and testimony they obtain to the public.

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

An antitrust proceeding may be stayed for the same reasons as any other civil litigation. For instance, courts will sometimes grant stays in civil antitrust litigation to prevent the civil case from interfering with an ongoing criminal investigation into the same conduct; the United States Department of Justice's antitrust division frequently supports such stays. It may also stay a proceeding to allow a higher court to decide an interlocutory appeal or settle an important legal issue in a separate case.

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?

Private antitrust plaintiffs must prove each element of a claim by a preponderance of the evidence. Section 4 of the Clayton Act requires the plaintiff to prove that the defendant violated the antitrust laws, and that the illegal conduct caused the plaintiff's economic injury. The second element has some important qualifications, however. For one thing, not just any injury will suffice. The injury must be an 'antitrust injury', that is an injury 'of the type the antitrust laws were intended to prevent' (*Brunswick Corp v Pueblo Bowl-O-Mat Inc*, 429 US 477, 489 (1977)). Lost profits caused by too much competition, for example, do not constitute antitrust harm. In addition, although the illegal conduct need not be the only cause of the plaintiff's injury, it must be a material cause (*Zenith Radio Corp v Hazeltine Research Inc*, 395 US 100 (1969)).

A plaintiff that suffers an 'antitrust injury' may still lack antitrust standing if the nexus between the violation and the injury is too remote (*Blue Shield of Virginia v McCready*, 457 US 465 (1982)) or if the plaintiff is an indirect purchaser (*Illinois Brick Co v Illinois*, 431 US 720 (1977)). Because only direct purchasers are permitted to sue, there is no 'passing on' defence for antitrust defendants in federal court. However, many states do allow indirect purchasers to sue, which can make 'passing on' relevant for damages exposure (see question 2).

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

The timetable for civil antitrust litigation can vary widely from case to case. The court could dismiss a lawsuit fairly quickly if the plaintiff fails to plead sufficiently specific facts to state a claim under the *Twombly* standard. In the absence of dismissal at the pleading stage, a lawsuit can drag on for years, with extensive discovery, a jury trial and numerous appeals (both interlocutory and post-trial).

The parties generally cannot accelerate proceedings on their own without conceding important issues, but proceedings tend to be shorter when the plaintiff is an individual rather than a class, when discovery is not extensive and when the court operates with short deadlines.

17 What are the relevant limitation periods?

Under section 4(b) of the Clayton Act, a plaintiff has four years from the time of injury to bring a civil antitrust suit. The statute of limitations does not begin to run until damages are capable of being proven and may be suspended during government civil or criminal proceedings on the same matter. Plaintiffs have at least one year from the conclusion of the government proceedings to bring their claims.

The statute of limitations may be tolled for other reasons as well, including fraudulent concealment and filing of a class action. If the defendant affirmatively prevents the plaintiff from learning of the cause of action despite exercising due diligence, the statute does not run until the plaintiff knew or should have known about the harm. When plaintiffs file a class action, the statute tolls for potential class members in the event class certification is denied.

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

Once a federal district court judgment becomes final, it can be appealed as of right to a US court of appeals. While the district court proceedings are still ongoing, appeals are usually not permitted except in limited circumstances. These interim, or interlocutory, appeals of collateral orders are available when a district court order is conclusive, resolves important questions completely separate from the merits and renders an important question unreviewable on final judgment appeal. See *Digital Equipment Corp v Desktop Direct Inc*, 511 US 863 (1994). Examples of permitted interlocutory appeals include orders asserting personal jurisdiction and orders granting class certification.

Both factual findings and legal conclusions are appealable. Appeals courts generally give substantial deference to district courts' factual findings, but review legal conclusions without regard to the district court's decision (de novo).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings are available for civil antitrust claims, and are known as 'class action' litigation in the United States. The Class Action Fairness Act of 2005 (CAFA) greatly expanded federal jurisdiction over large class actions. Under CAFA, class action litigations that meet thresholds like the US$5 million amount-in-controversy requirement can be removed to a federal court even if they would otherwise be heard in a state court.

20 Are collective proceedings mandated by legislation?

No. Federal Rule of Civil Procedure 23 authorises, but does not require, parties to bring class action litigation. Under the US 'opt-out' class action system, when a court certifies a class, potential class members are automatically included unless they affirmatively opt out of the class.

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

Federal Rule of Civil Procedure 23 establishes four requirements that class members must satisfy in order to be certified. First, the class must be so numerous that joinder of all members under Federal Rules of Civil Procedure 19 or 20 is impracticable (Fed R Civ P 23(a)(1)). Second, the proceeding must address questions of law or fact that are common to the class (Fed R Civ P 23(a)(2)). Third, 'the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class' (Fed R Civ P 23(a)(3)). Finally, the law requires that 'the representative parties will fairly and adequately protect the interests of the class'.

In addition to the prerequisites, putative classes must also satisfy Federal Rule of Civil Procedure 23(b), which governs the types of class actions allowed. Class action antitrust plaintiffs typically attempt to certify classes under Rule 23(b)(3), which requires that 'the questions of law or fact common to class members predominate over any questions affecting only individual members'. To meet the predominance requirement, putative class members must show class-wide antitrust impact and a common methodology to quantify class-wide damages (*Comcast Corp v Behrend*, 133 S Ct 1426, 1430 (2013)). The Supreme Court recently clarified this ruling in *Tyson Foods Inc v Bouaphakeo*, where plaintiffs sought compensation for overtime work in compliance with the Fair Labor Standards Act of 1938 (see 'Update and trends'). See question 22 for additional detail regarding the trend toward increasing rigour in analysing class certification.

22 Have courts certified collective proceedings in antitrust matters?

Yes, in the past, courts routinely certified classes for class-action antitrust litigations. However, the standard for class certification continues to grow more and more stringent, and the Supreme Court has held that lower courts must undertake a rigorous analysis in all aspects of class certification, including issues of liability, causation and damages and has recently reversed lower courts' certifications of classes (see *Comcast Corp v Behrend*, 133 S Ct 1426 (2013) and *Wal-Mart Stores Inc v Dukes*, 131 S Ct 2541 (2011)). A district court also has the authority to review, modify and even decertify a previously certified class at any time during the litigation (see, for example, *In re Flonase Antitrust Litig*, 2013 WL 3060591, at *6 (ED Pa 19 June 2013) and *In re Urethane Antitrust Litig*, 2013 WL 2097346, at *2 (D Kan 2013), aff'd, 768 F.3d 1245 (10th Cir 2014)).

Examples of recent cases in which class certification was granted include:

- *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir 2015): AstraZeneca and other drug-makers appealed the District of Massachusetts's certification of a class of individual consumers, third-party payers, union plan sponsors and insurance companies involved in the purchase of the drug Nexium. The First Circuit affirmed certification and reasoned that 'Comcast did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage' and further that '"[r]igorous analysis" of the evidence does not show that the number of uninjured class members is more than de minimis'.
- *In re VHS of Michigan*, 61 Fed Appx 342 (6th Cir 2015): at the district court level, registered nurses working at eight Detroit-area hospitals won class certification in a wage suppression suit against the hospitals, arguing they all had identical responsibilities and were compensated through similar pay structures. The Sixth Circuit affirmed the Eastern District of Michigan, finding that *Comcast* applies to cases in which plaintiffs allege multiple theories of liability. It also ruled, however, that a generic damages model is permissible if plaintiffs offer evidence grounding the model in a theory that has been accepted for class-action treatment.
- *Laumann v National Hockey League*, No. 1:12-CV-01817 (SDNY 2015) and *Lerner v Office of the Commissioner of Baseball*, No. 1:12-CV-03704 (SDNY 2015): Comcast and DirecTV subscribers claimed they overpaid to watch baseball and hockey games and sought class certification in suit against NHL, MLB and broadcasters. The Southern District of New York held the subscribers could proceed as an injunctive class to compel the defendants to change their subscription policies, but denied certification on the plaintiffs' damages claim. The court ruled that economic analysis offered to prove how much the plaintiffs overpaid was inadmissible.

23 Can plaintiffs opt out or opt in?

Under the US opt-out system, members are included in a class unless they affirmatively opt out of it (ie, exclude themselves from the class).

24 Do collective settlements require judicial authorisation?

Any settlement after a class has been certified requires judicial authorisation. Judicial authorisation is also required for voluntary dismissals or compromises after certification (Fed R Civ P 23(e)).

Once a proposed settlement has been reached between the parties, a three-stage process generally ensues: a preliminary approval hearing, class notice and the mandatory final approval hearing. In the preliminary approval phase, the parties will submit the proposed settlement agreement to the court for review; if the court preliminarily approves the settlement as proposed, it will order the parties to notice the class. The parties must then provide notice to all class members subject to the settlement. For class action proceedings under Rule 23(b)(3), the district court may also require the parties to provide class members with a renewed chance to opt out of the class; however, in most instances, the notice of class certification and proposed settlement is distributed at the same time. After the notice period ends, the parties will go to the court for a final approval hearing, or a 'fairness hearing'. At the fairness hearing, the court must determine if the settlement is 'fair, adequate and reasonable'. *Girsh v Jepson*, 521 F2d 153 (3d Cir 1975), is a leading appellate court case identifying the following nine factors to be analysed when reviewing a proposed settlement:

> *(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; 6) the risks of maintaining a class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.*

Putative class members will have the opportunity to object to the proposed settlement; any such objections may be withdrawn with court approval.

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?

Nationwide class-action proceedings are available to plaintiffs. If multiple private actions are pending simultaneously, the parties may centralise the case and consolidate pretrial proceedings by asking the Judicial Panel for Multidistrict Litigation (JPML) to transfer the cases to a single federal district court. The JPML will determine whether consolidation is appropriate to preserve party and court resources and, if so, which court is best suited to hear the matter, at least during the pretrial stages of the litigation.

26 Has a plaintiffs' collective-proceeding bar developed?

Yes. The US class-action system has led to the development of a very active class-action plaintiffs' bar. The perceived abuses of the US system have been expressly noted by governments and agencies in other jurisdictions, most notably in Europe, which has led to proposals for private antitrust litigation targeted at avoiding such abuses.

Remedies

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

Section 4 of the Clayton Act provides that prevailing US antitrust plaintiffs can recover three times their total compensatory, or actual, damages, known as 'treble damages,' as well as costs incurred and reasonable attorneys' fees.

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

Section 16 of the Clayton Act also entitles private plaintiffs to injunctive relief:

> *In order to seek injunctive relief under section 16 of the Clayton Act, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.*
> *Fair Isaac Corp v Experian Information Solutions Inc*, 650 F3d 1139, 1146 (8th Cir 2011) (citing *Cargill Inc v Monfort of Colo Inc*, 479 US 104, 113 (1986)).

Furthermore, in order to obtain injunctive relief, 'a plaintiff must face a threat of injury that is both "real and immediate", not "conjectural" or "hypothetical" [...]. There must be some immediacy or imminence to the threatened injury' (idem (citing *In re New Motor Vehicles Canadian Exp Antitrust Litig*, 522 F3d 6, 14 (1st Cir 2008)).

29 Are punitive or exemplary damages available?

Antitrust law does not explicitly allow for punitive damages; however, the availability of treble damages under section 4 of the Clayton Act serves a similar function.

As noted above, amnesty applicants can, under the ACPERA, qualify for single damages in follow-on civil litigation if they provide 'satisfactory cooperation' to the civil plaintiffs.

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

Section 4 of the Clayton Act also provides that the trial court has the discretion to award a prevailing plaintiff 'simple interest on actual damages' for the time between the service of the complaint to the date of judgment. In determining whether awarding interest is appropriate, courts are required to consider:

Update and trends

In the past year, private antitrust litigation has been very active across a variety of industries and legal issues. Issues related to the legality of 'reverse payment' settlements in the wake of the *Actavis* decision and alleged London Interbank Offered Rate (LIBOR) manipulation remain muddled. There have also been significant decisions that could affect the way that private suits are litigated, particularly with respect to class certification. Finally, there are new issues relating to the scope of discovery, injunctive relief and the legality of membership associations.

Continued exposure for pharmaceutical manufacturers

District courts' interpretations as to what may potentially constitute an unlawful reverse payment settlement between brand-name and generic drugmakers have continued to vary. In *FTC v Actavis*, the Supreme Court held that the legality of a reverse payment settlement agreement is to be evaluated under the rule of reason. In so holding, the court noted that only a reverse payment that is both 'large and unjustified' can bring with it the risk of significant anticompetitive effects (*FTC v Actavis Inc*, 133 S Ct 2223, 2237 (2013)). This ruling raises two questions: what qualifies as a 'payment' and how does a plaintiff demonstrate a payment was 'large and unjustified'.

A number of lower courts have held that even settlements that involve non-monetary 'payments' flowing from the brand-name company to the generic company can be subject to antitrust scrutiny under *Actavis*. In February 2016, a First Circuit panel revived a reverse payment case that had previously been dismissed, holding that *Actavis* did in fact apply to non-cash payments (*In re Loestrin 24 Fe Antitrust Litigation*, 814 F.3d 538 (1st Cir 2016)). The panel limited its ruling, however, by noting that plaintiffs 'must allege facts sufficient to support the legal conclusion that the settlement at issue involves a large and unjustified reverse payment under *Actavis*'. The First Circuit's conclusion that *Actavis* extends to non-cash payments is consistent with the view adopted by other courts. See, for example, *King Drug Co of Florence Inc v SmithKline Beecham Corp*, 791 F.3d 388, 394 (3d Cir 26 June 2015) (holding that the 'no-AG' agreement in question fell under the purview of *Actavis* 'because it may represent an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer'); *In re Opana ER Antitrust Litigation*, No. 14-C-10150, 2016 US Dist LEXIS 23319 (ND Ill 25 February 2016) (finding that allegation of a 'no-AG' agreement was adequate to establish that a settlement contained a reverse payment, but dismissing complaint for failure adequately to plead that the payment was 'large and unjustified'); Order Granting In Part and Denying In Part Motion to Dismiss at 17-20, *In re Lidoderm Antitrust Litigation*, 11 F Supp 3d 1344 (ND Cal 17 November 2014) (3:14-MD-02521-WHO) (rejecting the argument that *Actavis* applies only to cash transfers but cautioning that a plaintiff's complaint must demonstrate it is possible to calculate the value of non-monetary settlements in order to survive dismissal); and *In re Niaspan Antitrust Litigation*, MDL No. 2460, 2014 WL 4403848 (ED Pa 5 September 2014) (accepting a definition of 'payment' that embraces exchanges transferring any 'valuable thing'). It is clear that the trend in the lower courts is to extend the holding in *Actavis* to non-cash payments.

Having left open the question in *Actavis*, the Supreme Court has now been asked to consider the question of what constitutes a 'payment'. In June 2015, a Third Circuit panel revived private plaintiffs' claims against GlaxoSmithKline and Teva that the 'no-AG' agreement between the two drug manufacturers was anticompetitive (*King Drug*, 791 F.3d 405). The panel held that a 'no-AG' agreement might be considered a transfer of value and thus warranted antitrust scrutiny. The defendants have petitioned the Supreme Court to grant certiorari, claiming that the 'no-AG' agreement simply amounts to an exclusive patent licence – a licence that is typically legal. The Supreme Court has not yet granted certiorari, though in early June 2016 the court requested that the US Solicitor General advise on the issue. The question of what exactly constitutes a 'payment' may be further clarified in the months to come.

Courts have also tackled the 'large and unjustified' language central to the holding in *Actavis*. Several courts have interpreted this as a threshold issue that the plaintiffs must prove. For example, in *In re Solodyn Antitrust Litigation*, the district court judge held that plaintiffs must allege a 'large and unjustified payment' but, once they do, the burden then shifts to defendants 'to show that the challenged conduct promotes a sufficiently procompetitive objective' (*In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, 2015 US Dist LEXIS 125999 (D Mass 25 February 2014). Another district court judge ruled that, as a threshold matter, plaintiffs alleging an illegal reverse payment would need to provide enough factual information for the court to estimate the value of the settlement terms in order to discern whether the payment was large and unjustified (*In re Actos End Payor Antitrust Litigation*, No. 13-CV-9244, 2015 US Dist LEXIS 127748 (SDNY 22 September 2015) ('plaintiffs have... failed to meet their initial burden under the rule of reason of alleging cognizable anticompetitive conduct')).

LIBOR antitrust suit revived

In May 2016, claims of alleged rigging of LIBOR were revived when a Second Circuit panel vacated the lower court's decision to dismiss the claims against 16 of the world's largest banks. See generally *In re LIBOR-based Financial Instruments Antitrust Litigation*, 11 MDL 2262, 2016 WL 2851333 (2d Cir 23 May 2016). The panel held that the district court judge erred when she dismissed the claims on the grounds that the plaintiffs failed to allege injury under antitrust law. The panel ruled that the proceedings should be reopened because antitrust law does not require that plaintiffs show injury in order to effectively allege a conspiracy to price-fix as price-fixing is a per se violation of the Sherman Act section 1. The case was remanded for further proceedings to determine whether the plaintiffs would qualify as 'efficient enforcers' of the antitrust statute.

It should be noted that the effects of the United Kingdom's recent decision to exit from the European Union (Brexit) are currently unknown. Brexit could have a significant impact on the enforcement of antitrust and competition law matters in the future. In particular, if and when Brexit occurs, the Competition and Markets Authority (CMA) is likely to assume jurisdiction over all antitrust and competition-related matters affecting the UK. This may lead to parallel investigations and merger reviews by both the European Commission and the CMA. This may complicate US-based cases involving cross-border antitrust and competition matters.

Standards for class certification

While not an antitrust case, a recent Supreme Court decision regarding class certification could have significant implications for antitrust class action litigation. In *Tyson Foods v Bouaphakeo*, the court found that, because the Fair Labor Standards Act (FLSA) allowed for averaging rather than individual record-keeping, the plaintiffs could rely on a statistical sample to certify the class (*Tyson Foods Inc v Bouaphakeo*, No. 14-1146, slip op at 10-11 (US 22 March 2016)). The court also noted that since the defendant did not keep adequate time records for its employees, sampling was a practical way to describe relevant information. At the same time, it is unclear from *Tyson Foods* whether a poorly constructed or unreliable sample would have disqualified a putative class from being certified. In the end, this case was in the context of a statutory violation of the FLSA and it is yet to be seen whether its implications on the use of sampling will be narrow or broad.

Another issue highlighted by *Tyson Foods* is how to avoid payment to uninjured members of a certified class. The court asserted that courts will need to develop a method for distribution of damages without compensating class members who were not actually hurt. While the court declined to espouse any specifics regarding the form of any such method, it still highlighted the need for a proper method to be in place. Therefore while plaintiffs might have an easier time acquiring class certification in certain circumstances, distribution of damages awards in those circumstances may be more difficult.

What to watch out for

- The revised Federal Rules of Civil Procedure went into effect on 1 December 2015. In particular, Rule 26(b)(1) redefines the scope of permissible discovery by applying a proportionality standard when setting the scope of discovery. In practice, courts have applied this proportionality standard by limiting discovery to only information that is relevant to the issues in the case. Courts are also likely to order discovery that is easy to obtain. These new rules are likely to affect case strategy, the 'meet and confer' negotiation process and the types of discoverable information going forward.
- On 30 September 2015, the Ninth Circuit issued its ruling in *O'Bannon v NCAA*, vacating in part the lower court's decision to enjoin the NCAA from prohibiting its member schools from paying student-athletes (*O'Bannon v NCAA*, Nos. 14-16601, 14-17068, 2015 US App LEXIS 17193 (9th Cir 30 September 2015)). The Ninth Circuit held that student-athletes could receive compensation up to a full-cost of attendance scholarship, but rejected the lower court's allowance of additional deferred compensation. The parties are currently petitioning the Supreme Court for grant of writ of certiorari.
- On 28 June 2016, the Supreme Court granted certiorari to petitions in the case *Osborn v Visa*. The plaintiffs alleged that certain defendants, who were members of an association, fixed prices for ATM access fees. This case is likely to add some insight as to exactly when membership in an association qualifies as anticompetitive.

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defences so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith; (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.
(section 4 Clayton Act)

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

No. Any criminal fines paid by an antitrust defendant are not considered when determining the amount of civil damages.

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

As noted above, section 4 of the Clayton Act provides that a prevailing plaintiff can recover its reasonable attorneys' fees and costs.

Federal Rule of Civil Procedure 11 also provides a defendant with the opportunity to recoup some of its legal expenses if the plaintiff is 'sanctioned'. Rule 11 requires attorneys to conduct some minimal preliminary inquiry commencing a lawsuit; plaintiffs' counsel who fail to do so can be subject to monetary and disciplinary sanctions.

33 Is liability imposed on a joint and several basis?

Yes. Co-conspirators can be found jointly and severally liable for the entire amount in controversy, with no right of contribution.

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

The antitrust laws do not provide for a right of contribution among defendants (see *Texas Indus Inc v Radcliff Materials Inc*, 451 US 630, 646 (1981) ('[N]either the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution.')). Further, co-conspirators cannot agree among themselves to any indemnification agreements for illegal conduct. However, indemnity may be available where a defendant's liability is purely the result of its relationship with an offending party (see *Wills Trucking Inc v Baltimore and Ohio R Co*, 181 F3d 106, *3 (6th Cir 1999) ('[I]ndemnity is available only when the party seeking indemnification is an innocent actor whose liability stems from some legal relationship with the truly culpable party; for example, an employer held vicariously liable for the tortious actions of his employee may seek indemnification from the employee.').

35 Is the 'passing on' defence allowed?

As noted above, the federal antitrust laws permit only direct purchasers to sue and recover for antitrust injuries (see *Illinois Brick v Illinois*, 431 US 720 (1977)). In holding so, the Supreme Court sought to prevent duplicative recoveries under section 4 of the Clayton Act. Many individual states have, however, passed '*Illinois Brick* repealer' statutes, which provide indirect purchasers with the right to bring antitrust claims.

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

Antitrust defendants can assert the same defences available to other private litigants.

37 Is alternative dispute resolution available?

Yes. Courts generally favour resolution thorough non-judicial means as a way to reduce the burden on the courts. Alternative dispute resolution is encouraged, but not mandated.

Where parties have agreed to arbitrate any disputes, courts will require the parties to arbitrate their antitrust claims, even when an individual plaintiff's cost of doing so is high. See *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304 (2013) (holding that the Federal Arbitration Act prohibits courts from invalidating class-action waivers agreed to by parties in arbitration agreements). The Supreme Court's decision in *American Express*, like its decision in *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2011), is based on the Federal Arbitration Act, which allows companies to include broad class-action waivers in their contractual agreements with others. Specifically, the *American Express* majority found that the antitrust laws 'do not guarantee an affordable procedural path to the vindication of every claim', such that parties that agreed to arbitrate a claim are bound by their agreement, even if proceeding with arbitration would be cost-prohibitive (*Italian Colors*, 133 S Ct at 2309).

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